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The 1999-2000 academic year is off to an excellent start at the University of Baltimore School of Law. In August we welcomed another fine entering class -- 222 first-year day students and 81 first-year evening students. This is one of the largest entering classes we have had in recent years, and the second largest day first-year class in our history. Thus UB continues to attract fine students despite the thirty percent decline in law school applicants across the nation over the past seven years.

Like most law schools, we have faced a number of difficult challenges during the 1990s, including the imperative of improving our curriculum to more fully prepare our graduates for the practice of law in the 21st century, and the necessity of enhancing the technological infrastructure of the school (at great expense) to equip our students, faculty, and staff to compete successfully in a world of Pentium PCs and the internet. The faculty and administration -- and our students -- have worked very hard over the past six years to meet those challenges. With the important assistance of many of our alumni, we have achieved much success. Here is a brief summary of the most important.

• The employment percentage for the Class of 1998 was again well over the national average (92.2% as opposed to 89.9% nationally), and an outstanding 57 of our 304 graduates from that class were serving in judicial clerkships.

• Our curriculum has been improved by adding two new clinics (Community Development and Disability Law); greatly expanding our skills training courses (such as trial and pretrial advocacy; interviewing, negotiating and counseling; mediation skills; and planning and drafting courses); significantly increasing our international and comparative law offerings (including a new summer program at the University of Haifa, Israel, which will open in the summer of 2000); and creating twelve areas of concentration for our upper-class students to select.

• The excellent faculty, enhanced by highly competent new members, have always been fine teachers, they have become even more productive in their scholarship, and they continue to be leaders in law reform work in our state.

• In the past two years, we have greatly improved our infrastructure by upgrading all our PCs and installing the school’s first “smart” classroom (with equipment that permits data from a PC, the internet, and other documents to be projected on a screen in front of the room). The collection and services of the Law Library have also been substantially improved.

These advances have been made despite the fact that the law school continues to be one of the least well financed law schools in the country. Our students pay tuition that is well over the national average for public law schools, as well as a much larger share of the cost of their legal education.

Thus we must seek others sources for funds to continue to improve the quality of legal education at UB. While we will continue to seek substantial increases in funding from the state in the next two years, we also must seek additional private support from our alumni and friends. Fall is the season when all organizations seek charitable contributions, and I ask you to be particularly generous this fall when asked for your support of the University and the School of Law.

On another important topic, I want to take this opportunity to congratulate the editors of Volume 29 of the University of Baltimore Law Forum, headed by Editor-in-Chief Gregory P. Jimeno, on their excellent work this year. The Board has introduced a new look for the Law Forum, and they have made arrangements to ensure that this and future editions of the Law Forum will be included on Westlaw. They also have a new website, the address of which appears on the cover of this issue.

As we thank the Volume 29 editors for their work, we also welcome the new editorial board for Volume 30, headed by Walter W. Green. They are already hard at work on the first issue of the next volume, and I am sure that they also will do an excellent job.

John A. Sebert
Dean and Professor of Law
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The editorial board and staff of the University of Baltimore Law Forum have worked hard to ensure that Volume 29.2 continues to be interesting as well as informative. In addition to highlighting recent cases in what has become a Law Forum staple, the Recent Developments section of Volume 29.2 has expanded its coverage of the Maryland General Assembly by providing summaries of selected legislation. Finally, the articles. This issue continues a concept which began in Volume 28.1, bringing the readers two author’s perspectives on the same issue. This volume’s yin and yang section arose out of a recent decision in the Circuit Court for Baltimore City, Williams v. State. We invited Janet M. LaRue of the Family Research Counsel and Dwight H. Sullivan from the American Civil Liberties Union to express their views on Williams and sodomy laws in Maryland. Our third article, written by David C. Wright of PRISM, Inc. takes on the daunting task of sentence calculation.

With the publication of Volume 29.2, my tenure as Editor-In-Chief of the University of Baltimore Law Forum is brought to a close. With this in mind, I would like to acknowledge some of the people that have made this a rewarding and productive year. Often going above and beyond their respective job descriptions and being unafraid of change, the members of the Editorial Board worked together to create the best journal that they could.

The individuals who made up this committed team each had their own strengths and assets which they brought to their work on the Law Forum. First, my thanks go out to Production Editor John Cox who kept the journal on schedule during the year and never complained when the production schedule was altered, changing his normal routine. As Business Editor, Sean Casey not only brought with him a working knowledge of how student organizations are funded, but he also went above and beyond his traditional role to fulfill the duties of an associate editor. If their were any members of the Editorial Board who demonstrated the spirit of teamwork daily, it was Articles Editor Ruth-Ann Lane and Assistant Articles Editor Holly Currier. Ruth-Ann took the lead by following the work on the articles meticulously from selection to layout in order to guarantee that the articles were ready for publication, while Holly painstakingly edited and reviewed the articles prior to publication. Both Ruth-Ann and Holly did an outstanding job soliciting articles on various subjects that appealed to readers with varied interests. The effort they put forth resulted in the publication of articles that received high praise from judges, practitioners, professors, and students. Mariana Bravo, Recent Developments Editor, and Samuel Shapiro, Assistant Recent Developments Editor, focused on keeping Law Forum readers informed about new trends in the Maryland legal community. Mariana poured her heart and soul into editing the Recent Developments and supervising the associate editors. Meanwhile, Sam headed the extension of the Recent Development section to bring Law Forum readers expanded coverage of Attorney General’s Opinions and recent legislation passed by the Maryland General Assembly.

Perhaps the two members of the Editorial Board with whom I worked the closest were Manuscripts Editor Gwendolyn Lubbert and Managing Editor John Magee. Gwen did so much more than her job title indicates. Starting with revising the mailing list to staying at school all hours of the night in order to get the journal out on time to figuring out how to lay out the journal in a new computer program, Gwen was determined to make the Law Forum a first-class journal. John Magee also showed this commitment. John was a trusted advisor with whom I consulted before making every major decision. With an even temper and an understanding of how to deal with people diplomatically, John made the journal a more memorable experience.

Letter From the Editor-in-Chief
My gratitude would not be complete without thanking the unsung heroes of the Law Forum staff, the Associate Editors. Although not given the credit that comes with being a member of the Editorial Board, the journal truly could not operated without their efforts. These individuals gave up the opportunity to have their own piece published to spend countless hours pouring over the Recent Developments of the general staff in an effort to bring their cases to publishable quality.

There were many other people who went out of their way to ensure that the Law Forum was successful. Dean John Sebert provided enormous support of the Law Forum by continuing to provide funds, by offering his encouragement and suggestions, and by helping to get the Law Forum more involved in the law school community. I would again like to thank Nikhil Divecha and Professor Robert Lande, whose support and counseling helped the journal staff continue on the right course toward our goals.

Part of what made this such a busy year for the Law Forum were the numerous changes made to the appearance of the journal and to its accessibility. My thanks go out to our publisher, Bob Greenlee and his staff at Sir Speedy BWI who put many hours into the redesign of our cover. In addition, I would like to extend my thanks to the computer experts at Legal Technology Solutions, headed by Steve Stern, who ensured that our web site, www.ublawforum.com, made it to the internet and became a research tool for practitioners.

Finally, I would like to wish my successor, Walter W. Green, the best of luck as he takes over the reigns of the Law Forum. Walter has demonstrated a dedication to ensuring that the Law Forum will continue to be an invaluable tool to the Maryland legal community. As Editor-in-Chief, Walter and other members of the Editorial Board of Volume 30, particularly new Articles Editor Cheryl Matricciani, have already made their presence felt be helping to edit and revise this issue of the University of Baltimore Law Forum.

Gregory P. Jimeno
**WILLIAMS v. STATE: THE CONSTITUTIONALITY AND NECESSITY OF SODOMY LAWS**

by Janet M. LaRue and Rory K. Nugent

I. INTRODUCTION

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.\(^1\)

Although Justice White’s words of admonition may have been intended for the United States Supreme Court alone, they succinctly define for all of us the role of the judiciary in a three-branched system of government.\(^2\) The message is clear: state courts, with no inherent powers to create public policy, undermine their viability when they pull jurisprudential rabbits out of hats and fashion new rights from their respective state constitutions. In *Bowers v. Hardwick*, the United States Supreme Court expressed that it had dealt sufficiently with “emanating penumbras” and meticulous historical analysis, and declined to create a federal constitutional right to engage in homosexual sodomy based on such analysis.\(^3\) However, in *Williams v. State*,\(^4\) the Circuit Court for Baltimore City recently delved into issue with dangerous consequences.

Despite the weak legal foundation of the *Williams* case, the circuit court found that a valid law, which served as a necessary means of protecting public health and morality, did not apply to private, consensual, non-commercial sexual activity.\(^5\) It is well recognized that the states have broad powers to legislate with regard to these matters.\(^6\) Sodomy laws prohibit conduct deemed to be immoral by the state and protect the public from disease and infection. These concerns represent legitimate state interests and the judiciary should maintain a high burden of proof for those seeking to overturn the law.

This article will demonstrate how the Maryland courts have ignored precedent and rewritten valid legislation in an attempt to “keep up with the Joneses” during the nationwide frenzy of invalidating state sodomy statutes.\(^7\) The circuit court’s decision in *Williams* exemplifies the judicial fiat that now represents legal reasoning in the court system.

II. WILLIAMS v. STATE

In *Williams v. State*, six individuals challenged the validity of Article 27, section 554 of the Annotated Code of Maryland.\(^8\) Article 27, section 554 criminalizes sodomy, whether oral or anal, as an unnatural and

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2 See id. at 194-95.

3 See id.


5 See id.

6 See U.S. CONST. amend. X.


8 Md. ANN. CODE art 27, § 554 (1998). Section 554 reads as follows: Every person who is convicted of taking into his or her mouth the sexual organ of any other person or animal, or who shall be convicted of placing his or her sexual organ in the mouth of any other person or animal, or who shall be convicted of committing any other unnatural or perverted sexual practice with any other person or animal, shall be fined not more than one thousand dollars ($1,000.00), or be imprisoned in jail or in the house of correction or in the penitentiary for a period not exceeding ten years, or shall
perverted practice. Each of the plaintiffs, Williams included, were members of the Maryland Bar. Each alleged that the existence of the statute placed them in constant fear of arrest and subsequent prosecution. They argued that as a result of this fear, they had suffered psychological injury and real or potential pecuniary damages. Only one of the plaintiffs, Doe, had been arrested on a related crime of solicitation for attempting to engage in homosexual conduct with an undercover police officer. Doe argued that if section 554 does not prohibit consensual, non-commercial, private homosexual conduct, then solicitation of such conduct should not be illegal. However, the court upheld the solicitation statute, noting that unlike the actual conduct, “an unwanted solicitation is neither private nor consensual.”

The sixth plaintiff, who joined only as a taxpayer, asserted that state funds should not have been “wasted” in enforcing the sodomy statute. The court first noted that in order to seek a declaratory judgment, a justiciable controversy must exist. Ironically, the State argued that there was no justiciable issue since the statute is not enforced as to either heterosexuals or homosexuals as long as the conduct is consensual, non-commercial, and private. The court rejected the argument, observing that present and future State’s Attorneys may interpret the statute differently. Therefore, the court concluded that the plaintiffs had a legitimate fear of prosecution and that this fear constituted a justiciable controversy.

III. THE “JUMPING OFF POINT”: SCHOCHET V. STATE

The Williams court analyzed the alleged constitutional issues by first acknowledging that the “jumping off point” for the plaintiffs was Schochet v. State. The defendant in Schochet was charged with seven counts of rape, as well as fellatio in violation of section 554. The State failed to establish that the sexual activity was non-consensual and a jury subsequently acquitted the defendant of the rape charges. However, the jury returned a guilty verdict on the fellatio charge. The court of special appeals affirmed, holding that there was “no constitutional protection for sexual activity – orthodox or unorthodox, heterosexual or homosexual – at least outside of marriage.” The Court of Appeals of Maryland reversed the ruling below after considering the following two issues: (1) whether Article 27 section 554 encompasses “consensual, noncommercial, heterosexual activity between adults in the privacy of home,” and if so; (2) whether it violates either the Constitution of the United States or the Maryland Declaration of Rights. The Schochet court began its opinion by reviewing the canon of construction which demands that “if a legislative act is susceptible of two reasonable interpretations, one of which would not involve a decision as to the constitutionality of the act while the other would, the construction which avoids the determination of...
constitutionality is to be preferred. In order to avoid an unconstitutional interpretation of the statute, the court of appeals construed the statute narrowly and chose not to include within its scope “noncommercial, heterosexual activity between consenting adults in the privacy of the home,” thereby creating the exception upon which Williams was based.

Despite the good intentions of the judiciary, Schochet, like Williams, is an example of an unbridled court system. As the State argued in Schochet, the interpretation that created the exception can hardly be said to be a “reasonable” interpretation of the statute. The legislature in section 554 does not make a distinction between consensual and nonconsensual, public and private, commercial and noncommercial, or most importantly, heterosexual and homosexual activity. Nonetheless, the Schochet court held that to give effect to the statute’s broad language would raise questions as to its overall constitutionality. In support of this reasoning, the court cited the split amongst the states concerning whether such conduct could be prohibited by legislative enactment.

The court then catalogued all of the Maryland decisions considering section 554. Because no consensual, noncommercial, heterosexual conduct had been prosecuted under section 554, the court found that this type of conduct was not within the contemplation of the drafters of section 554, and therefore, was not included within its application. After this lengthy review, the court decided to rewrite the statute, rather than give effect to the intent of the Maryland legislature.

The decision of the court in Schochet simply does not follow logical reasoning. The Supreme Court has not yet overruled Bowers; therefore, it is inconsequential to Maryland courts how other state tribunals have ruled on similar statutes in relation to application of their respective state constitutions. The only issue that need be considered by a Maryland court is the law passed by the Maryland legislature and its applicability to the Maryland constitution. The Schochet court, however, fails to mention the Maryland constitution or discuss its application to the issue at bar. Unfortunately, the court in Williams follows the same course of ambitious adjudication as demonstrated by the Schochet court.

The court of appeals in Schochet also rejected the argument forwarded by the State based on the legislative history surrounding section 554. The Maryland General Assembly proposed an amendment to a bill dividing rape into first and second degrees, thus effectively repealing sections 553 and 554. The report from the Maryland Senate Judicial Proceedings Committee commented that sections 553 and 554 should be repealed, as offenses

27 Id. at 725, 580 A.2d at 181 (quoting Heilman Brewing v. Stroh Brewery, 308 Md. 746, 763-764 (1987)).
28 Id. at 731, 580 A.2d at 184.
29 See Williams, at *13. The plaintiffs in Williams questioned why consensual, noncommercial, heterosexual activity, excluded by section 554, should apply to homosexual activity in similar circumstances.
30 See id. at 729, 580 A.2d 183.
32 See id. at 731, 580 A.2d at 184.
33 See id. at 726, 580 A.2d at 182. The court looked to People v. Onofre, 51 N.Y.2d 476, 488, 415 N.E.2d 936, 940-41, 434 N.Y.S.2d 947, 951 (1980) (holding as unconstitutional the invasion of privacy to attempt to regulate, through use of criminal penalty, consensual oral sex between persons of the opposite sex). The court also cited Commonwealth v. Balthazaar, 366 Mass. 298, 318 N.E. 478 (1974) (interpreting statute narrowly so as to avoid constitutional issue as to whether consensual oral sex, in private, between members of the opposite sex, can be proscribed by statute).
34 See id. at 731, 580 A.2d 184-85. The court categorized the cases into three types: (1) those that involved homosexual activity, (2) those that involved minors, and (3) those that involved a violation in a public place.
35 See id.
36 See id. at 733, 580 A.2d at 185.
37 See Bowers, 478 U.S. 186.
38 See id. at 194-95.
39 See Schochet, 320 Md. at 714, 580 A.2d at 176.
40 See id. at 714, 580 A.2d 176.
41 See id. at 734, 580 A.2d at 186.
42 See id. at 733, 580 A.2d at 186 (citing Pitcher, Rape and Other Sexual Offense Law Reform In Maryland, 7 U. Balt. L. Rev 151 (1977)).
under these sections were rarely prosecuted. However, when the bill was finally enacted it had been amended so as not to repeal the statutes at issue. The State, therefore, posited that because these sections were not repealed, the legislature intended sections 553 and 554 to apply to consensual, noncommercial heterosexual activity. The court found this argument “unpersuasive,” and declared that the General Assembly “may have decided that consensual homosexual acts should still be prohibited.” This statement by the court of appeals appears to indicate that the judiciary anticipated no equal protection problem in applying section 554 to homosexuals but not to heterosexuals. Nevertheless, the Williams court disagreed, finding that section 554 violated the equal protection rights of an individual.

It is often said that “hard cases make bad law.” In light of Schochet and the circuit court’s expansion of that case, it may well be said that bad law will only make more hard cases. The reconstruction of section 554 by the Schochet court has led the Williams court to also conduct an ad hoc exercise of judicial will, rather than a consistent and prudent exercise of judicial reasoning. The Court of Appeals of Maryland attempted to avoid a constitutional privacy issue by creating a potential equal protection issue; the Williams decision attempted to address the equal protection problem and rendered a legislative enactment meaningless. Schochet certainly provides a “jumping off point” on the issue. The concern though, is where we will land.

IV. THE RIGHT TO PRIVACY AND EQUAL PROTECTION

Rather than defend the statute, the State in Williams argued before the Circuit Court for Baltimore City that the Schochet ruling should not be extended to include consensual, noncommercial, homosexual activity in the privacy of the home. Otherwise, the State claimed, enforcement of section 554 would amount to an unconstitutional invasion of privacy. The circuit court agreed, holding that the statute does not apply to homosexual conduct, just as it does not apply to heterosexual conduct. In a single paragraph, the court provides a scant analysis and announced, “[i]t cannot be doubted, as Defendants concede, that there would be an equal protection violation if acts, considered not criminal when committed by a heterosexual couple, could be prosecuted when practiced by a homosexual couple.”

In the tradition of Schochet, the court then construed the statute so as not to include consensual, noncommercial, homosexual activity between adults in private. Other than the court using Schochet’s aphorism “in order to avoid serious constitutional issues,” the court did not cite any Maryland case law or statute in support of its reasoning. The opinion in Williams suggests that the Equal Protection Clause would be violated because the Schochet case recognized a privacy interest in the context of heterosexual conduct. This is false. Schochet clearly stated that it was giving section 554 a narrow construction in order to avoid constitutional questions. The unreasonable interpretation that Schochet gives to section 554 certainly provides the appearance of clever constitutional adjudication, yet the court of appeals went

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42 See id. at 733-34, 580 A.2d at 186 (citing the Senate Judicial Proceedings Committee report on Senate Bill 358).
43 See id. at 734, 580 A.2d at 186.
44 See id.
45 Id. at 735, 580 A.2d at 187.
46 See Williams, at *13-14.
47 See Schochet, 320 Md. at 725-26, 580 A.2d at 181-82.
48 See id.
49 See Williams, at *14.
50 See id. at *13.
51 See id. at *13-14.
52 See id.
53 See id. at *13.
54 See id. at *22.
55 Id.
56 See id. at *10. The question remains, however, how there can be certainty as to the existence of a constitutional issue that has never been before a Maryland court.
to great lengths to indicate that it was avoiding the privacy issue. The Schochet decision does not hold that there is a right to privacy when engaging in consensual, noncommercial heterosexual conduct in private, rather, the court in Schochet holds that section 554 does not apply in this context.\textsuperscript{57} Therefore, the Williams court clearly needed to look beyond Schochet for support of its ruling.

A. The Uncle No One Talks About: Neville v. State

In Neville v. State,\textsuperscript{58} the Court of Appeals of Maryland provided guidance that the courts largely ignored in both Schochet and Williams. The court in Neville found the defendant guilty of violating section 554 for committing oral sodomy with a woman at an abandoned missile site.\textsuperscript{59} The court of appeals upheld the conviction on the grounds that the missile site was a public area and, therefore, the privacy rights of the defendant did not attach.\textsuperscript{60} After reviewing several United States Supreme Court opinions, as well as the applicable Maryland cases, the Neville court determined that “[i]t is clear from the foregoing review that there is no holding by the Supreme Court that the right of privacy applies to conduct of the type prohibited by Md. Code, Art. 27 §554.”\textsuperscript{61} If there is no right to privacy for this type of behavior guaranteed under the United States Constitution, then such a privacy right must be found in state law if it is entitled to the protection of the court.

The defendant in Neville argued that the statute violated equal protection guarantees because it creates two classes: (1) a class of married people, whose right to privacy shields them from prosecution, and (2) a class of unmarried people, who are subject to prosecution under section 554.\textsuperscript{62} The right to privacy under section 554 would, therefore, attach to one class, but not to the other.\textsuperscript{63} The court reviewed this argument and held that if a married couple was prosecuted under section 554, the marriage would not be a defense and no other privacy interest associated with marriage would apply.\textsuperscript{64} Under this rationale, it is fair to say that the Court of Appeals of Maryland would not find a right to privacy associated with the conduct proscribed by section 554. If this is the case, then the Williams court is merely hypothesizing when it says, “[i]t cannot be doubted that there would be an equal protection violation.”\textsuperscript{65}

Further, the Neville court considered whether an intermediate standard of review applies that requires “a fair and substantial relation between the statute under consideration and the legitimate objective of the police power for which it was enacted.”\textsuperscript{66} According to Neville, this standard applies where legislation involves important personal rights that do not merit strict scrutiny review, but are entitled to more protection than the rational relation test would afford.\textsuperscript{67} The court rejected the standard, holding that the practices proscribed by section 554 did not qualify as an “important personal right.”\textsuperscript{68} Instead, the court applied the rational relation test, and held section 554 to be a valid exercise of Maryland’s police power in maintaining a decent society and protecting the public morality.\textsuperscript{69} In light of this precedent, it is surprising that a trial court could find that the sodomy statute would not survive equal protection analysis.

\bibitem{Schochet} See Schochet, 320 Md. at 735, 580 A.2d at 186.
\bibitem{Williams} 290 Md. 364, 430 A.2d 570 (1981).
\bibitem{id} See id. at 367, 430 A.2d at 572.
\bibitem{Schochet2} See id. at 377, 430 A.2d at 576-77.
\bibitem{id2} Id. at 377, 430 A.2d at 576.
\bibitem{id3} See id. at 381-82, 430 A.2d at 579.
\bibitem{Schochet3} See id. at 382, 430 A.2d at 579.
\bibitem{id4} See id.
\bibitem{Williams2} Williams, at *13.
\bibitem{Neville} Neville, 290 Md. at 383, 430 A.2d at 580.
\bibitem{id5} See id.
\bibitem{id6} Id.
\bibitem{id7} See id. at 383-84, 430 A.2d at 580.
V. THE VALIDITY OF SODOMY LAWS

Having suffered defeat several times on the floor of the legislature, individuals seeking repeal of the sodomy laws have sought relief in the courts. Such plaintiffs advance the same policy arguments that failed in the political process, and in a case such as Williams, these arguments act as an invaluable tool to supplement weak legal analysis. Nevertheless, the courts are willing to listen, and society is forced to enter an unconstitutional area where the process of judicial legislation occurs.

A. Constitutionality of Sodomy Laws

As noted earlier, the Supreme Court held in Bowers v. Hardwick that there is no federal constitutional right to engage in sodomy. This opinion has been the subject of much commentary and criticism as it seemed to contradict a line of cases considering the right to privacy. For example, in Griswold v. Connecticut, the court stated that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.” The Court in Bowers, however, refused to advance Griswold’s “prenumbras” and “emanations” in the context of state sodomy laws.

The continued existence of Bowers was subsequently threatened by the decision of Romer v. Evans. In Romer, the Supreme Court held that Amendment 2 of the Colorado State Constitution, which precluded all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their homosexual, lesbian or bisexual orientation, conduct, practices or relationships, violated the Equal Protection Clause of the Fourteenth Amendment. Bowers, however, remains valid and provides keen insight into the Griswold line of cases. In Bowers, Justice White meticulously distinguished sodomy from the rights that had been declared implicit in the “right to privacy,” asserting that the limits of this right had been discerned by Carey v. Population Services International. The Court reviewed a number of privacy cases and concluded that the “right to privacy,” as defined by these cases, became relevant only in the contexts of family, marriage, or procreation. Since there is no connection between sodomy and the interests of family, marriage, or procreation, the Court held that the “right to privacy” does not create a right to engage in homosexual sodomy.

Continuing its analysis, the Bowers Court held that because sodomy is not protected by the Constitution, it may be validly regulated by the police power of the states. This police power includes the ability of the state to regulate matters between consenting adults in private, and can be

70 See Bowers, 478 U.S. 186.
72 381 U.S. 479 (1965) (holding that the Connecticut law forbidding use of contraceptives unconstitutionally intrudes upon the right of marital privacy).
73 See id. at 484.
74 See Bowers, 478 U.S. at 197.
sufficiently founded on the basis of morality. Critics of this statement, the Supreme Court noted that, “[t]he law, however, is constantly based on notions of morality, and if all the laws representing moral choices are to be invalidated under the Due Process Clause, the courts would be very busy indeed.” Urging caution, Bowers provided a reminder that morality is traditionally within the state’s police power.85

B. Sodomy Laws and “Public Morality”

The Court of Appeals of Maryland in Neville characterized Article 27, section 554 as a valid exercise of the state’s police power in its protection of the public morality. Critics of this justification argue that sodomy laws are outside of the concern for the public morality when it is consensual and private. But are sodomy laws actually “outside the realm of public morality” whenever sexual conduct occurs in private and with mutual consent? The answer should be a resounding no. For example, the following activities are still considered illegal: private, consensual sex between a man and a sixteen-year-old girl; bestiality in the privacy of the Griswoldian bedroom; incestuous affairs between adults; private possession and ingestion of illicit drugs; private possession of child pornography; and private consensual, homosexual and heterosexual prostitution. These illustrations make it clear that “public morality” may, and in fact does, include consensual conduct that occurs in a private setting.

Whenever the state regulates conduct for the sake of public morality, it is a policy-based determination made by the legislature that the conduct in question addresses, thereby affecting, the morality of the citizens of that state. It is perfectly valid for the state to make a legislative decision that reflects a deeper moral choice. Thus, the concern for the public morality is not limited to

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84 See id. at 196-97.
85 See id. at 196.
86 See id.
87 See id. at 196.
88 See id. at 196.
89 See id. at 196.
90 See id. at 196.
91 See id. at 196.
92 See id. at 196.
93 See id. at 196.
94 See id. at 196.
95 See id. at 196.
96 See id. at 196.
97 See id. at 196.
98 See id. at 196.
99 See id. at 196.
100 See id. at 196.
101 See id. at 196.
102 See id. at 196.
103 See id. at 196.
104 See id. at 196.
105 See id. at 196.
106 See id. at 196.
107 See id. at 196.
108 See id. at 196.
109 See id. at 196.
nonconsensual conduct or conduct that occurs in public. “Public morality” should be construed to mean the morality of the public, not merely morality in public. As noted above, this power to proscribe conduct is only restrained by the federal and state constitutions. Accordingly, unless the conduct is protected by some constitutional right, it may be validly proscribed by the state’s police power.

Moreover, the purpose of the sodomy law is to encourage moral behavior (i.e., that which is productive, healthy, or otherwise beneficial for the individual or society) and to discourage immoral behavior. Even if such moral behavior is not practiced in private homes, these laws have the effect of restraining immoral, unhealthy conduct and preventing its normalization. To invalidate a law, not because it is unconstitutional, but merely because it reflects a moral decision on the part of the legislature, is to deprive the states of their constitutional right to regulate the conduct of their citizens. To strip the state of the moral dimension of its police power is to render the state helpless in controlling and confronting conflicts for which its citizens expect a remedy. Arguing that the state has no interest in the public morality beyond the public forum necessarily undermines what has traditionally been delegated to the states.

C. Sodomy Laws and Public Health

The Supreme Court has also recognized that a state may validly exercise its police powers in the interest of public health. This is especially important in the advent of the HIV/AIDS epidemic and the explosion of other sexually transmitted diseases. States are struggling to find a way to reduce the rapid spread of disease, and many experimental measures have been tried. It has been proposed that the HIV/AIDS crisis has a much greater impact on homosexuals and intravenous drug users. As a corollary, those who engage in intravenous drug use and unprotected sex are categorized as “high risk” for contracting the HIV virus. If the tide of this epidemic is to be turned, then such “high risk” behavior must become the focal point of our concern.

The most recent statistics available from the Centers for Disease Control and Prevention highlight the need to control “high-risk” sexual behavior. Homosexual men represent fifty-seven percent of the cumulative total number of AIDS cases through 1998 in the United States, a far larger percentage than any other category. Furthermore, sodomy, whether heterosexual, homosexual, or bisexual, inevitably leads to rectal and prostate damage which may lead to the onset of AIDS, hepatitis B, and other sexually transmitted diseases. Former Surgeon General C. Everett Koop has stated that “anal intercourse, even with a condom, is simply too dangerous a practice.”

96 See Bowers, 478 U.S. at 192.
97 See id.
98 See U.S. CONST. amend. X.
100 See Comment, Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U.MIAMI L.REV. at 631-34.
102 See id.
104 See id. at 12, Table 5. In contrast, heterosexual males represent only four percent of AIDS cases. Id. If the figures are totaled by race or ethnicity, the greatest percentage of AIDS cases is again found among homosexual males. Id. at 16, Table 9. Of males between the ages of thirteen and nineteen, homosexuals represent thirty percent of the total number of AIDS cases, while heterosexual males comprise only nine percent. Id. at 26, Table 18. Between the ages of twenty and twenty-four, homosexual males represent sixty-three percent, while heterosexual males represent only four percent. Id. Even though the Centers report that AIDS incidence is declining in all groups, statistics show that homosexual behavior carries with it a greater risk of infection.
105 See The Causes of Male Homosexuality, Why is Homosexuality not a Normal Sexual Variation?, National Association for Research and Therapy of Homosexuality.
Statutes such as section 554 of the Maryland Annotated Code, were enacted to prohibit “unnatural or perverted practices” among all classes of people and serves to curtail risks that arise as a result of such behavior. It is clear that controlling this behavior is within the state’s power to regulate conduct for the sake of the public health. In light of the statistics cited, it would be prudent for the state maintain such a statute.

VI. CONCLUSION

It is the duty of a trial court to apply the law as it is written to the set of facts to be decided. Considering the Williams ruling, however, this statement is worth repeating. Williams relies on the rulings of other state courts that have interpreted their own state constitutions regarding the statutes that had been approved by their state legislatures. Williams also relies on Schochet, a case that is exceptional for its willful construction of the law and analysis that similarly ignores its own precedent. It should be recognized that a constitutional issue in one state is not necessarily a constitutional issue in every state. A tribunal does not fulfill its duty merely by pronouncing that other courts are divided on the issue, and then arbitrarily deciding whether it is to fall on the “pro” or “con” side.

Lastly, it is well within the state’s legislative power to prohibit conduct that is not constitutionally protected. States have always had the ability to criminalize conduct that was considered indecent in order to maintain the morality of the citizenry. The state’s power to regulate immoral conduct extends not only to public activities, but to activities engaged within private arenas as well. Additionally, it has been generally held that the state has a compelling interest in promoting public health and safety. Sodomy laws, therefore, come well within the legislative territory of the states. The fact that the critics of these laws have failed to persuade the states otherwise is not an argument against the validity of enacted statutes.

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I. INTRODUCTION

Criminalizing sexual intimacy is an unwarranted invasion of personal liberty. Government simply has no legitimate interest in prohibiting private, non-commercial intimate sexual activity between consenting adults. The Annotated Code of Maryland appears to violate this principle by subjecting those engaged in certain common acts of sexual intimacy to up to ten years in prison. Article 27, section 554 of the Annotated Code of Maryland makes it a crime for a person to “take[ ] into his or her mouth the sexual organ of any other person,” or to “place[ ] his or her sexual organ in the mouth of any other person.” That section also prohibits “any other unnatural or perverted sexual practice with any other person.” Further, Article 27, section 553 outlaws “sodomy,” or anal sex.

If these statutes were to be applied literally, they would criminalize acts that the vast majority of Americans - and, presumably, Marylanders - practice. The Court of Appeals of Maryland’s 1990 ruling in Schochet v. State, however, exempted private, non-commercial, consensual heterosexual oral sex from the reach of Maryland’s criminal law. But that ruling left same-gender couples who practice oral or anal sex vulnerable to prosecution, while also creating uncertainty over the permissibility of prosecuting heterosexual couples who engage in anal sex.

A 1999 ruling by the Circuit Court for Baltimore City has largely corrected Schochet’s limitations. In the wake of Williams v. State, all Marylanders may now engage in private, non-commercial, consensual sexual intimacy without fear of prosecution. The Williams decision is in line with a recent trend toward eliminating archaic sex laws, which has left only a minority of states with operable sodomy statutes.

While advancing gay and lesbian rights, as well as signifying a victory for the privacy rights of all Marylanders, the Williams ruling stopped short of completely decriminalizing the field of sexual intimacy. Williams forecloses prosecution of private, non-commercial,

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1 Md. Ann. Code art. 27, § 554 (1996). Violations of this codal section are punishable by a fine of up to $1,000, confinement for up to ten years, or both. Id. Oral sex was first made a crime under Maryland law in 1916. See Schochet v. State, 320 Md. 714, 733 n.5, 580 A.2d 176, 185 n.5 (1990).

2 Md. Ann. Code art. 27, § 554 (1996). This section makes it a crime to “take[ ] into his or her mouth the sexual organ of any other person or animal . . . or . . . . commit[ ] any other unnatural or perverted sexual practice with any other person or animal . . . .” Id. A violation of this statute is punishable by a fine of up to $1,000 and/or confinement for up to ten years. Id.


4 See June M. Reinish, The Kinsey Institute New Report on Sex 132 (1990) (noting that a “study reported that more than 90 percent of married couples younger than 25 had engaged in oral sex” while another “study of more than 100 heterosexual couples of all ages reported a similar percentage”); see also James Patterson & Peter Kim, The Day America Told the Truth 81 (1991) (finding that 79 percent of the men and 70 percent of the women surveyed had engaged in oral sex and 40 percent of the men and 34 percent of the women surveyed had engaged in anal sex).


7 Only eighteen states and Puerto Rico now have operable sodomy statutes, five of which apply only to same-gender partners. American Civil Liberties Union, States of U.S. Sodomy Laws (last modified Jan. 1999) <http://www.aclu.org/issues/gay/sodomy.html>. In one of those eighteen states, Louisiana, a Court of Appeal decision recently struck down the sodomy statute to the extent that it prohibited non-commercial, consensual, private sexual behavior. See State v. Smith, No. 97-KA-
consensual sex acts themselves, but leaves open the possibility of prosecuting someone merely for asking another adult to engage in such legal acts. This article will discuss the implications of Schochet and Williams and suggest approaches for completing the decriminalization of intimate sexual activity in Maryland.

II. SCHOCHE ET V. STATE

Steven Adam Schochet was tried in the Circuit Court for Montgomery County for allegedly forcing a woman to engage in several sex acts with him in her apartment. Schochet admitted to having sex with the woman, including an act of fellatio, but maintained that she had consented. The jury apparently believed Schochet, acquitting him of all of the charged forcible sex acts. The judge, however, had declined the defense’s request for an instruction that consent was a defense to the oral sex charge. In light of the judge’s instructions and Schochet’s own admission that the alleged victim had performed fellatio on him, it is hardly surprising that the jury found him guilty of violating the “unnatural and perverted sexual practices” statute.

Schochet appealed his conviction to the Court of Special Appeals of Maryland, arguing that the United States Constitution prohibits the criminalization of “private and noncommercial sexual acts between consenting heterosexual adults.” The court of special appeals affirmed Schochet’s conviction by a two-to-one decision. Judge Moylan, joined by Judge Garrity, held that the United States Constitution provides no “protection for sexual activity - orthodox or unorthodox, heterosexual or homosexual - at least outside of marriage.” Judge Wilner, in dissent, concluded that both the United States Constitution’s Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights protected Schochet from prosecution for engaging in private, consensual, non-commercial, heterosexual fellatio.

The Court of Appeals of Maryland granted Schochet’s certiorari petition and, in a majority opinion written by Judge Eldridge, overturned Schochet’s conviction without reaching the constitutional issue. Rather than siding with the court of special appeals majority or dissent, the court of appeals narrowly construed the unnatural and perverted sexual practices statute to exclude acts of consensual, private, non-commercial, heterosexual oral sex from its scope.

The court of appeals initially noted that “very strong arguments, based on Supreme Court decisions and language in Supreme Court opinions, can be made on both sides of the constitutional right to privacy issue presented here.” These conflicting arguments resulted in:

14 See id. at 339, 541 A.2d at 195.
15 Article 24 of the Maryland Declaration of Rights provides, “That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.” The Court of Appeals has indicated that Article 24 is coextensive with the U.S. Constitution’s Fifth Amendment Due Process Clause. See Lodowski v. State, 307 Md. 233, 513 A.2d 299 (1986).
17 See Schochet, 320 Md. at 726, 580 A.2d at 181.
in a “significant division” among courts “addressing the constitutionality of punishing consensual, heterosexual acts between consenting adults in private.” The Maryland court cited seven cases supporting a constitutional right to engage in such conduct, while citing an additional six cases for the opposite view. The majority concluded that “the approximately even division among appellate courts reinforces our conclusion that the constitutional issue here presented is a very difficult one.”

Next, the court analyzed whether the language of Article 27, section 554 could be narrowly construed to avoid the constitutional question. Chief Judge Murphy’s dissent argued that the oral sex statute does not permit a limiting construction because its “all-encompassing language was plainly intended to reach those ‘unnatural’ or ‘perverted’ sexual practices, therein so vividly described, without exception.” The majority, however, rejected this argument, expressly relying on the “very broad and sweeping” language of section 554 to conclude that “[t]he statute’s silence concerning the matters of consent, privacy, marriage, etc., creates legitimate questions regarding the reach of the statute.”

The court of appeals also surveyed its own case law involving sections 553 and 554, noting that “many cases in this Court involving §§ 554 or 553 have been prosecutions for homosexual activity,” “prosecutions for sexual acts with minors,” and prosecutions for sexual activity “in places which could not be considered ‘private.’” But “none has been a prosecution based on consensual, non-commercial, heterosexual activity between adults in the privacy of the home.”

Ultimately, the court held that under the circumstances of the case, section 554 did not apply; therefore, the conviction had to be reversed. Schchet’s net effect was to legalize heterosexual oral sex and throw into doubt the continued criminalization of heterosexual anal sex, while leaving acts of same-gender oral and anal sex open to prosecution.

III. WILLIAMS V. STATE
A. Attacking the Prohibition Against Same-Gender Oral Sex

In the wake of Schchet, some Maryland law enforcement agencies continued vigorous application of section 554 to gay men, including arrests for invitations to go to private places to engage in consensual, non-commercial oral sex. Following one such undercover sting operation designed to arrest men for soliciting other men to engage in oral sex, the American Civil Liberties Union filed a challenge to section 554’s application to private, non-commercial, consensual, same-gender oral sex. The suit challenged the use of Section 15(e) of Article 27, which prohibits solicitation “for the
purpose of . . . lewdness,”\textsuperscript{33} to criminalize a request to engage in such a private, non-commercial, consensual sex act.

The plaintiffs in Williams included four gay men and a lesbian who wished to engage in private intimate activity and who feared prosecution under Maryland law.\textsuperscript{34} One of these such plaintiffs had already been previously arrested for inviting an undercover police officer to engage in a private sex act.\textsuperscript{35} The final plaintiff was a taxpayer who objected to the use of her tax dollars to enforce statutes criminalizing same-gender sexual intimacy.\textsuperscript{36}

The plaintiffs based their challenge on both privacy and equal protection principles. The privacy arguments advanced called for a reinterpretation of federal privacy law and a more expansive reading of Maryland privacy law.\textsuperscript{37} For example, in Bowers v. Hardwick,\textsuperscript{38} the Supreme Court held that the United States Constitution does not preclude states from criminalizing same-gender sex acts.\textsuperscript{39} Through its decision in Romer v. Evans,\textsuperscript{40} however, the Supreme Court had cast some doubt over Bowers’ continued vitality.\textsuperscript{41} Thus, the Williams privacy challenge could have allowed the Supreme Court an opportunity to revisit Bowers. The Williams case also presented the Maryland Court of Appeals with an opportunity to find that the Maryland Declaration of Rights includes a broad privacy right that protects same-gender sexual activity.

On the other hand, the equal protection claims raised unresolved questions of whether the federal or state constitutions prohibit the criminalization of same-gender intimate activity that is legal for married or unmarried heterosexual couples. The equal protection challenge under the United States Constitution was bolstered by the Supreme Court’s holding in Romer v. Evans, which adopted a “muscular rational basis”\textsuperscript{42} standard to review laws that draw distinctions on the basis of sexual orientation.\textsuperscript{43} The complaint also raised a challenge under Article 46 of the Maryland Declaration of Rights (the state Equal Rights Amendment), which provides that “[e]quality of rights under the law shall not be abridged or denied because of sex.”\textsuperscript{44} At its most basic level, the criminalization of only same-gender oral sex acts appears to violate the equal rights guarantee. For example, imagine two people, A and B, engaged in an act of oral sex. Assume A is a man. Under Schochet’s interpretation of section 554, the sex act is legal if B is a woman, but illegal if B is a man. B’s gender alone determines the act’s legality, thus raising serious equal protection concerns under Article 46.\textsuperscript{45}

The defendants in Williams, who included both State of Maryland and Anne Arundel County officials, moved to dismiss the complaint. The crux of the defendants’ argument was that the plaintiffs did not have standing to challenge section 554’s applicability to private, non-commercial consensual same-gender oral sex because the statute was never enforced against

\textsuperscript{33} See Md. Ann. Code art. 27, § 15(e) (1996). Section 15 provides, “[i]t shall be unlawful: . . . (e) To procure or to solicit or offer to procure or solicit for the purpose of prostitution, lewdness or assignation.” A violation of this statute is punishable by a fine of up to $500 and/or confinement for up to one year. See id. at § 17.

\textsuperscript{34} See Williams, at *2, 3.

\textsuperscript{35} See id.

\textsuperscript{36} See id. at *3.

\textsuperscript{37} See id. at *15.

\textsuperscript{38} 478 U.S. 186 (1986).

\textsuperscript{39} See id. at 190-91.

\textsuperscript{40} 517 U.S. 620 (1996).

\textsuperscript{41} See Thomas C. Grey, Bowers v. Hardwick Diminished, 68 U. Colo. L. Rev. 373 (1997). See also Nabozny v. Podlesney, 92 F.3d 446, 458 n.12 (7th Cir. 1996) (“Of course Bowers will soon be eclipsed in the area of equal protection by the Supreme Court’s holding in Romer v. Evans, [517 U.S. 620 (1996)].”).

\textsuperscript{42} Andrew M. Jacobs, Romer Wasn’t Built in a Day: The Subtle Transformation in Judicial Arguments over Gay Rights, 1996 Wis. L. Rev. 893, 966.

\textsuperscript{43} See Romer, 517 U.S. at 631.

\textsuperscript{44} Maryland Declaration of Rights, Art. 46.

\textsuperscript{45} See Kline v. Ansell, 287 Md. 585, 414 A.2d 929 (1980) (holding that the cause of action for criminal conversation, which was available to a husband whose wife committed adultery, but not to a wife whose husband committed adultery, violated Article 46).
such activity.\textsuperscript{46} However, the defendants also offered a fall-back argument that would prove crucial to the case’s resolution. The Attorney General’s office argued on behalf of the State defendants that if the court determined that the plaintiffs had standing to challenge sections 15\textsuperscript{47} and 554, “it should construe those statutes so as not to apply to private, consensual, non-commercial homosexual activity.”\textsuperscript{48} In Schochet, the court of appeals had already narrowed section 554 to exclude “consensual, non-commercial, heterosexual activity between adults in the privacy of the home.”\textsuperscript{49} In essence, the defendants asked the circuit court to narrow Schochet’s construction of section 554 still further “by striking the word heterosexual from the holding.”\textsuperscript{50}

In light of the defendants’ proposed limiting construction, the outcome of the case would depend almost entirely on the standing issue. After receiving briefs and hearing oral arguments, Judge Richard T. Rombro of the Circuit Court for Baltimore City held that the plaintiffs did, indeed, have standing to challenge the statutes.\textsuperscript{51} While noting that a criminal statute’s mere existence is insufficient to provide standing,\textsuperscript{52} the court found that “Plaintiffs’ concern goes beyond the mere existence of a criminal statute.”\textsuperscript{53} Judge Rombro pointed to the possibility that a conviction for violating the challenged statutes could jeopardize the licenses of those plaintiffs who are lawyers, thus threatening their ability to earn a living.\textsuperscript{54} The court also noted that a conviction could threaten the plaintiffs’ ability to serve as personal representatives of their partners’ estates.\textsuperscript{55} The court observed that twenty-four separate State’s Attorneys had discretion to decide how to enforce the challenged statutes,\textsuperscript{56} thus making it impossible to know how each of those officeholders and their successors would choose to enforce those sections.\textsuperscript{57} Accordingly, the court found that it could not say that the plaintiffs’ subjective fear of prosecution was merely imagined, and that the challenge presented “a justiciable issue, ripe for resolution.”\textsuperscript{58}

After resolving the question of standing, the court considered the proper scope of section 554. In a ringing endorsement of the principle that individuals should be treated equally regardless of their sexual orientation, Judge Rombro opined, “[i]t cannot be doubted, as Defendants concede, that there would be an equal protection violation if acts, considered not criminal when committed by a heterosexual couple, could be prosecuted when practiced by a homosexual couple. There is simply no basis for the distinction.”\textsuperscript{59} Judge Rombro then offered an analogy to support his conclusion: “[o]ne group may drive at 60 miles per hour, but another would be prosecuted for driving at a speed greater than 50 miles per hour. Merely to state such a hypothesis is to show its constitutional infirmity.”\textsuperscript{60} Thus, “in order to avoid serious constitutional issues,”\textsuperscript{61} the court held that section 554 “does not encompass consensual, non-commercial,
heterosexual or homosexual activity between adults in private.  

B. Extending the Court’s Ruling to the Prohibition Against Anal Sex

Less than nine months after Williams was filed, the court ruled that Maryland’s criminal law should not make distinctions based on sexual orientation. While that ruling was an enormous step forward, it applied only to section 554, which governs oral sex, and not to section 553, which governs anal sex. In the wake of Schochet and the initial Williams opinion, section 553’s continued applicability to both heterosexual and same-gender private, non-commercial, consensual anal sex was unclear.

To resolve this continued uncertainty as to section 553’s scope, the plaintiffs negotiated an agreement under which the defendants consented to the circuit court’s extension of its Williams ruling to section 553 as well. That extension fit well within the legal framework established by Schochet and the initial Williams opinion. While the Schochet court did not directly construe section 553, because Schochet had been acquitted of the sodomy charge, the Schochet decision’s rationale seems to apply to section 553 as well as to section 554. In finding that section 554’s application to private, consensual, non-commercial heterosexual sexual activity would raise constitutional doubt, the court of appeals pointed to seven cases invalidating or limiting other states’ statutes criminalizing private sexual activity. Six of those seven statutes prohibited not only oral sex, but also sodomy as defined by section 553. Additionally, since

the court of appeals decided Schochet in 1990, several other states’ sodomy laws had also been judicially invalidated. Thus, the constitutional doubt regarding application of section 554 to private, non-commercial, consensual sexual activity also envelops the application of section 553 to anal sex.

At the request of the parties in Williams, the circuit court agreed to extend its initial ruling to include section 553 as well as section 554. Accordingly, the court resolved the Williams case by declaring “that Article 27, Sections 553 and 554 of the Annotated Code of Maryland do not apply to consensual, non-commercial, private sexual activities.” The court also enjoined the defendants - including the State of Maryland and its employees - from enforcing those sections in cases of consensual, non-commercial, private sexual activity. This injunction gives the Williams ruling statewide effect due to the fact that every prosecutor in Maryland is a state employee.

The importance of the Williams ruling lies in two aspects that reach beyond the court of appeals’ Schochet holding. First, while Schochet construed section 554 to exclude acts of private, non-commercial, consensual heterosexual oral sex, the Williams ruling expands the exception to apply to same-gender oral sex acts as well. Second, the Schochet holding, though not necessarily its rationale, was limited to section 554. The Williams ruling, however, applies to section

62 See supra notes 10-11.
63 See supra note 7.
64 See Williams, at *1.
65 See id.
66 See id.
67 See id.
68 See id.
69 See supra note 7.
70 See Schochet, 320 Md. at 734, 580 A.2d at 186.
71 See Williams, at *25
72 See Schochet, 320 Md. at 734, 580 A.2d at 186.
553 as well as section 554.\textsuperscript{73} \textit{Williams} thus largely decriminalizes private consensual sexual activity in Maryland.

**IV. THE CONTINUED CRIMINALIZATION OF SOLICITATION**

Even after \textit{Williams}, Maryland’s criminal law still improperly intrudes into one area of personal relationships: requests to engage in intimate activity. The \textit{Williams} plaintiffs had challenged application of Maryland’s solicitation statute - Article 27, section 15(e)\textsuperscript{74} - to requests to engage in private, non-commercial, consensual sex acts. This challenge was based on the proposition that “once private intimate activity is recognized as legal, a request to engage in that activity cannot be criminal.”\textsuperscript{75} In rejecting this argument, Judge Rombro reasoned that the court of appeals’ “\textit{Schochet} decision held that acts between consenting adults which were conducted in private are not criminal. An unwanted solicitation is neither private nor consensual.”\textsuperscript{76} The circuit court found that “the varied ramifications of solicitation make it inappropriate for a court to declare such a statute facially unconstitutional.”\textsuperscript{77} The court contended that legal distinctions arise according to “whether the solicitation occurs in a bar, gay or straight, [or] in a shopping mall. In the latter case, there is involved an element of harassment and nuisance: cases arising from that set of facts usually come about because of merchant complaints that their customers have received unwelcome overtures.”\textsuperscript{78} That assertion, nevertheless, is open to doubt; in many arrests for solicitation in public places, the “victims” are undercover police officers purposely creating an impression that they desire to be solicited.\textsuperscript{79}

Regardless of the accuracy of the court’s empirical assessment, not every annoyance is—or should be—subject to criminal prosecution. A man who approaches a woman at a bar, on a street corner, or in a park and suggests that they go to his home to engage in sexual intercourse may be guilty of boorish behavior, but he is not guilty of a crime. If a man approaches another man and suggests that they go to his home to engage in oral or anal sex, he is guilty of a crime. The law then violates the equal protection rationale that was crucial to the \textit{Williams} ruling interpretation of section 554. The circuit court was wrong, then, in maintaining that section 15(e) “prohibits solicitation by either homosexuals or heterosexuals.”\textsuperscript{80} Contrary to the court’s insistence that “one segment of society is not singled out,”\textsuperscript{81} gay men appear to be the only targets of prosecution under section 15(e) for asking someone to engage in non-commercial intimacy. Moreover, Judge Rombro’s rationale does not address why the state should be permitted to criminalize any discussion of private sexual activity between adults, regardless of whether the prohibition targets a specific group or applies across-the-board. Unconstitutional restrictions on free speech are not cured simply by applying them indiscriminately.

\textsuperscript{73} See \textit{Williams}, at *1.

\textsuperscript{74} See supra note 33.

\textsuperscript{75} \textit{Williams}, at *22-23 (quoting Plaintiffs’ Memorandum in Opposition to State, at 22).

\textsuperscript{76} \textit{Id.} at *25.

\textsuperscript{77} \textit{Id.}

\textsuperscript{78} \textit{Id.}


\textsuperscript{80} \textit{Williams}, at *24.

\textsuperscript{81} \textit{Id.}
The factor that should govern the legality of a request to engage in non-commercial sexual intimacy is not the location of the request, but rather the proposed location of the act. If an individual solicits an adult to go to a private place to engage in a non-commercial sex act, then the requested act should be legal. Conversely, if an individual solicits an adult to engage in a sex act in a public place, such as a shopping mall restroom, then the requested act may constitute indecent exposure and, if so, may therefore be subject to punishment.

Criminalizing requests -- even requests in public places -- to engage in private sexual activity would present a serious constitutional question. The First Amendment simply does not allow the criminalization of pure speech for the purpose of proposing a legal activity, at least absent a harassment element, which section 15(e) lacks. That principle is consistent with the New York Court of Appeals’ decision in People v. Uplinger, which considered a statute that criminalized loitering “in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature.” The New York court invalidated the statute, reasoning that “[i]nasmuch as the conduct ultimately contemplated by the loitering statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose.”

Therefore, applying section 15(e) to requests to engage in private, non-commercial, consensual sex acts presents a serious constitutional issue that can be avoided simply by construing section 15(e) to exclude requests to engage in such conduct. Indeed, the statutory construction rule of in pari materia offers the best interpretation of section 15(e). In applying this concept, section 15(e) prohibits solicitation to commit “lewdness.” Section 16, in turn, defines “lewdness” as “any unnatural sexual practice.” Section 554’s title is “Unnatural or perverted sexual practices.” Accordingly, even absent any constitutional difficulties arising from the criminalization of pure speech, the most logical interpretation of section 15(e) is that it prohibits only requests to engage in activities that are illegal under section 554. Under Williams, section 554 “do[es] not apply to consensual, non-commercial, private sexual activities.” Hence, a request to engage in such activity is not a solicitation of “lewdness” as that term is defined under Maryland law.

V. STATUTORY REVISION

While the Williams ruling brings Maryland in line with the majority of states by legalizing private consensual intimate activity, the ruling is in danger of being overlooked. Because the case was resolved at the circuit court level without an appeal, the decision will not appear in Michie’s Annotated Code of Maryland. The opinion is available via LEXIS, but only in the GENFED library’s EXTRA file. In time, police agencies, state’s attorneys, and even judges may become unfamiliar with the Williams ruling, thus risking law enforcement activity enjoined by Williams.

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82 See Md. Ann. Code art. 27, § 335A (1996). This section makes “indecent exposure” a crime punishable by a fine of up to $1,000 and/or confinement for up to three years. Id.
83 See U.S. Const. amend. 1.
84 Id.
86 Id. at 63.
87 See 2B Norman J. Singer, Statutes and Statutory Construction § 51 (5th ed. 1992). The rule of in pari materia provides that where two statutes deal with the same subject matter, they should be construed together. This rule of statutory construction is well established under Maryland law. See Gargliano v. State, 334 Md. 428, 436, 639 A.2d 675, 679 (1994).
88 Md. Ann. Code art. 27, § 16 (1996). This section describes the terms “prostitution,” “lewdness,” and “assignation” as follows: (1) prostitution - “the offering or receiving of the body for sexual intercourse for hire,” (2) lewdness - “any unnatural sexual practice,” (3) assignation - “the making of any appointment, or engagement for prostitution or lewdness or any act in furtherance of such appointment or engagement.”
89 This proposed construction does not conflict with In re Appeal No. 180, 278 Md. 443, 365 A.2d 540 (1976), which broadly construes section 15’s use of the word “solicit.” Rather than interpreting the word “solicit,” this proposed construction limits those acts that constitute “lewdness.”
90 Williams, at *1.
To ensure that Maryland law is applied consistently with the State’s own recommended interpretation in *Williams*, the Article 27 Revision Committee should propose either modifying sections 15(e), 553, and 554 to exclude private, non-commercial, consensual sex acts or, in the alternative, abolishing sections 553 and 554 altogether while deleting the word “lewdness” from section 15(e). Maryland law has other provisions that criminalize non-consensual sex acts, public sex acts, and commercial sex acts. These provisions are sufficient to regulate undesirable forms of vaginal intercourse; no reason exists to suspect that they are insufficient to regulate oral and anal sex as well.

VI. CONCLUSION

The decriminalization of consensual sex in Maryland began with the court of appeals decision in *Schochet*. *Williams* has advanced the evolutionary process begun by *Schochet*, but that evolution is not yet complete. Maryland law now presents the anomaly of certain forms of behavior enjoying greater protection than the mere pure speech about those behaviors. This anomaly could be cured by a judicial interpretation of section 15(e) that narrows it to match the *Schochet/Williams* framework. Alternatively, section 15(e) could be narrowed legislatively in conjunction with a codification of *Schochet* and *Williams*. Only then will the bedrooms of the “Free State” truly be free.

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THE NEW MATH OF SENTENCE CALCULATION AFTER
FIELDS, WICKES, AND HENDERSON

by David C. Wright, Stephen Z. Meehan, and Joseph B. Tetrault

1. INTRODUCTION

For a long time the General Assembly has implemented and relied upon the award of diminution credits to prisoners serving sentences in the State’s prisons. The function of diminution credits is two-fold: First, to encourage prisoners to maintain good conduct and accept employment at prison jobs. Second, it function to alleviate overcrowding by promoting early release of nonviolent and non-felony drug offenders. Over the last decade the General Assembly has expanded the authority and discretion of the Parole Commission to impose penalties upon the revocation of mandatory supervision release. Further complicating matters, over the same period, the diminution credit scheme itself has undergone several amendments and modifications.

The changes in the law governing the diminution credit scheme resulted in a more complicated sentence calculation for the 5,000 prisoners per year that enter the Maryland state prisons, especially for those prisoners with consecutive, partially consecutive, or overlapping sentences. The changes also impacted the sentences of prisoners already in the State prison system whose terms of confinement were retrospectively effected by legislation or court decisions.

The executive branch’s concern over liability compounded by the perceived leniency for the incorrect early release of prisoners further complicated the sentence calculation. The Division of Correction (“DOC”) cured the inconsistencies by imposing overly strict interpretations of sentence calculation statutes. In some instances the DOC even engaged in outright unauthorized bookkeeping methods.

The result was a legal war between prisoners and the State waged in and refereed by the Court of Appeals of Maryland. The first battle of that war was waged on behalf of Wayne Hood, Michael Sayko, and Merrill Fields, three prisoners who challenged the DOC’s unauthorized disallowance of street time credits awarded by the Maryland Parole Commission and the denial of certain good conduct credits. On writ of certiorari, the court of appeals held that the DOC had misapplied the respective statutes. Consolidated under Maryland House of Corrections v. Fields, the decision resulted in the en mass release of prisoners who had been imprisoned beyond their correct release dates. Fields, Sayko, and Hood were followed into the fray by Wayne Wickes, who challenged the DOC’s application of the 1992 amendments creating a two-tiered good conduct credit system. Reported as Beshears v. Wickes, the decision adopted a short-lived interpretation of Article 27, Section 700 of the Maryland Annotated Code which created multiple terms of confinement for calculation purposes. Pursuant to that decision, the DOC en masse arrested approximately 50 prisoners who had been released on mandatory supervision, not for violating the terms of that release, but because the State had recalculated and retrospectively

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1 Individuals housed in the State of Maryland Division of Correction (“DOC”) prefer to be referred to as “prisoners,” implying they are detained against their will, as opposed to “inmates,” which they believe implies some consent to or acquiescence in their confinement.


4 See Md. Ann. Code art. 27, § 700 (Since 1970 this section has been amended over thirteen times); Md. Ann. Code art. 41, § 4-511 (1997) (Since its inception this section has been amended at least six times); Md. Ann. Code art. 41, § 4-612 (Since its inception this section has been amended over five times).


7 Id.


9 Id.
revised their release dates. One of those arrested was Vincent Henderson, who was released on a petition for writ of habeas corpus by the Circuit Court for Baltimore City. The State sought certiorari and the court of appeals, in Secretary, Dep’t of Pub. Safety & Correctional Serv. v. Henderson revised the interpretation of Article 27, section 700 adopted in Wickes. The court further held that the retroactive recalculation and re-incarceration of prisoners on mandatory supervision release was improper.

II. RELEVANT CHANGES IN THE LAW PRIOR TO THE 1992 LEGISLATION

Diminution credits for state prisoners in Maryland have existed for decades. However, prisoners released by the accumulation of credits, as opposed to those released by parole, were not under supervision until 1970. Even if a prisoner released on mandatory supervision release committed a new offense, that prisoner’s mandatory supervision release could not be revoked. In 1970 the General Assembly amended the statute to provide, “[a]ny person sentenced after July 1, 1970, shall, upon release, be deemed as if released on parole.” The amendment further provided the released person was to “remain under the supervision of the State Department of Parole and Probation until the expiration of the maximum term or terms for which he was sentenced.”

The statute was amended again in 1989, to permit the Parole Commissioner presiding at a revocation hearing to, “rescind all diminution credits previously earned on the sentence or any portion thereof.” Prisoners sentenced after 1970 but before 1989 challenged the retrospective application of the amendment on ex post facto grounds. In Frost v. State, the court rejected the argument, ruling that “the only logical interpretation of the previous statute that would accomplish its purpose required a loss of diminution credits by operation of law.” The 1989 amendment also provided that a person who violated mandatory supervision release (“MSR”) may not earn any new credits on the balance of the sentence imposed for violating MSR.

A. The 1992 Changes

By 1992, the General Assembly increased the total possible credit under Article 27, section 700 to 20 days per month. The same amendment allowed certain prisoners to receive ten good conduct credits per month if they had not been convicted of crimes of violence as defined in Article 27, section 643B or drug felony offenses. An uncodified section of the amendment provided for prospective application only to a term of confinement imposed after October 1, 1992. It is the currently litigating whether this prohibition is directed towards the remainder of any mandatory supervision term or extends as well to a new sentence. The DOC takes the view that one must “max out” on the old sentence before any credits can be applied to the maximum expiration date of the new sentence. The prisoners’ point of view is that under Article 27, section 700, diminution of confinement credits accrue on the new sentence from the date of commitment to custody of the Commissioner of Correction. Under the Wickes regime the prisoners were successful but after Henderson the DOC returned to its prior position in this regard. There are as of yet no reported appellate decisions on these “max to max” cases.


11 Id.

12 See id. at 452-53, 718 A.2d at 1157-58.

13 Diminution credits are earned by the inmates to reduce the length of their confinement. Md. Ann. Code art. 27, § 700 specifies four types of diminution credits: Inmates can earn diminution credits based upon good conduct, “satisfactory performance of work tasks,” “satisfactory progress in vocational or other educational or training courses,” and “satisfactory
latter amendment that spawned the *Fields*, *Wickes*, and *Henderson* cases.24

B. The Cases

1. *Fields*

The *Fields* case entailed a consolidated appeal of three separate habeas petitions, each seeking immediate release based upon diminution credits.25 The court considered the following three issues in *Maryland House of Correction v. Fields*:26

1) **Administrative Exhaustion.** In contesting a sentence calculation, was an inmate required to exhaust administrative remedies prior to filing a petition for writ of habeas corpus?27

2) **Double good conduct credits.** Is an inmate who is serving both a qualifying and disqualifying sentence entitled to double good conduct credits on the qualifying sentence?28

3) **Street time.** Upon the Parole Commission revoking mandatory supervision release and awarding both street time and diminution credits, in calculating the prisoner’s resulting obligation to the State, may the DOC deduct the street time from the diminution credits and only apply the remaining diminution credits?29

a. **Administrative Exhaustion**

The DOC has established a lengthy and somewhat complicated administrative hearing process to redress prisoner grievances.30 This process follows five steps:

1) Mandatory informal resolution,

2) Administrative Remedy Procedure to the warden (“ARP”),

3) Appeal of Administrative Remedy Procedure to the Commissioner of Correction (“AARP”),

4) Inmate Grievance Office (“IGO”) complaint before an administrative law judge of the Office of Administrative Hearings, and

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24 The 1992 changes also caused the DOC to ponder whether certain offenses were indeed crimes of violence. In particular, in late 1996 the DOC decided that manslaughter by automobile was a crime of violence and halved the credits of prisoners convicted of that offense. Some of the prisoners were actually awaiting release when the Commissioner of Correction, Richard A. Lanham, Sr., in consultation with the Secretary of Public Safety, Stuart Simms, and Governor Parris Glendening, made the decision to retroactively apply *Wickes*, causing the arrest of those previously released and the retention of those awaiting release. Not surprisingly prisoners sought habeas corpus relief. *See* Sacchet v. Blan, 120 Md. App. 154, 706 A.2d 620 (1998).

25 *See* Maryland House of Corrections v. Fields, 348 Md. 245, 703 A.2d 167 (1997). While *Fields*, *Sayko*, and *Hood* were consolidated for argument before the Court and opinion by the Court, only *Fields* raised all three issues. *Sayko* raised only the first two issues and *Hood* raised only the third issue. Accordingly, the joint opinion is generally referred to as *Fields*.

26 *See* id. In *Hood*, *Sayko* and *Wickes*, the prisoner plaintiffs were represented by the Prisoner Rights Information System of Maryland, Inc. (PRISM). In *Fields* and *Henderson*, PRISM attorneys filed *amicus curiae* briefs arguing in the interest of the similarly affected prison population. In both *Fields* and *Henderson*, the *amicus curiae* position carried the day. PRISM is a private legal services corporation designated by the Secretary of the Department of Public Safety and Correctional Services to provide legal services to prisoners in the DOC in certain very limited areas. In addition to assistance with federal civil rights claims resulting from conditions of housing, excessive force, improper medical care, and other similar matters, PRISM’s representation extends to state habeas corpus proceedings based upon improper or illegal sentence calculations.

27 *See* id. at 249, 703 A.2d at 169.

28 *See* id.

29 *See* id.

30 Despite the requirements of Annotated Code of Maryland, Article 41, Section 4-104(h)(2) (1993 & Supp. 1995), the DOC’s administrative remedy procedure has never been adopted pursuant to the procedures specified for the adoption of regulations in the Administrative Procedure Act, Md. Code Ann., State Government Article, §10-101 (1995). Instead, it is contained in 28 separate Division of Correction Directives (“DCDs”) which total 66 pages and have 14 appendices. DCDs 185-001 through 185-700 (effective April 1, 1993). This requirement was not adopted until 1983, after the decision in *State v. McCray*, 267 Md. 111, 297 A.2d 265 (1972). Moreover, the early versions of the administrative remedy procedure were much simpler than the present one. In 1985 it consisted of a mere five pages. Division of Correction Regulation (“DCR”) 185-2 (effective August 8, 1985). Even as late as 1992 the procedure was only ten pages long. DCR 185-2 (effective June 1, 1987). It was not until 1993 that it became the huge, unwieldy procedure discussed in the text.
5) Mandatory review of any favorable decision by the Secretary of Public Safety and Correctional Services.31

31 COMAR 12.07.01.03D requires that the prisoner first exhaust the “administrative remedy procedure,” before filing a complaint with the IGO. This requires that a prisoner must:
1. File a request for informal resolution of his/her complaint to the staff member involved, pursuant to DCD 185-203.
2. Prison officials have 15 days from the date that they receive the request to respond, pursuant to DCD 185-101, §III.A.1.
3. After receiving the response to the requested informal resolution, the prisoner must file a request for Administrative Remedy (ARP) to the warden, pursuant to DCD 185-402.
4. The institution has five working days from the date it receives the request to “index” the request, pursuant to DCD 185-101, §§III.C.3.
5. The warden then has 30 days from the date the request is indexed to respond and may request an additional 10 days, pursuant to DCD 185-101, §III.E.
6. After receiving the warden’s response, the prisoner must file an appeal to the Commissioner of Correction (AARP), pursuant to DCD 185-403.
7. The Commissioner’s office has five working days from the date it receives the appeal to index the appeal, pursuant to DCD 185-101, §III.H.3.
8. The Commissioner has 20 days from the date an appeal is indexed to respond, pursuant to DCD 185-101, §III.K.

Once the prisoner receives a response from the Commissioner the prisoner is free from the procedural labyrinth which is a prerequisite to filing a complaint with the IGO, and he may then finally file such a complaint. The IGO procedure, however, is not without its obstacles and delays, as it does not provide for an immediate hearing as does the habeas corpus procedure, and it does not provide prisoners with the ancillary litigation tools, which are consistent with procedural due process. The complaint to the IGO is processed as follows:

1. The IGO has 60 days to perform an initial review to determine if the case should be dismissed without a hearing, pursuant to Art. 41, §4-102.1(d)(1)(97).
2. If the complaint is not dismissed, it is referred to the Office of the Administrative Hearings.
3. A prisoner is not allowed to use prehearing discovery. COMAR 12.07.01.08B.
4. The prisoner is only permitted to call “such witnesses as the [Inmate Grievance] Office or an administrative law judge agrees may have relevant testimony to submit and as may be available at reasonable times.” COMAR 12.07.01.08C(2).
5. Although hearings are supposed to be held and decisions issued “promptly,” there are not actual limits in which a hearing must be held or a decision issued.
6. If the administrative law judge who conducts the hearing finds the complaint to be meritorious in whole or in part, the decision must be sent to the Secretary of the Department of Public Safety and Correctional Services.
7. The Secretary of the Department of Public Safety and Correctional Services has 15 days to review the decision. MD. ANN. CODE art. 41, § 4-102.1.

The administrative decision is appealed on the record to the circuit court.32 The total time to complete this process may easily exceed six months.33

In Fields, the DOC contended that the prisoner must first exhaust administrative remedies before seeking habeas corpus relief.34 Therefore, the DOC argued that the principles of administrative law required exhaustion of administrative remedies and judicial review prior to seeking habeas corpus relief.35 The DOC argued that Fields was barred because of his alleged procedural missteps.36

Fields had pursued his administrative remedies through the IGO.37 Believing he was long overdue for release, he sought to avoid the delay of the judicial review process and seek habeas corpus relief.38 The DOC maintained that Fields was barred from seeking habeas corpus relief prior to exhausting the judicial review step, even though section 4-102.1(k) did not address habeas corpus proceedings either expressly or implicitly.39 Additionally, the DOC argued that since Fields had raised only the award of double good conduct credits in his administrative remedies, and had not raised the street time issue administratively, he was barred from raising the street time issue by way of a habeas corpus proceeding.40

32 See MD. Rule 7-201, et seq.
33 Assuming that the prisoners met all of the applicable deadlines, it may take 85 days for the prisoner’s complaint to reach the IGO. Once the prisoner’s complaint reaches the IGO, assuming the matter is scheduled before an administrative law judge within 30 days as required, it may take an additional 105 days for the prisoner to receive a final decision from the IGO.

It should also be noted that after the circuitous detours of the administrative process leading to the IGO, and after the IGO process, the prisoner’s complaint is returned to the Secretary of the Department against which the prisoner has filed his complaint. The Secretary then has what is effectively veto power over a decision of an administrative law judge that may be in the prisoner’s favor.

34 See Fields, 348 Md. at 256, 703 A.2d at 173.
35 See id.
36 See id.
37 See id. at 252, 703 A.2d at 171.
38 See id.
39 See id. at 259-60, 703 A.2d at 174.
40 See id. at 256, 703 A.2d at 173.
The prisoner plaintiffs, in the cases before the court in *Fields*, asserted that the resolution in their favor of the unauthorized taking of street time credits and the failure to award statutorily mandated good conduct credits claims entitle them to immediate release. Therefore a habeas corpus petition was proper. The prisoners relied upon *Earle v. Gunnell* which held that prior to the prisoner filing a 42 U.S.C. § 1983, civil rights action in state court, exhaustion of the remedy provided by the IGO is not required. The *Earle* prisoners relied on former Md. Rule Z41, which provided that any unlawfully confined prisoner may file for habeas corpus relief.

The *Fields* prisoners also put forth *Frost v. State* and *Gluckstern v. Sutton* to support their position. In *Frost*, the appellant had reached the court by way of a habeas corpus proceeding filed as a challenge to the legality of his confinement without first exhausting administrative remedies. In *Gluckstern*, the court affirmed the grant of habeas corpus relief in the case of a prisoner who challenged the retroactive application of statutory requirements for parole from the Patuxent Institution without first exhausting administrative remedies. In both cases the court never addressed the exhaustion question, but rather proceeded to the substantive issues. While no Maryland cases have opined on this specific issue, foreign courts which have addressed the question have ruled that administrative exhaustion is not a prerequisite to habeas corpus relief.

Finally, the *Fields* prisoners argued that the DOC’s administrative remedy process was insufficient, if not illusory. The DOC’s administrative system is slow, cumbersome, and often leaves prisoners no further relief than when they started. The practical reality is that even when a prisoner reaches the IGO, the prisoner can expect a six month delay before a hearing, that is if the IGO does not dismiss the complaint on procedural grounds thus requiring judicial review on the dismissal prior to any productive review. A system so bogged down is simply inadequate to address challenges to the duration of confinement when the inmate, if successful, is entitled to immediate or near immediate release. The power of the Secretary of the Department of Public Safety to have final review and veto power makes the process illusory.

The court determined that, “the usual legal presumption is that the administrative remedy is primary and must be “first invoked and followed” before resort to the courts.” The court also concluded that, generally, prisoners with any grievance or complaint against any office were required to exhaust administrative remedies before seeking relief under other common law or statutory remedies. However, in the case of prisoners entitled to immediate release challenging illegal confinement, there was no logical bar to habeas corpus proceedings in the administrative scheme. Writing for the *Fields* Court, Judge Chasanow opined:

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41 See id.
43 See id. at 658, 554 A.2d at 1261.
44 The “Z” rules were repealed prior to the *Fields* decision and are now found at Md. Rule 15-301, et seq.
45 See Earle, 78 Md. App. at 656, 554 A.2d at 1260.
46 336 Md. 125, 647 A.2d 106 (1994).
48 See Frost, 336 Md. at 130-31, 647 A.2d 108-09.
49 See Gluckstern, 319 Md. 634, 574 A.2d 898.
50 The purpose of habeas corpus is to allow a restrained person “to have a speedy investigation into the cause of his detention and to secure his release that takes at least six months unless he is lawfully detained.” Such a purpose is frustrated if an administrative procedure is a prerequisite to habeas corpus relief. Luckie v. State, 502 So.2d 870, 872 (Ala. Crim. App. 1986). The court must balance the interests of judicial economy and administrative efficiency, against the right of the individual to gain his freedom at the earliest possible time through a writ of habeas corpus. If the court finds the balance tipped in favor of the prisoner, a habeas corpus petition will be considered without first exhausting the administrative remedies. Barrows v. Hogan, 379 F. Supp. 314, 316 (M.D. Pa. 1974).
52 See id. at 259-60, 703 A.2d at 175.
53 See id. at 260, 703 A.2d at 174-75.
If a habeas corpus proceeding, by an inmate asserting an entitlement to immediate release, were nothing more than a common-law or statutory remedy, we would agree with the Division that the inmate would be required first to invoke and exhaust the administrative procedure.

A habeas corpus proceeding, however, is not simply a common-law or statutory remedy over which the General Assembly has full control. Instead, it is a remedy authorized and protected by the Constitution of Maryland. Md. Const. Art. III, §55 provides that “[t]he General Assembly shall pass no Law suspending the privilege of the Writ of Habeas Corpus.” While the legislature may “reasonably” regulate the issuance of the writ, any legislatively imposed regulations must not impair the fundamental right to the substantive remedy of habeas corpus.54

b. Double Good Conduct Credits for Post-October 1, 1992 Offenders.

The determination of this issue hinges on the interpretation and application of “term of confinement” as that term is used in the 1992 amendment to Article 27, section 700,55 which implemented a dual system of good conduct credits for qualifying and disqualifying sentences.56

Those prisoners serving qualified sentences imposed after 1992 receive double good conduct credits of 10 days per month, while prisoners serving disqualifying sentences received only 5 days per month.57 All offenders sentenced prior to 1992 received credit at the old rate. Due to the 1992 amendment to Article 27, section 700, the legislature created the possibility that a prisoner could owe an obligation to the State consisting of two separate sentences, one of which was for a qualifying offense for which sentence was imposed after 1992, and one of which was for a disqualifying offense, or a pre-1992 sentence.58

The DOC contended that “term of confinement” included the entire obligation to the State and that if any portion of that obligation was for a disqualifying offense or a pre-1992 sentence, the prisoner was disqualified from receiving double good conduct credits on the entire obligation to the State.59 The prisoners took the position that a period of incarceration consisting of multiple sentences imposed at different times cannot be considered to have been imposed at any single definite point in time and is therefore not a single term of confinement, at least on the good conduct issue.60 In point of fact, the prisoners contended that with the potential for additional sentences, a term of confinement can never be said to have been fully imposed until it has been fully served.61

54 Id. at 260, 703 A.2d at 174-75 (citing Olewiler v. Brady, 185 Md. 341, 346, 44 A.2d 807, 809 (1945); State v. Glenn, 54 Md. 572 (1880)).


In this section, “term of confinement” means:
(1) The length of the sentence for a single sentence; or
(2) The period from the first day of the sentence beginning first through the last day of the sentence ending last for:
(i) Concurrent sentences;
(ii) Partially concurrent sentences;
(iii) Consecutive sentences; or
(iv) A combination of concurrent and consecutive sentences.

56 See Fields, 348 Md. at 263, 708 A.2d at 176. Specifically the operative language of MD. ANN. CODE art. 27, § 700(d) stated:
(1) An inmate shall be allowed a deduction in advance from the inmate’s term of confinement, subject to the inmate’s future good conduct.


58 See MD. ANN. CODE art. 27, § 700(a).

59 See Fields, 348 Md. at 263, 703 A.2d at 176.

60 See id. at 265-66, 703 A.2d at 177.

61 See id. at 266-67, 703 A.2d at 178.
The court ruled that while the definition of “term of confinement” as set forth in Article 27, section 700, included a prisoner’s total obligation to the State, the clarity of that definition does not “‘preclud[e] [the court] from looking at the purpose of the statute.’” The court noted that the legislative history behind the implementation of double good conduct credits was to reduce prison overcrowding. Based upon the legislative history, the court concluded that a prisoner’s obligation to the State could be comprised of more than one term of confinement with the application of good conduct credits for qualifying nonviolent sentences and disqualifying or pre-1992 sentences as the statute provided. The court explained that

[t]he effect of this decision is that, for those sentences imposed before October 1, 1992, good conduct credits should be awarded at the old rate of five days per month. Those nonviolent, non-drug related sentences imposed during a new sentencing after October 1, 1992 should carry good conduct credits at the rate of ten per month.

c. Street Time

When a prisoner’s time in custody and the prisoner’s total diminution credits equals the total sentence and the prisoner has not previously been released on parole, the prisoner is released to mandatory supervision for a period equal to his diminution credits. Upon violation, the prisoner appears before a parole commissioner for a revocation hearing. Where the parole commissioner finds that the prisoner has violated the mandatory supervision release, the prisoner is required to serve the balance of the sentence – time equal to the number of diminution credits used to secure mandatory release. At this point, the parole commissioner has the discretion to reduce the time remaining on the sentence by crediting all or part of the days spent out on supervision and allow the prisoner to retain all, some, or none of the diminution credits the prisoner had earned and used to secure mandatory supervision release.

Notwithstanding the statutory provision, the DOC took the position that street time credit and diminution credits could not both be applied to the balance of the sentence to be served. The DOC’s ultimate concern was that in a case where a prisoner was awarded all of the street time and all of the diminution credits, the Parole Commission could effectively terminate any return to custody and return the prisoner to the street. The DOC argued that the institutional commitment offices were required to deduct the street time credit awarded by a parole commissioner from the good conduct credits awarded by the Parole Commissioner and the net result was applied against the balance of the time the prisoner had to serve. The DOC argued that it was not exercising any discretionary authority, but was merely carrying out the Parole Commission’s decision and cited its own internal

7. See Md. Ann. Code art. 41, § 4-511 provides in part: “[I]f the order of parole is revoked, the prisoner shall serve the remainder of the sentence originally imposed unless the Commission member hearing the parole revocation, in the member’s discretion, grants credit for time between release on parole and revocation of parole.”
9. See Fields, 348 Md. at 269, 703 A.2d at 179.
10. The DOC maintained this position despite the fact that the controlling legislation did not prohibit such a result. Logically, however, such a result would be unlikely in that if the Commissioner sought to achieve such an end result, the means would very likely have been simply a decision not to violate MSR.
11. See Fields, 348 Md. at 268-69, 703 A.2d at 179.
regulations, the Commitment Procedures Manual, as authority for its position. To this day, those regulations have never met the scrutiny of the legislature and are not reliable authority.

The prisoners set forth a three-prong attack on the DOC’s form of cipher. First, the Parole Commission was perfectly within its authority to grant sufficient street time and good conduct credits to effectively vacate the balance of the sentence. Second, it is the Parole Commission and not the DOC which has the sole authority to rescind good conduct credits following revocation at mandatory supervision. Third, if street time and good conduct credits are both designed to reduce a prisoner’s sentence, it is illogical and illegal to deduct one from the other for sole purpose of making a prisoner serve more time.

The respective DOC’s and prisoners’ approaches may be demonstrated as follows:

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| GCC Bal: 431 | subtotal: 190 |
| | MPC Resc.: <401> |
| | **Illusory subtotal: -0-** |
| New GCC: 300 | New GCC: 300 |
| GCC Bal: 731 | GCC Bal: 300 |

| MSR Date: 12/31/01 | MSR Date: 12/31/99 |
| less 731 days = 12/30/99 | less 300 days = 3/6/01 |

After setting forth this dual sentence calculation in their *amicus curiae* brief in *Fields*, the prisoners demonstrate the illogic of the DOC’s stance. The confusion of the “illusory subtotal,” implies the DOC has an unwritten
rule “which magnanimously requires that the prisoner not be given a negative diminution credit balance which would require the prisoner to serve time to offset that negative balance before he may actually begin serving his sentence.” The brief asserts there is a severe flaw in an accounting system which must include in its procedure a built in adjustment to avoid results which are logically dictated to be incorrect. The brief concludes that the mere fact that such an illogical result must be avoided by an exception to the stated procedure is evidence that the procedure itself is defective.

The *amicus* brief further illustrates the effect of the DOC’s dubious procedure. The Parole Commission gives “street time” which is accounted for in the adjusted maximum expiration date. The DOC then takes away that “street time” by deducting it from the prisoners diminution credits. It is unclear, as the brief states, the source from which the DOC derives its authority to subtract the “street time” credit from the diminution credits.

The brief notes the Parole Commission derives its authority from two separate statutes enacted by the Maryland General Assembly. Moreover, the brief asserts, the logical intent of those statutes support Parole Commission’s position. The DOC’s basis of support is its own Commitment Procedures Manual which was adopted without any prior public dissemination or opportunity for public comment and is subject only to the delegable approval authority of the Commissioner of Correction. Further illustrating the illogic of the system, the computer system used is acknowledged by the DOC, “to be incapable of correctly calculating sentences.”

The court agreed with the prisoners’ position. The DOC’s interpretation of street time credits was found to be “especially illogical” in light of the statute. Article 41, section 4-511(d)(1), provides that upon revocation of mandatory supervision release, the prisoner shall serve the remainder of the sentence originally imposed, unless the Maryland Parole Commission, in its discretion, grants credit for the time between release on mandatory supervision and revocation of that mandatory supervision. The language of subsection (d)(1) provides that the prisoner must serve the balance of the originally imposed sentence, unless the Parole Commission grants street time credit.

The court concluded that the DOC was without authority to adjust the award of diminution credits given by the Parole Commission. That authority rests solely within the discretion of the Parole Commission. Accordingly, the court concluded that the DOC improperly adjusted prisoner’s diminution credits by the amount of street time credit awarded the prisoners by the Parole Commission.

2. *Wickes*

*Beshears v. Wickes* was the first test case of the DOC’s interpretation of *Fields*. *Fields* raised the more general question about the appropriate application of the October 1, 1992 amendment to post-amendment violators with nonviolent offenses. Wayne Wickes challenged the

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82 See id.
83 See id.
84 See id.
85 See id.
86 See id.
87 See id.
88 See id.
89 See id.
90 See id.
91 See *Fields*, 348 Md. at 269, 706 A.2d at 179.
93 See id. (Subsection (d)(2) creates an exception to that exception which prohibits the Parole Commission from granting street time credit to those prisoners whose mandatory supervision was revoked as a result of violent crime. The Court of Appeals implied that exception to the exception substantiated the statutory authority for use of the exception.)
94 See *Fields*, 348 Md. at 271, 706 A.2d at 180.
95 See id.
96 See id. at 271-72, 706 A.2d at 180.
DOC’s application of the good conduct credit amendment to a prisoner who was serving sentences for both a pre-amendment violent crime and a post-amendment nonviolent crime. Confronted with that factual scenario, the DOC concluded that the pre-amendment sentence for a violent crime tainted the post-amendment sentence for a nonviolent crime for the purposes of awarding double good conduct. Wickes argued that such an interpretation was an incorrect reading of both the statute and the Fields decision. 100

On a petition for habeas corpus, the trial court agreed with Wickes and ordered that the DOC apply good conduct credits at the rate of 10 per month to the sentence for the post-amendment nonviolent crime. The DOC appealed to the Court of Special Appeals of Maryland, but the Court of Appeals of Maryland, sua sponte, issued a writ of certiorari to decide the question. The court affirmed the trial court, but included dicta that resulted in the creation of multiple terms of confinement for each individual sentencing event where there was a break in custody from the DOC.

Applying the Fields decision to Wickes’ case, Judge Chasanow, writing for the court, concluded that “the sentencing of a defendant for a subsequent offense while he is out on mandatory supervision release for a prior offense is a separate sentencing event.” As such, the court stated that “Wickes’ sentences for the violent offense of rape and the nonviolent offense of third-degree burglary [were] part of two separate sentencing events and, therefore, are to be deemed separate terms of confinement.”

As innocuous and possessed of a priori logic as that statement may seem, the DOC relied upon this dicta in Wickes as a basis to recalculate sentences for those prisoners who were serving or had served partial concurrent, partial consecutive, qualifying and disqualifying sentences. The result was that numerous prisoners were “Wickes’ed.” This meant the DOC applied Wickes

100 The operative language, defined by the prisoners as dicta, was not so defined by the DOC or the minority of the Court in Henderson, 351 Md. 438, 718 A.2d 1150 (1998). That language was as follows: “Finally, we reiterate our rejection of the Division’s argument, posited in Fields, that to calculate separate rates for separate terms of confinement being served consecutively ‘would be difficult to administer.’” Wickes, 349 Md. at 10, 706 A.2d at 612 (quoting Fields, 348 Md. at 265, 703 A.2d at 177). However, an illustration shows that the calculations are not that complicated.

An inmate may have two different mandatory release dates just as the inmate may serve concurrent sentences of different lengths. For example, an inmate is serving concurrent overlapping sentences A and B. Sentence A is a ten-year sentence for a crime of violence imposed on January 1, 2000. The inmate is released on mandatory supervision 600 days early (10 years x 5 credits/month x 12 months/year = 600 good conduct credits). While out on mandatory supervision release the inmate receives sentence B, a ten-year sentence for a nonviolent, non-drug related offense imposed on January 1, 2009, which would terminate on January 1, 2019 without the application of any good conduct credits. Because this subsequent offense violates the conditions of the inmate’s mandatory release, his mandatory supervision release is revoked and he must now serve the 600 days remaining on sentence A, which he also began serving on January 1, 2009. Thus, the inmate’s mandatory release date with respect to sentence A will be August of 2010. Unless the inmate’s B sentence is reversed, however, the inmate will not actually be released in August of 2010 because with regard to sentence B, the inmate will not be eligible for mandatory supervision release until September of 2015 (more than 3 years early through the application of good conduct credits at a rate of ten days per month – 10 years x 10 credits/month x 12 months/year = 1200 good-conduct credits). In other words, even though these sentences overlap, the inmate will have two different mandatory release dates. Similarly, if sentence B were for one year, the mandatory supervision release date would be August of 2010, instead of September of 2009. Moreover, as we said in Fields, “[w]e should not adopt the Division’s theory merely because to do otherwise would saddle the Division with more complex calculations.” Id. at 10-11, 206 A.2d at 603 (quoting Fields, 348 Md. at 265, 703 A.2d at 177).

At argument before the court of appeals in Henderson, upon questioning from the court, counsel for the Secretary indicated very few prisoners were effected, less than 100 prisoners. When asked by the court, counsel for the prisoners reported that the DOC’s house counsel
retrospectively to prisoners’ sentence calculation and thus moved mandatory release dates further into the future or issued administrative escape retake warrants to return prisoners who, on recalculation, were released too early.\textsuperscript{108}

\textbf{a. History behind \textit{Wickes}}

To understand the nuances of the DOC’s interpretation of the dicta in \textit{Wickes}, one must participate in a history lesson in sentence calculation and return to the line graphs of our adolescence.\textsuperscript{109} Prior to 1990 and the codification of DCIB 9-90 by amendment to the provisions of Article 27, section 700,\textsuperscript{110} the DOC operated under a sentence calculation system which provided for cell parole for partially concurrent, partially consecutive “overlapping” sentences. An “overlapping consecutive/concurrent” obligation to the DOC may be graphically illustrated as follows:

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\textsuperscript{108} See generally Wickes, 349 Md. 1, 706 A.2d 608. The \textit{Wickes} decision did not reach the issue of street time credit for the time the DOC said these prisoners were wrongfully released. However, logic certainly supports the contention that an erroneous release on mandatory supervision subject to the same terms and conditions as if one were on parole, is in effect a parole, or, at the very least, that such a prisoner is entitled to street time credit for that period during which he was on mandatory supervision release without violation of its condition.

\textsuperscript{109} Much of this history and the illustrative graphs are directly from the prisoners’ brief in \textit{Henderson}.

\textsuperscript{110} DCIB No. 9-90, dated March 9, 1990, SUBJECT: AWARDING DIMINUTION OF CONFINEMENT CREDIT FOR INMATES WITH OVERLAPPING CONCURRENT SENTENCES

1. Secretary Bishop L. Robinson has now received advice by memorandum from Attorney General J. Joseph Curran on the application of diminution credits to overlapping concurrent sentences. Overlapping concurrent sentences are those which:
   a. have a starting date which falls between the inmate’s then current starting and maximum expiration dates; and
   b. cause a new maximum expiration date which falls beyond the current maximum expiration date.

2. Attorney General Curran’s memorandum advises that credits earned under Article 27, section 700 between the first day of commitment and the maximum expiration date are to be applied to the maximum expiration date. Section 704A credits, it follows, are to be applied in the same manner. This means that credits ordinarily will not be attributed only to specific sentences, but instead to whole terms of incarceration. Specific circumstances may require exceptions to this, and they will be reviewed and dealt with as they arise.

3. A hypothetical case will illustrate the principles set out in this policy:

   If inmate Jones has a three year sentence beginning January 1, 1990, and receives a second three year sentence beginning on January 1, 1991, his maximum expiration date will be January 1, 1994. Good conduct days attributable to the four year term (assuming full good conduct credits, 240 days) will be applied to this maximum expiration date. Additionally, all industrial, educational, and special project credits earned from January 1, 1990 will be applied to this maximum expiration date.

4. This method of applying diminution credits will be implemented immediately by all commitment offices, and will be applied to all new transactions occurring after the date of this DCIB. Additionally, the DOC will, as soon as reasonably possible, recalculate all sentences of this nature which have not been calculated in accordance with the above method. The review of existing sentences will be under the supervision of the commitment supervisor for each institution, who shall:
   a. ensure that first the sentences of all inmates scheduled for release on mandatory supervision (those in the “short file”) are reviewed and recalculated under the policy set out in this DCIB, if necessary;
   b. ensure that the sentences of all inmates identified on a computer list generated from OBSCIS and provided by DOC HQ are reviewed and recalculated under this DCIB, if necessary;
   c. ensure that specific claims of overlapping concurrent sentences by or on behalf of inmates are reviewed to assure that the sentences are calculated consistent with this DCIB; and
   d. ensure that the sentences of all inmates returned to custody from escape, parole, mandatory supervision, or other out-of-custody status are reviewed, and to the extent necessary, recalculated under this DCIB.

5. In the event there are any questions about this procedure, or concerns about possible exceptions to the procedure, they should be referred to Warren Sparrow, Chief of Classification.
For the purpose of consistency, if not logic, in sentence illustrations and hypotheticals, the author has used the DOC’s sentence identification style of identifying the first sentence as Sentence “B” for “Before” and the second sentence as Sentence “A” for “After.” (The author is unable to attribute the praise for this bit of nomenclature to any individual in the DOC, so the DOC as a whole is the recipient of such praise.)

In response to prisoner litigation, the DOC reevaluated its practices in regard to “overlapping consecutive/concurrent” sentences and “cell parole” and on March 6, 1990, issued Division of Correction Information Bulletin (“DCIB”) 9-90, which directed the DOC’s commitment clerks to apply diminution of confinement credits to the maximum expiration date farthest in the future. DCIB 9-90 abolished the practice of “cell parole” and inmates received the benefit of all diminution of confinement credits awarded or earned while in prison. Subsequent to the abolishment of “cell parole,” inmates no longer lost the benefit of diminution credits earned on the earlier sentence and received earlier mandatory supervision release dates and earlier releases from incarceration. However, the DOC still maintained the view that a combination of sentences for eligible and ineligible offenses in an “overlapping consecutive/concurrent” sentence structure rendered the prisoner completely ineligible for special project diminution credits for the entire period of incarceration.

Pursuant to Article 41, section 4-612(f), the DOC determined that a prisoner could not earn any diminution of confinement credits on a subsequent “overlapping consecutive/concurrent” sentence until the prisoner reached the maximum expiration date of the prior revocation of mandatory release sentence. These cases became known as “max to max” cases, as good conduct credit on the subsequent sentence was only awarded from the maximum expiration date of the prior sentence to the maximum expiration date of the subsequent sentence, rather than the entire period of incarceration.
than from the date of commitment on the subsequent sentence to the maximum expiration date of that subsequent sentence. This may be illustrated as follows:

<table>
<thead>
<tr>
<th>Period of Parole/Mand.</th>
<th>Maximum Expiration Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supervision</td>
<td></td>
</tr>
<tr>
<td>Post 7/1/89</td>
<td>Sentence B</td>
</tr>
<tr>
<td>Sentence B</td>
<td>Start Date</td>
</tr>
<tr>
<td>Parole/Mand.</td>
<td>Sent B</td>
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<tr>
<td>Start Date</td>
<td></td>
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<tr>
<td>Release Date</td>
<td></td>
</tr>
<tr>
<td>Date</td>
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</tbody>
</table>

Consider the following example.\(^{113}\) On January 1, 1980, John Doe is committed to the custody of the Commissioner of Correction for a sentence of five years. For the sake of simplicity, let us eliminate pretrial credit under Article 27, section 638C, and posit that the sentence also commences on January 1, 1980. The maximum expiration date is therefore January 1, 1985. On January 1, 1981, Doe is again committed to the custody of the Commissioner of Correction for a sentence of five years, commencing January 1, 1981. The new maximum expiration date is now January 1, 1986. The total obligation to the DOC is six years. The sentence structure may be graphically illustrated as follows:

On January 1, 1980, Mike Roe is committed to the custody of the Commissioner of Correction for a sentence of five years, commencing January 1, 1980. On January 1, 1981, Roe is sentenced to one year, to be served consecutively. Roe’s maximum expiration date is January 1, 1986. Roe’s total obligation is six years. The sentence structure may be graphically illustrated as follows:

Based upon the preceding hypothetical, prior to March 6, 1990, the official effective date of DCIB 9-90, Doe’s and Roe’s sentences could have been calculated as follows:

1. Roe would have been released to mandatory supervision on or about April 22, 1984, having received the benefit of 360 good conduct credits and approximately 259 industrial credits;
2. Doe would have been “released” to “cell parole” on his “B” sentence on or about August 4, 1983, having been awarded 300 good conduct credits on that sentence and having earned approximately 216 industrial credits;
3. Doe would have remained incarcerated to complete the service of the “A” sentence and would not have actually been released from incarceration until on or about December 15, 1984. At this point he has been awarded 300 good conduct credits on his second sentence but has only received the benefit of 82 industrial credits earned between the date of his “cell parole” and his actual mandatory supervision release date.

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\(^{113}\) The following assumptions apply to this hypothetical: (1) all four convictions are for the same offense; (2) there are no forfeitures for violating prison disciplinary rules (See Md. Ann. Code: art. 27, § 700(g)); (3) neither prisoner makes parole; (4) each prisoner gets 120 diminution of confinement credits per year of incarceration (60 good conduct credit and 60 industrial credits with the good conduct credits given in a “lump sum” at entry into the DOC and the industrial credits being earned on a month by month basis at a rate of five days per month of incarceration).
Let us assume that prior to April 22, 1984, under the hypothetical set forth above, Doe and Roe shared the same cell and worked side-by-side in the same prison kitchen for their five industrial credits per month. On April 22, 1984, Doe sees his cell mate, who was convicted of the same offenses and received the same time to serve, go home, while Doe stays in prison for another eight months. As a result of that inequity, prisoners in Doe’s situation filed suit and sought relief. In response to these cases, the DOC promulgated DCIB 9-90, which officially became effective on March 6, 1990. For the first time, DOC commitment staff were directed to apply diminution credits against the entire term of confinement. At the request of the Department of Public Safety and Correctional Services, the General Assembly subsequently amended Article 27, section 700, to add a definition of “term of confinement” that comported with the application of credits called for by DCIB 9-90.\footnote{See 1991 Md. Laws, ch. 354.}

The legislative history of the 1991 amendment to Article 27, section 700 shows that the DOC’s current view of sentences is that of separate terms of confinement for the purpose of applying the benefit of diminution credits.\footnote{See id.} This view is contrary to the intent of the General Assembly and is violative of the guarantee of equal protection of the laws. The amendment originated as House Bill 174.\footnote{See id.} The Department of Public Safety and Correctional Services filed a bill entitled “Position on Proposed Legislation.”\footnote{See id.} That document reads that the amendment in question, concerning the definition of “term of confinement,”\footnote{Prior to July 1, 1991, the effective date of the amendment, Md. Ann. Code art. 27, §700, provided for deductions, “...within the period between the first day of commitment to the custody of the Commissioner and the last day of the inmate’s maximum term of confinement,” but did not define, “term of confinement.” Md. Ann. Code art. 27, § 700 (1987 Repl. Vol.).} would:

\begin{quote}
[m]ake it clear, consistent with Division [of Correction] practice and view of current law [\textit{i.e.}, the view contained in DCIB 9-90], that diminution of confinement credits are applied across the entire term of confinement an inmate is serving, as opposed to being applied to the individual sentences that make up that term. \textit{The result is that an inmate with a combination of consecutive and concurrent sentences is awarded good conduct credits in the same manner as an inmate who must serve the same amount of time, but based upon a single sentence.} This is consistent with the manner in which the Maryland Parole Commission, under law, treats the sentences to which an inmate is subject when parole is granted.\footnote{1991 Md. Laws, ch. 354 (emphasis added). A review of the H.B. 174 file reveals that the particular amendment to the definition of term of confinement was approved with little or no controversy. It appears that another amendment that took effect in 1991 and prohibited the award of diminution of confinement credits to prisoners serving Maryland sentences in foreign jurisdictions occupied more committee attention and comment from both the Legal Aid Bureau and the Office of the Attorney General.}

In the wake of Wickes, the DOC returned to “cell parole” for those prisoners with sentences separated by a break in custody as a result of reincarceration after release to either mandatory supervision or parole.\footnote{While the breaks in custody in both Fields and Wickes were caused by mandatory supervision releases, there appears to be no logical distinction between parole and release to mandatory supervision under these circumstances. It is unknown in its post-Wickes calculations how the DOC would treat a break in confinement due to an escape.} It should be noted that the amendment to Article 27, section 700, was as a result of the DOC’s request to codify DCIB 9-90, and that the DOC was interpreting that amendment to Article 27, section 700, in such a way as to recreate the equal protection problem DCIB 9-90 was designed to cure. The equal protection problems presented by the DOC’s approach may be illustrated by another hypothetical.
\end{quote}
On January 1, 1990, John Doe is sentenced to ten years in the DOC, commencing on January 1, 1990, with a maximum expiration date of January 1, 2000. Doe is granted parole effective on January 1, 1995. Doe remains free from DOC custody for two years. On January 1, 1997, Doe receives a sentence of ten years, commencing January 1, 1997, running concurrent with the prior sentence and resulting in an adjusted maximum expiration date of January 1, 2007 for Sentence A. Parole is revoked. He owes the DOC two years for time out of custody. Doe is allowed one year credit for “street” time. He owes the DOC one year, which is added to the end of his first sentence, but which does not affect his maximum expiration date to give him an adjusted maximum expiration date of January 1, 2001 for Sentence B. Doe’s obligation may be graphically illustrated as follows:

The total obligation to the DOC in both cases is exactly the same. However, in the post-\textit{Wickes} world of diminution of confinement credits, at least in the DOC’s view of that world, Roe receives the benefit of all credits awarded or earned during the entire period of incarceration, while Doe will have to “mandatory out” on the balance of Sentence B and then start all over again on the Sentence A. Again, assuming credit at a rate of 120 days per year (60 days per year for good conduct credit awarded in a lump sum at the start of each incarceration and five days a month industrial credits earned and applied on a month to month basis) and no forfeitures of good conduct credit for violating prison disciplinary rules, Doe will be released to mandatory supervision on or about May 14, 2004, while Roe will be released to mandatory supervision on or about September 24, 2002, a difference of roughly 20 months.

\footnote{122 Under the DOC’s interpretation of \textit{Md. Ann. Code} art. 27, § 690C (1996), parole must first be revoked for a sentence to be run consecutively to a term imposed for a parole violation. If, as in most cases, parole is not revoked until after a new sentence is imposed, and even though the sentencing judge may have specified that the sentence was to be served consecutively to the parole violation sentence, the DOC treats the new sentence as starting on the date of its imposition and thus is either an “underlapping” sentence or an “overlapping concurrent/consecutive” sentence.}

\footnote{123 1996 Md. Laws, ch. 567, added a prohibition to \textit{Md. Ann. Code} art. 27, § 700(g) which prevents a parole violator from receiving the benefit of credits earned prior to release on parole. This provision could not be applied to either prisoner without violation of \textit{ex post facto} principles.}
b. Getting “Wickes’ed”

Representatives from the DOC testified before the Maryland General Assembly that the cell parole theory of sentence calculation was too cumbersome and unfair in its application. Moreover, the DOC also testified that it was incapable of recalculating all those sentences in regard to the double good conduct credits. However, the DOC’s reaction to Wickes was to recalculate all of the prisoners sentences. For those individuals who had been released based upon a overlapping consecutive/concurrent sentence calculation but which would not have been released at that time under a cell parole sentence calculation, the DOC issued administrative escape warrants for approximately 160 prisoners.

3. Henderson

Vincent Henderson was released from the DOC to MSR on July 7, 1997. On May 5, 1998, after 10 months of infraction free mandatory supervision release, Henderson was “Wickes’ed” under the authority of an administrative retake warrant charging escape. After retaining Henderson in custody for several days, Henderson was released on May 14, 1998 pursuant to habeas corpus relief granted by the Circuit Court for Baltimore City on the grounds that the DOC had violated Henderson’s due process rights. Some short time after Henderson was released, the DOC released those other prisoners which had been “Wickes’ed” back into custody, but still maintained that the DOC had acted properly in retaking the prisoners. On May 18, 1998, the DOC appealed the decision to the Court of Special Appeals of Maryland and at the same time petitioned the Court of Appeals of Maryland for issuance of a writ of certiorari. The court granted the petition and the matter proceeded on an expedited basis with arguments held only three weeks later on June 6, 1998.

The case was of obvious importance to Henderson, but the system-wide impact was more significant. The DOC was forced to finally admit that their twist on the Wickes decision impacted some 2000 prisoners and thus resolving the difficulties created for that large prisoner population was imperative.

On appeal, the DOC took the position that its post-Wickes policies were a correction of its prior erroneous construction of Article 27, section 700, which had been corrected by Wickes. The DOC further argued that Henderson’s due process rights were not violated because

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124 These were not judicially issued arrest warrants, but rather administrative escape retake warrants issued by the Parole Commission.

125 Administrative escape retake warrants were issued for 111 individuals, and an additional 13 warrants were issued for individuals who had been erroneously released but also had parole violations pending.


127 See id. at 447-48, 718 A.2d. at 1155. Approximately 50 individuals were physically returned to the DOC pursuant to an administrative escape retake warrant.

128 See id. at 449, 718 A.2d at 1156.

129 See id. at 450, 718 at 1156. At oral argument before the court of appeals on Henderson, the court was prompted to ask the DOC, if the court of appeals ruled in their favor, would the DOC retake all effected prisoners, hold them just long enough for them to lose their employment, housing, and means of transportation, and then release them.

130 See id.

131 Henderson argued for affirmation of the trial court on ex post facto principles of state and federal constitutional grounds and his counsel, Ralph S. Tyler, formerly Deputy Attorney General of Maryland and now a partner in the Baltimore office of Hogan & Hartson, LLC, vehemently objected to PRISM’s entry into the case as amicus curiae on behalf of the general prison population. Tyler was concerned that the general prison population’s arguments could adversely affect or detract from his argument on behalf of his one client.

PRISM took the position that the problem, while systematic, was not constitutional in nature. PRISM recognized the sweeping effect the DOC’s interpretation had on the prison population and the systemic interests in resolving the issue for the entire prison population to avoid delay and overcrowding of the court docket. The court of appeals agreed and permitted PRISM to brief and argue as amicus curiae on behalf of the prisoners on several grounds, including the need to amend Wickes.

In rendering its decision in Wickes, the court of appeals understandably did not appreciate how the dicta in that case would be used by the DOC to make mischief. The court ultimately adopted the prisoners’ position and revised the Wickes decision rather than reaching any constitutional issues, thus resolving not only Henderson’s problem, but the dilemma that faced all similarly situated prisoners.

132 See supra note 108.

133 See Henderson, 351 Md. at 451, 718 A.2d. at 1156.
the DOC’s policy pursuant to *Wickes* was a foreseeable result and he was not required to serve any more time than required under the law.\(^{134}\)

Henderson argued that the *Wickes* decision constituted a new rule the DOC’s retroactive application of *Wickes* was arbitrary and capricious.\(^{135}\) Henderson also raised two constitutional arguments. First, that the retroactive application of *Wickes* violated the federal and state constitutional prohibition against *ex post facto* laws, and, second, that it violated substantive due process.\(^{136}\)

As *amicus curiae*, PRISM argued for the prisoner class that the DOC’s interpretation of *Wickes* violated federal and state equal protection principles and the clear intent of the statute.\(^{137}\) Accordingly, the court needed to clarify its decision in *Wickes* to ensure that prisoners received the full benefit of their earned diminution credits.\(^{138}\) Finally, *Wickes* should be applied retroactively to the prisoners benefited by the decision.\(^{139}\)

Judge Wilner authored the Henderson decision for a divided court.\(^{140}\) That decision held that Judge Chasanow’s decision in *Wickes* went beyond what was necessary to render a decision in that case and it was that additional language, argued by the prisoners to be dicta,\(^{141}\) that had caused the mischief that prompted the *Fields* litigation.

While there was no true *mea culpa*, the court of appeals did acknowledge the misstep of *Wickes* and heeded the *amicus curiae*’s call to clarify *Wickes*, bringing an end, for now, to the long running credits controversy. In so doing, the court concluded that the rule of lenity alone would have dictated the same result in *Wickes* and *Fields* without any need to go further.\(^{142}\) Additionally, had the ruling been confined to those instances where strict application of the section 700 definition of “term of confinement” deprived some inmates of the benefit of the 1992 law, there would have been no confusion.\(^{143}\) But, no. The court entered a ruling that enunciated a broader definition of “term of confinement” which does not aggregate sentences imposed before and after mandatory supervision release. The court held that “[t]he sole basis of the Division’s recalculation of Henderson’s good conduct credits was the language we used in Wickes … That and that alone, is what led the Division to redetermine the mandatory supervision release dates of some 2,000 inmates.”\(^{142}\)

The majority recognized that the expanded holding of *Wickes* resulting in a restricted application of Article 27, section 700, “was not necessary in order to reach the result in *Wickes*.\(^{143}\) The court clarified the rule regarding aggregation, stating, “[a]pplication of the statutory direction to aggregated the sentences produces no ambiguity in this instance; it does not deprive Mr. Henderson or others similarly situated of any legislatively created benefit."\(^{144}\)

Most significant in the majority opinion was the court’s recognition of the nuances inherent in Maryland’s diminution of confinement scheme. Concluding the court’s opinion, Judge Wilner opined:

> These three cases -- *Fields*, *Wickes*, and *Henderson* -- illustrate the different ways in which a statute such as Ch. 588 can affect inmates in our correctional system. In *Fields* and *Wickes*, we were dealing with one context and did not need, or really intend, to go beyond it. In articulating a secondary justification for our holding in *Wickes*, we inadvertently led the Division to a conclusion that was both unintended and erroneous. *Fields* and *Wickes* remain good law, based on the ambiguity created in the circumstances of those cases and

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\(^{134}\) See *id* at 447-49, 718 A.2d at 1155.

\(^{135}\) See *id* at 448, 718 A.2d at 1155.

\(^{136}\) See *id*.

\(^{137}\) See *Amicus curiae* brief for PRISM at 9, Henderson (No. 39-1998).

\(^{138}\) See *id* at 20.

\(^{139}\) See *id* at 24.

\(^{140}\) The opinion was written by Wilner, J., and joined by Eldridge, Raker and Cathell, JJ. Chasanow, J., author of *Frost, Fields* and *Wickes*, filed a heated dissent and was joined by Bell, C.J., and Rodowsky, J.

\(^{141}\) During oral argument there was a respectful but spirited debate between prisoners’ counsel and Judge Chasanow as to whether or not that language was in fact dicta. Judge Chasanow maintained at oral argument and later in his dissent that the language did indeed set forth the law of the case.

\(^{142}\) See Henderson, 351 Md. at 451-52, 718 A.2d at 1157.

\(^{143}\) See *id* at 452, 718 A.2d at 1157.

\(^{144}\) *Id* at 451, 718 A.2d at 1157.
its resolution through application of the rule of lenity. That rule does not require a departure from the statutory direction in § 700 when, as here, there is no ambiguity.\textsuperscript{145}

In \textit{Fields} and \textit{Wickes}, the court adopted unanimous positions. When it came to \textit{Henderson} and the interpretation of \textit{Wickes}, the court divided 4-3. The stinging tone of the minority decision illustrates just how seriously divided the court was on this question.

The majority’s opinion is consistent with \textit{Fields} and \textit{Wickes} in its explanation of the history of § 700 and the interpretation of that statute as applied in \textit{Fields} and \textit{Wickes}. The majority strains to manufacture a way to make the \textit{Fields} and \textit{Wickes} decisions inapplicable to recidivists who commit violent crimes on parole in order to let those violent recidivists out earlier than our express language in the \textit{Wickes} decision would allow. I do not believe this inconsistent construction that benefits violent multiple offenders was the intent of the legislature, and I know it is contrary to the express language of \textit{Wickes} and was neither the intent of the author of the \textit{Fields} and \textit{Wickes} opinions nor at least two additional members of the Court.\textsuperscript{146}

\section*{III. CONCLUSION}

Prisoners’ litigation is not a pursuit which carries public favor, especially in regard to matters concerning early release from incarceration. It is popular to say that, “If a person is sentenced to five years, he should serve five years.” But that is not really the issue in the series of cases which have been discussed in this article. Even the most ardent proponent of incarceration would not agree that, “If a person is sentenced to five years, he should serve seven years.”

The Rule of Lenity is a long standing general principle of law by which any discretion in imposition or calculation of sentence is resolved in favor of the prisoner. For some reason, the DOC moved away from that rule a few years ago, and began the policies which have resulted in the litigation which is the subject of this article.\textsuperscript{147} The prisoners have described the DOC’s conduct in this regard as the Rule of Dislenity, whereby any discrepancy in sentence calculation is resolved to the prisoners’ detriment. So far the Rule of Lenity has prevailed,\textsuperscript{148} although in the guise of esoteric and arcane statutory interpretation. Most assuredly there will be legislation which addresses the effect of this series of decisions. That legislation will most probably be aimed at closing a loophole and eliminating any discrepancy which might invoke the Rule of Lenity. The reader may judge for themselves what course the DOC and the prisoners will pursue at that time.\textsuperscript{149}

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\textsuperscript{145} \textit{Id.}

\textsuperscript{146} \textit{Id.} at 452, 718 A.2d at 1157, (The reader should also note, that while not explicitly stating the same, the \textit{Henderson} Court found the language which was at issue in \textit{Wickes} to indeed be dicta.).

\textsuperscript{147} \textit{Id.} at 453, 718 A.2d at 1158.

\textsuperscript{148} \textit{Id.} at 455-56, 718 A.2d at 1159 (Chasanow, J. dissenting).

\textsuperscript{149} This move occurred roughly contemporaneously with the revelation that John Thanos may have been released prior to his correctly calculated release date. The reader will note that Thanos was executed for murders which occurred after his actual release, but prior to what could be argued to be his correctly calculated release date.

\textsuperscript{150} Additionally, while \textit{Fields}, \textit{Sayko}, \textit{Hood}, and \textit{Wickes} were victories for the prisoner, \textit{Henderson} may fairly be called only a retrospective victory.

\textsuperscript{151} Currently pending before the Court of Appeals is \textit{Lomax v. Warden}, No. 45, Sept. Term 1998, in which prisoners are challenging the Governor’s policy of no parole for parolable life sentences.
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Beynon v. Montgomery Cablevision Ltd.:
Accident Victim’s Estate May Recover Damages for Pre-Impact Fright if a Jury is Capable of Making an Objective Determination that the Victim Experienced Anguish and Distress Before Impending Death

By Catherine Bowers

In a case of first impression, the Court of Appeals of Maryland addressed whether the estate of an accident victim may be awarded damages in a survival action when the victim, who died immediately upon impact, experienced pre-impact fright. *Beynon v. Montgomery Cablevision Ltd.*, 351 Md. 460, 718 A.2d 1161 (1998). The court held that when a decedent experiences great anxiety and fear of imminent death immediately prior to the fatal physical impact, the decedent’s estate may recover for emotional distress and mental anguish that can be measured by an objective determination.

In the early morning of June 8, 1990, Montgomery Cablevision Limited Partnership was installing replacement cable on Interstate 495 (“capital beltway”). *Beynon*, 351 Md. at 464, 718 A.2d at 1163. Montgomery Cable coordinated with the Maryland State Police to have traffic on the capital beltway stopped during the cable replacement. *Id*. During the repair, traffic backed up one mile on both sides of the capital beltway. *Id*. James P. Kirkland (“Kirkland”) was at the end of the traffic congestion in his tractor-trailer. *Id*. Kirkland testified that his trailer was stopped in a middle lane, and that there was traffic on both sides of him. *Id*.

At the same time, Douglas K. Beynon (“Beynon”) was traveling at 55 m.p.h. in the same direction as Kirkland. *Id*. at 464-65, 718 A.2d at 1163. Beynon was approximately 192 feet behind Kirkland’s tractor-trailer when he realized he was going to crash. *Id*. at 465, 718 A.2d at 1163. Beynon slammed on his brakes and veered to the right. *Id*. However, Beynon was unable to stop his vehicle, hit the rear of Kirkland’s trailer, and was killed on impact. *Id*.

In the Circuit Court for Montgomery County, Beynon’s parents contended that Beynon suffered and should be compensated for pre-impact fright, which was defined as “the mental anguish the decedent suffered from the time he became aware of the impending crash until the collision.” *Id*. at 465, 718 A.2d at 1164. Beynon’s parents presented the seventy-one and a half feet of skid marks to prove that Beynon reacted to the imminent danger of crashing. *Id*. at 465, 718 A.2d at 1163. The trial court agreed that the parents presented sufficient evidence of pre-impact fright and instructed the jury that it could make an award for pain, suffering, and mental anguish. *Id*. at 465-66, 718 A.2d at 1164. The jury returned a verdict for the petitioners, and awarded $1,000,000.00 to Beynon’s estate for pre-impact fright. *Id*. at 466, 718 A.2d at 1164. The court reduced the award to $350,000 pursuant to section 11-108(b) of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland. *Id*. The Court of Special Appeals of Maryland reversed the judgment for post-impact fright, concluding that a cause of action based only on fright cannot stand without physical injury to the victim or an injury capable of objective determination. *Id*. at 467-69, 718 A.2d at 1164-65 (citing *Montgomery Cablevision Ltd. v. Beynon*, 116 Md. App. 363, 388, 696 A.2d 491, 503 (1997)). The intermediate appellate court stated that damages for pre-impact fright cannot be awarded when a victim dies on impact or never regains consciousness. *Id*. at 469, 718 A.3d at 1165 (citing *Montgomery Cablevision Ltd.*, 116 Md. App. at 388, 696 A.2d at 503). The Court of Appeals of Maryland granted certiorari, reversed the court of special appeals and remanded the case with instructions to reinstate the trial court’s judgment. *Id*. at 509, 718 A.2d at 1185.

The court of appeals began its analysis by reviewing case law from jurisdictions that allow the recovery of pre-impact fright damages and jurisdictions that do not allow such damages. *Id*. at 476-97, 718 A.2d at 1169-79. Following this review,
the court determined that the cases upholding an award of damages for pre-impact fright were more persuasive and compatible with Maryland law. Id. at 497, 718 A.2d at 1179.

The court next summarized Maryland law involving issues regarding recovery for emotional injury. Id. at 497-504, 718 A.2d at 1179-83. The court concluded that damages for emotional distress are recoverable in Maryland under two circumstances. Id. at 504-05, 718 A.2d at 1183. First, damages are recoverable when the emotional distress is proximately caused by the defendant’s wrongful act and results in a physical injury. Id. (citing Green v. T.A. Shoemaker & Co., 111 Md. 69, 77, 73 A. 688, 691 (1909)).

Second, damages are recoverable when the emotional distress is capable of being determined in an objective manner. Id. (citing Vance v. Vance, 286 Md. 490, 500, 408 A.2d 728, 733 (1979)). Significantly, the court noted that this standard for recovery of damages for emotional distress chronologically varies the common law chain of events - wrongful fact, physical impact, physical injury and then emotional distress, for such recovery. Id. at 505, 718 A.2d at 1183. Thus, the court introduced a more flexible and accommodating sequence of events for recovery of emotional damages. Id. The court concluded, given the new accommodating sequence of events, that the compensability of pre-impact fright is permissible “when it is the proximate result of a wrongful act and it produces a physical injury or is manifested in some objective form.” Id.

Physical injury, the court stressed, provides the objective manifestation of the emotional injury and serves “as the yardstick by which a tort victim’s emotional harm may be measured.” Id. at 507, 718 A.2d at 1184. In the present case, the court explained, Beynon’s fright was accompanied by physical injuries, the injuries that caused his death. Id. The court also stated that Beynon’s fright was also accompanied by an independent objective manifestation of emotional distress and mental anguish. Id. The court concluded that Beynon’s fright was capable of objective determination by the seventy-one and a half feet of skid marks that resulted from his apprehension of impending death. Id.

Again discussing the sequence of events and proximate cause of harm, the court stressed that the fact that Beynon’s fright occurred before the crash that resulted in his fatal injuries did not affect causation. Id. A wrongful act need only proximately cause mental anguish, and this mental disturbance does not need to be the result of physical injury. Id. Thus, the court opined, the respondent was responsible for the emotional disturbance Beynon experienced due to the crash. Id.

In addition, the court reasoned that considering the purpose of survival statutes is to permit a decedent’s estate to bring an action that the decedent would have brought had he lived, refusing to allow Beynon’s estate to recover pre-impact fright damages in this survival action would be illogical. Id. at 508, 718 A.2d at 1185. Had Beynon lived, he no doubt would have been permitted to recover damages for the pre-impact fright he suffered before hitting the tractor-trailer. Id.

The court next addressed the issue of permitting a jury to determine pre-impact fright. Id. The court concluded that the jury determination required the jury to use the same reasoning and common knowledge it would be permitted to use if it were determining non-economic damages such as pain and suffering. Id. Furthermore, the court explained that the jury only needs evidence from which they could reasonably infer that the decedent experienced fright. Id. The court opined that in the present case, the jury could have reasonably inferred from the seventy-one and a half foot skid marks that Beynon was aware of the impending crash and tried to avoid it. Id.

In a dissenting opinion, Judge Wilner disagreed with the majority determination that the existence of fright could be measured by seventy-one and a half feet of skid marks. Id. at 509-10, 718 A.2d at 1185-86. Judge Wilner stated that the case lacked any substantial evidence from which a jury could infer that Beynon was consciously experiencing fright while trying to stop his vehicle. Id. at 511, 718 A.2d at 1186. According to Judge Wilner, it was “rank speculation” for a jury to conclude that Beynon was consciously thinking about anything other than trying to avoid hitting the trailer. Id. Judge Wilner also expressed great concern over the amount per second of
damages awarded in the case, which was $140,000 per second of fright. *Id.* at 512, 718 A.2d at 1187.

Significantly, in *Beynon v. Montgomery Cablevision Ltd.*, the Court of Appeals of Maryland recognized an action for pre-impact fright when the impact causes instantaneous death. As a result of this decision, when a plaintiff offers evidence that provides an objective determination of the distress suffered by the decedent, his or her estate may recover for the suffering. The court’s holding permits juries to infer the decedent’s fright from the evidence presented. The effect of this case will add to the unchecked speculation and conjecture in Maryland’s jury rooms.
Recent Developments

_Boswell v. Boswell:_
Parent’s Visitation Shall Not be Restricted Solely Due to a Relationship with a Non-Marital Partner

By Richard Dirk Selland

The Court of Appeals of Maryland held that the “correct standard to be applied in visitation determinations involving the presence of a non-marital partner is the best interest of the child, with liberal visitation being restricted only upon a showing of actual or potential adverse impact to [the] child resulting from contact with [the] non-marital partner.” _Boswell v. Boswell_, 352 Md. 204, 721 A.2d 662 (1998). The court further held that requiring the father’s homosexual partner to be absent during visitation was improper in the absence of specific findings of potential or actual adverse impact to the children. _Id._ The court emphasized that this decision would apply to both heterosexual and homosexual relationships outside of marriage.

Robert and Kimberly Boswell were married in May 1986. _Id._ at 210, 721 A.2d at 664. A son, Ryan, was born in 1988 and a daughter, Amanda, was born in 1991. _Id._ The parties separated in August 1994 when Mr. Boswell told his wife that he was a homosexual. _Id._ He began living with Robert Donathan in February 1995 and the two started an intimate relationship. _Id._

After Ms. Boswell filed for a limited divorce, Judge James Cawood of the Circuit Court for Anne Arundel County ordered that visitation between Mr. Boswell and his children take place one week night and alternating weekends. _Id._ In July 1995, Mr. Boswell filed a counterclaim for absolute divorce. _Id._ at 210, 721 A.2d at 665. Judge Lawrence Rushworth presided over a five day trial in March and April of 1996. Disputes were limited to the possession, value, and disposition of various personal property items. _Id._ The issue of custody was not contested since both parties had previously agreed that Ms. Boswell was to maintain primary custody of the children. _Id._ During trial, Mr. Boswell moved unsuccessfully for recusal of Judge Rushworth because he made statements indicating a predisposition toward restricting contact between the children and Mr. Donathan. _Id._

Judge Rushworth ruled on the topic of visitation, a non-contested issue, by severely limiting Mr. Boswell’s visitation time with his children. _Id._ The order “prohibited any overnight visitation and visitation with the children in the presence of Mr. Donathan, or ‘anyone having homosexual tendencies or such persuasions, . . . or with anyone that the father may be living with in a non-marital relationship.’” _Id._ at 211, 721 A.2d at 665. However, Ms. Boswell never testified that she wanted Mr. Donathan excluded from visitation, nor that his presence was adverse to the children. _Id._

Judge Rushworth based his order on in camera interviews with the children even though they provided no definitive response regarding their feelings about Mr. Donathan’s presence. _Id._ The Court of Special Appeals of Maryland reversed the trial judge by entering a judgment in Mr. Boswell’s favor and vacated the visitation prohibitions. _Id._ at 213, 721 A.2d at 666. The Court of Appeals of Maryland granted certiorari to “clarify the standard a court must apply in determining the extent of restrictions on parental visitation of children in the presence of non-marital partners.” _Id._ at 214, 721 A.2d at 666.

Before the court began its legal analysis, it examined the role and testimony of the court-appointed social worker, Marcia Kabriel. _Id._ at 214, 721 A.2d at 667. Explaining any discomfort the children may be having over their Father’s relationship, Ms. Kabriel testified that “the children would have been confused if it had been a man or a woman. The children routinely in the first year or two after a separation and divorce have hopes that their parents will reconcile.” _Id._ at 215, 721 A.2d at 667. Dr. Kay Standley, an expert witness for Ms. Boswell, added that she was “very much in favor of both parents having a great deal of contact with the children,” and that it is common for the children to
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be affected by any new partner of Mr. Boswell, heterosexual or homosexual. *Id.* at 216-17, 721 A.2d at 668.

Both testimonies were useful in the court’s analysis of the best interest of the child standard and how that standard applied to the case at hand. This standard, described as being “of transcendent importance” and the “sole question” in familial disputes; indeed it is ‘therefore not considered as one of many factors, but as the objective to which virtually all other factors speak.” *Id.* at 219, 721 A.2d at 669 (quoting *Taylor v. Taylor*, 306 Md. 290, 303, 508 A.2d 964, 970 (1986)). This standard has not only been applied to custody disputes, but also visitation determinations. *Boswell*, 352 Md. at 219, 721 A.2d at 669. A series of cases have held that visitation is to be treated like temporary custody and should thus be governed by the same standard. *Id.*

The court recognized that a parent has a fundamental right to raise a child, but that it is not carte blanche. *Id.* at 220, 721 A.2d at 669. The court of appeals expressed that in the course of a custody or visitation dispute, a parent’s liberty interest is subordinate to what is in the best interests of the child. *Id.* The court further recognized that it is in the best interests of the child to have an “opportunity to develop a close and loving relationship with each parent.” *Id.* The presumption that liberal unrestricted visitation with a non-custodial parent is in the best interests of the child may be overcome in those situations where there is evidence that the child may be harmed by such visitation. *Id.* at 221, 721 A.2d at 670. Maryland has restricted or denied visitation in cases involving physical, sexual, and/or emotional abuse by a parent by instituting a best interests standard coupled with a finding of harm. *Id.*

In applying the best interests standard, a court may consider factors derived from case law, including: “the age, sex and health of the child, the physical, spiritual, and moral well-being of the child, the environment and surroundings in which the child will be reared, [and] the influences likely to be exerted on the child.” *Id.* at 222, 721 A.2d at 670. Additionally, in making its findings of fact, a court is “not allowed to consider one factor, such as a parent’s adultery or homosexuality, to the exclusion of all others.” *Id.* at 224, 721 A.2d at 671.

The court continued its analysis by discussing a series of Maryland cases and their interpretation of the “harmful effect” or “adverse impact” requisite. *Id.* Where a change in visitation is requested on the basis of potential or actual harm to the child, courts will apply a best interests of the child standard concurrently with an adverse impact inquiry. *Id.* at 225, 721 A.2d at 672. A court will grant the change only upon a showing of actual emotional or physical harm to the child. *Id.*

The court supported this adverse impact requisite by turning its attention to other jurisdictions as well. *Id.* at 228-29, 721 A.2d at 674. The court agreed with other jurisdictions in concluding that the sexual orientation or conduct of the parent is not the primary factor in visitation proceedings. *Id.* at 229, 721 A.2d at 674. See also, *In re the Marriage of Birdsall*, 197 Cal. App. 3d 1024 (Cal. Ct. App.1988) (holding that the sexual orientation of a parent on its face is insufficient evidence to constitute harm); *Blew v. Verta*, 617 A.2d 31 (Pa. 1992) (holding that “courts ought not to impose restrictions which unnecessarily shield children from the true nature of their parent unless it can be shown that some detrimental impact will flow from the specific behavior of the parent.”). *Boswell*, 352 Md. at 230-31, 721 A.2d at 674-75.

The court moved on to its last step of analysis which is the requirement that a court must “find a nexus between the child’s emotional and/or physical harm and the contact with the non-marital partner.” *Id.* at 237, 721 A.2d at 678. A restriction on visitation will not be entertained without such a nexus. *Id.* In the present case, the court was unable to find any connection between the presence of Mr. Donathan, the non-marital partner, and actual or potential harm to the children. *Id.* at 238, 721 A.2d at 678. Denying or restricting visitation merely because of a fact finder’s disapproval of a non-marital relationship without making a determination of an adverse impact on the children has consistently been overturned by the Maryland courts, and this case is another example. *Id.* at 238, 721 A.2d at 679.

In *Boswell v. Boswell*, the Court of Appeals of Maryland emphasized that the only standard to apply is the best interests of the child, with “liberal visitation being restricted
only upon a showing of actual or potential adverse impact to the child resulting from the contact with the non-marital partner.” In the present case, the decision requiring Mr. Boswell to visit his children in the absence of his significant other was vacated. The decision reflects that a court will not treat a parent living in a committed relationship with someone of the same sex any differently from a parent living with someone of the opposite sex without the benefit of marriage. Sexual orientation is fundamentally irrelevant to a person’s capacity to be a good parent. Recognizing that fact, the Court of Appeals of Maryland rejected basing this decision on stereotypical assumptions. Rather, the court applied the best interests of the child standard coupled with requiring evidence of a clear connection between a parent’s actions and harm to the child before the parent’s sexual orientation assumes any relevance in the visitation proceeding.
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County of Sacramento v. Lewis:
A Suspect’s Substantive Due Process Right is Not Violated when Police Action, Aimed at Apprehending a Suspected Offender, with No Intent to Harm or Legally Worsen Suspect’s Situation, Causes Death

By Bryon S. Bereano

The Supreme Court of the United States ruled that a police officer who is engaged in a high-speed pursuit of a suspected offender does not violate a suspect’s substantive due process right by causing death through deliberate indifference or reckless indifference to life. County of Sacramento v. Lewis, 523 U.S. 833 (1998). In so holding, the Court determined that the proper standard necessary to establish a Due Process violation is deliberate indifference that shocks the conscience.

While responding to an unrelated call, officers James Smith (“Smith”) and Murray Stapp (“Stapp”) observed a motorcycle driven by Brian Willard (“Willard”) with Philip Lewis (“Lewis”) as a passenger, traveling at a high rate of speed. County of Sacramento v. Lewis, 523 U.S. 833 (1988). Stapp yelled for the motorcycle to stop, turned on his police lights, and a chase ensued. Id. In an effort to pin in the motorcycle, Stapp maneuvered his patrol car closer to Smith’s patrol car. Id. However, Willard sped away, managing to steer his motorcycle clear of the two police cars. Id. The chase ended when Willard’s motorcycle tipped over while attempting to turn left. Id. Smith immediately applied his brakes, but his patrol car skidded into Lewis at forty miles an hour, propelling Lewis seventy feet down the road. Id. Lewis suffered massive injuries and was pronounced dead at the scene. Id. Willard survived without serious injury. Id.

The respondents, Philip Lewis’s parents and the representatives of his estate, brought suit against the petitioners, Sacramento County, the Sacramento County Sheriff’s Department and Smith, alleging a deprivation of Lewis’s Fourteenth Amendment substantive due process right to life. Id. The district court granted summary judgment for Smith, reasoning that even if Smith violated Lewis’s constitutional rights, Smith was entitled to qualified immunity. The Court of Appeals for the Ninth Circuit reversed the district court’s decision and held that “the appropriate degree of fault to be applied to high-speed police pursuits is deliberate indifference to or reckless disregard for, a person’s right to life and personal security.” Id. (quoting Lewis v. County of Sacramento, 98 F.3d at 441 (9th Cir. 1996); Evans v. Avery, 100 F.3d 1033, 1038 (C.A.1 1996)). Before discussing which standards to apply, however, the Court addressed the County’s contention that the Respondents suit was barred by a more definite provision of the constitution, precluding the application of a substantive due process claim. The County relied upon Graham v. Conner, 490 U.S. 386 (1989), which held that “[w]here a particular amendment provides an explicit textual source of constitutional protection against a particular sort of Government behavior, that amendment, not the more generalized notion of substantive due process, must be the guide for analyzing claims.” The county argued that Smith’s actions constituted a seizure and, therefore, the case should be analyzed under the Fourth Amendment. The Court, however,
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held that the Fourth Amendment covers searches and seizures and a motorcycle chase in pursuit of a suspect does not constitute a seizure under the Fourth Amendment. \textit{Id.} (citing \textit{Graham}, 490 U.S. at 395). The Court concluded that there was no Fourth Amendment violation, and that Smith’s actions would be examined under a substantive due process violation analysis.

Having determined that a substantive due process analysis was applicable, the Court turned to the issue of culpability necessary for a violation. The Court stated that when dealing with abusive executive action, only the “most egregious official conduct can be said to be arbitrary in the constitutional sense.” \textit{Id.} at 1716 (quoting \textit{Collins v. Harker Heights}, 503 U.S. 115, 129, 112 S.Ct. 1061, 1071 (1992)). Under the \textit{Collins} test, substantive due process can only be violated by executive action that shocks the conscience. \textit{Id.} at 1717. The Court, relying on the \textit{Collins} test, determined that Smith did not violate Lewis’s substantive due process when he was killed during the vehicle chase. \textit{Id.} at 1720. When looking at the government’s actions, a totality of the circumstances standard should be used before judging actions that shock the conscience. \textit{Id.} at 1718. The Court determined that in a situation of a high-speed pursuit of a suspect, an officer’s instant judgment is required. \textit{Id.} at 1720. With no time to think, an officer’s actions must be held to the higher standard of the \textit{Collins} test and not to the level of deliberate indifference or reckless indifference.

In the wake of the Court’s holding, police officers will violate a suspect’s due process rights in a high-speed pursuit only if the officer’s actions are arbitrary and shock the conscience. No longer will conduct that is deliberate or shows reckless indifference be enough to hold police officers liable for injuries sustained by suspects during pursuits.
Degren v. State:  
Failure to Prevent the Sexual Abuse of a Child, When It Is Reasonably Possible to Act, Qualifies As Sexual Abuse Under Maryland’s Child Abuse Statute

By Sean E. Kreiger

In a unanimous decision, the Court of Appeals of Maryland held that an adult responsible for the supervision of a child is guilty of sexual abuse when they fail to prevent the sexual molestation of the child. Degren v. State, 352 Md. 400, 722 A.2d 887 (1999). The defendant’s conviction for child abuse was upheld in Degren because of her failure to stop or report the child abuse of a minor under her supervision when it was reasonably possible for her to act. In so holding, the court of appeals refined the child abuse statute and made it clear that a supervising adult has an affirmative duty to prevent the abuse of children under their care.

Sharon Degren (“Degren”) and the mother of twelve-year-old Jennifer B. (“Jennifer”) agreed that Jennifer would stay at Degren’s house, under Degren’s supervision. Id. at 405, 722 A.2d at 889. During her stay, Jennifer was sexually abused by Degren’s husband, Nick Degren (“Nick”), and his friend, Richard Dobsha (“Rick”). Id. at 406-07, 722 A.2d at 890. In some instances, Degren was present in the same room when Jennifer was sexually abused, occasionally watching the sexual abuse from the corner of the bed. Id. Nevertheless, Degren did not attempt to prevent the sexual abuse, or contact the authorities. Id. Degren was subsequently convicted by a jury in the Circuit Court for Charles County of four counts of child abuse, and sentenced to four concurrent ten-year sentences. Id. at 404, 722 A.2d at 889. On appeal, the Court of Special Appeals of Maryland affirmed the conviction, and the Court of Appeals of Maryland granted certiorari to address the issue of whether the child abuse statute includes an act of omission or failure to prevent abuse. Id.

The court of appeals began its analysis by interpreting Maryland’s child abuse statute to determine whether the failure to prevent sexual abuse of a minor was an act that constituted child abuse. Id. at 408, 722 A.2d at 891 (citing MD. ANN. CODE art. 27, § 35C (1996)). The relevant part of the statute states that “a parent or other person who has permanent or temporary care or responsibility for the supervision of a child . . . who causes the abuse to the child is guilty of a felony.” Id. at 408, 722 A.2d at 891 (quoting MD. ANN. CODE art. 27, § 35C(b)(1) (1996)). The court found that its rulings in these cases provided a basis for convicting a person for failure to prevent sexual abuse. Id.

To clarify that Degren’s failure to act qualified as sexual abuse, the court next addressed the plain meaning of the child abuse statute. Id. at 418, 722 A.2d at 896. The statute defines sexual abuse as “any act that involves sexual molestation or exploitation of a child.” Id. (quoting MD. ANN. CODE art. 27, § 35C(a)(6)(i) (1996)). Degren’s contention on appeal was that her actions did not qualify as sexual abuse because she did not act in furtherance of the abuse. Id. This contention prompted the court to define “act” and “involves” as they relate to the statute. Id. The court considered
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outside sources because the definition of “act” is not in the statute. *Id.*
According to Black’s Law Dictionary “an omission or failure to act may
constitute an act for the purpose of criminal laws.” *Id.* (quoting BLACK’S
LAW DICTIONARY 25 (6th ed. 1990)). Furthermore, the court pointed out
that “act” is normally construed to include omissions from a duty to act.
*Id.*

The court stated that the word “involves,” which modifies “act” in the
statute, “connotes a broad sense of inclusion, such as an act relating to
sexual molestation or exploitation.” *Id.* In further support of the statutory
usage of “involves,” the court reviewed Merriam-Webster’s Collegiate Dictionary and found that
“involves” means “to have an effect on.” *Id.* (quoting MERRIAM-
WEBSTER’S COLLEGIATE DICTIONARY 617). Thus, according to the court,
“involves” serves as an extender beyond sexual molestation or
exploitation to include “something done by the accused that relates to
the molestation or exploitation.” *Id.*

Moving beyond the issue of statutory construction, the court
considered the legislative intent behind the statute. *Id.* at 419-20, 722 A.2d
at 896-97. The court found the legislative intent clear because the
introductory paragraph and purpose clause of the statute stated that the
purpose of the statute was to protect children. *Id.* (citing MD. ANN. CODE
art. 27, § 35C (1996)). Furthermore, the court considered a 1974
amendment to the statute, which added sexual abuse as a form of child
abuse. *Id.* The purpose of this extension was to expand the definition
of child abuse. *Id.* Thus, the court concluded, the definition of child
abuse was intended to be open in application, making Degren’s contention that omissions were not acts contradictory to the legislative intent. *Id.*

Next, Degren argued that because the “failure to act” language
was not added to the sexual abuse provision, the statute was only
applicable for failure to intervene during the physical abuse of a minor.
*Id.* at 421, 722 A.2d at 897. The court rejected this argument and
stated that the definition of abuse does not require physical injury for criminal
penalties, and that the 1973 amendment broadened coverage of
the entire statute to include failure to act, regardless of whether the abuse
is physical or sexual. *Id.* After considering these factors, the court
held that “the definition itself encompasses what petitioner actually
did: the affirmative acts of watching and failing to intervene in the rape.”
*Id.* at 425, 722 A.2d at 899.

By allowing the conviction for sexual abuse for an omission to act,
the court of appeals has extended the coverage of the child abuse statute.
This praiseworthy decision will allow the prosecution of individuals who do
not directly participate in abuse, but who may reasonably prevent the
abuse and who have a responsibility or duty to the child. This decision will
help to further extend penalties for child abuse and thus provide a means
of prosecuting more participants in this insidious crime.
**Recent Developments**

**Dupree v. State:**

The Prosecution May Not Impeach a Defendant with Evidence of the Defendant’s Silence Following Advisement of Miranda Rights

By Anne Bodnar

In a unanimous decision, the Court of Appeals of Maryland held that a trial court may not admit testimony that a defendant was advised of his Miranda rights and thereafter remained silent for purposes of impeachment. *Dupree v. State*, 352 Md. 314, 722 A.2d 52 (1998). In so holding, the court preserved the right of a defendant to remain silent without evidence of this fact being used against him.

This case arose from an incident on May 3, 1996, when Sean Dupree ("Dupree") shot and killed a man following a brief confrontation on the street. *Id.* at 316, 722 A.2d at 53. Dupree was arrested and charged in connection with the incident. *Id.* at 321, 722 A.2d at 55. Upon his arrest, Dupree chose to remain silent after he was advised of his Miranda rights. *Id.* at 322, 722 A.2d at 55.

In the Circuit Court for Baltimore City, Dupree was found guilty of second degree murder and use of a handgun in the commission of a crime of violence. At Dupree’s trial, the court allowed the prosecution, for the purpose of impeachment, to introduce testimony that Dupree was advised of his Miranda rights. *Id.* at 321, 722 A.2d at 55. Dupree appealed the decision to the Court of Special Appeals of Maryland, which affirmed the conviction. *Id.*

Dupree petitioned the Court of Appeals of Maryland, which granted certiorari. *Id.* at 316, 722 A.2d at 53. Dupree contended that the prosecution’s offered testimony violated both Maryland evidentiary rules and his constitutional rights, stressing that the testimony allowed the jury to infer impossibly an admission of guilt. *Id.* at 322, 722 A.2d at 55.

In addressing the issue of whether the trial judge erred in admitting this evidence, the court first reviewed *State v. Raithel*, in which a similar issue was decided twenty years ago. *Id.* at 323, 722 A.2d at 56 (citing *State v. Raithel*, 285 Md. 478, 404 A.2d 264 (1979)). In *Raithel*, the court of special appeals held that the “privilege against self-incrimination prevents an accused’s silence at a prior hearing from being considered in assessing his credibility,” a ruling the court of appeals affirmed on appeal without having to reach the constitutional issue. *Id.* (citing *Raithel* at 478, 404 A.2d at 267).

The court observed that the initial consideration in admitting the evidence in the instant case was whether the evidence was proper under the applicable state law. *Id.* Under the Maryland Rules of Evidence 5-401 and 5-402, the trial court may not admit evidence of any fact that is not relevant to the determination of guilt or innocence in a criminal trial. *Id.* at 323-34, 722 A.2d at 56 (citing Md. R. EVID. 5-401 and 5-402). The court noted that, although the trial judge has the ultimate discretion under the rules to review and admit evidence, the judge may not abuse that discretion. *Id.* at 324, 722 A.2d at 56 (citing *Merzbacher v. State*, 346 Md. 391, 404, 697 A.2d 432, 439 (1997)). The court concluded that the judge in *Dupree* abused his/her discretion by admitting evidence that was not relevant to any issue in the case. *Id.* at 332, 722 A.2d at 61.

The court reasoned that, because Dupree’s silence was not material to any fact at issue in the case, testimony that he was advised of his rights was inadmissible. *Id.* at 332, 722 A.2d at 61. Such testimony, the court speculated, allowed the prosecution to indirectly suggest to the jury that the defendant chose to remain silent because he had something to hide. *Id.* at 322, 722 A.2d at 55. In so surmising, the court determined that the resulting prejudice of admitting evidence of a defendant’s advisement of Miranda rights at trial, when the defendant gave no subsequent statement, outweighed any probative value such testimony could offer. *Id.* at 330, 722 A.2d at 60. Notwithstanding this conclusion, the court found it helpful to address the constitutional question.
in order to clarify the circumstances under which the trial court may admit testimony of a defendant’s post-arrest silence for the purpose of impeachment. Id. at 324-30, 722 A.2d at 57-59.

The court considered the general rule that the State may not violate a defendant’s right to due process by introducing evidence of a defendant’s post-arrest silence for the purpose of impeachment, based on the inherent unfairness presented in penalizing an individual for invoking a guaranteed right. Id. at 324, 722 A.2d at 57 (citing Doyle v. Ohio, 426 U.S. 610 (1976)). The court reviewed past cases in which Doyle violations were found in order to assess the appropriate circumstances for allowing such testimony. Id. at 324-30, 722 A.2d at 57-59. In the instant case, Dupree posited that the prosecution’s mere mention that the defendant was advised of his Miranda rights, where no subsequent statement was made, was a violation of the Doyle rule. Id. at 325, 722 A.2d at 57.

Courts in the past have held that testimony that the police read the Miranda rights to a defendant upon arrest may be admitted to establish the voluntariness of the defendant’s statement given thereafter. Id. at 325-26, 722 A.2d at 57 (citing United States v. De La Luz Gallegos, 738 F.2d 378, 381-82 (10th Cir. 1984)). In cases where the defendant made no subsequent statement, however, the prosecution may not use testimony to that effect to impeach the defendant. Id. at 330, 722 A.2d at 60. Such testimony, according to the court, allows the jury to improperly infer the defendant’s guilt. Id. at 331, 722 A.2d at 60 (citing Zemo v. State, 101 Md. App. 303, 646 A.2d 1050 (1994)). This rule, in line with Doyle, serves to protect a defendant’s right to remain silent without fear that the silence will be used against the defendant at trial. Id. at 330, 722 A.2d at 59.

Finally, the court addressed the issue of whether this error was harmful to the extent that a reversal was warranted. Id. at 332-33, 722 A.2d at 61-62. The standard of review employed by the court in determining whether the error was harmless was whether the evidence bore on the ultimate verdict beyond a reasonable doubt. Id. at 332, 722 A.2d at 61. The court found that, because Dupree was asserting a case of self-defense, the prosecution’s use of his silence was a deliberate attempt to undermine his credibility. Id. at 333, 722 A.2d at 61. Because Dupree’s credibility was critical to his defense, the court ruled that the error committed was clearly harmful. Id.

In Dupree v. State, the court ruled that the risk of prejudice that would result from the admission of such evidence posed an impermissible harm to a defendant’s right to due process. By so holding, the court preserved the defendant’s right to remain silent without fear that the prosecution could use this silence to circumvent their heavy burden of proof. This ruling effectively prevents the jury from basing their determination of guilt or innocence on extraneous inferences of guilt and shifts the proper focus to the merits of the case.
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The Court of Appeals of Maryland held that a non-testimonial voice exemplar given by the defendant at trial did not violate the Fifth Amendment’s prohibition against compelled self incrimination. *Hopkins v. State*, 352 Md. 146, 721 A.2d 231 (citing *United States v. Wade*, 388 U.S. 218, 222-23 (1969)). The court further held, in an issue of first impression in Maryland, that such in-court voice identification evidence may be admissible where such evidence is relevant and reliable.

On April 27, 1996, the defendant, Marquis Hopkins (“Hopkins”), robbed Mr. and Mrs. Franklin McQuay at gunpoint in a parking lot. *Id.* at 150, 721 A.2d at 233. While placing the gun to Mr. McQuay’s head, Hopkins stated, “Yo, check it out.” *Id.* Additionally, Hopkins made several threatening statements and made his escape with the couple’s valuables. *Id.* After the robbery, Mrs. McQuay called the police and gave a physical description of Hopkins. *Id.* at 151, 721 A.2d at 233. A month later, Mrs. McQuay identified Hopkins from a photographic line-up, but indicated on the back of the photo that she needed to see him in person and hear him speak to be certain of her identification. *Id.*

At trial, Mrs. McQuay visually identified Hopkins as the robber. *Id.* The defense challenged the identification, and on re-direct examination, the prosecution requested the court to compel Hopkins to stand and state, “Yo, check it out.” *Id.* at 152, 721 A.2d at 234. The defense objected, arguing that the request was untimely. *Id.* The trial court ruled that any lapse in time affected the weight of the evidence, not its admissibility, and therefore allowed the voice exemplar. *Id.* at 153, 721 A.2d at 234. After hearing the voice exemplar, Mrs. McQuay reasserted her identification of Hopkins. *Id.* She said Hopkins’s voice was distinguishable from that of other African Americans because he was “articulate.” *Id.* The Baltimore County Circuit Court subsequently convicted Hopkins of robbery with a deadly and dangerous weapon and several other lesser offenses. *Id.* at 149, 721 A.2d at 233.

Hopkins appealed to the Court of Special Appeals of Maryland. *Id.* at 154, 721 A.2d at 235. Although the defense never made a Fifth Amendment objection at trial, or object to the characterization of Hopkins’ voice as “articulate,” it raised these issues on appeal. *Id.* The court of special appeals exercised its discretion to address the issues, and affirmed the conviction. *Id.* The Court of Appeals of Maryland granted certiorari on the same issues, and upheld the ruling of the court of special appeals. *Id.*

The court of appeals began its analysis by noting that the Fifth Amendment prohibition against self incrimination does not protect a defendant from being compelled to write or speak solely for identification purposes. *Id.* (citing *Schmerber v. California*, 384 U.S. 757, 764 (1966)). The Supreme Court, in *United States v. Wade*, held that voice identifications compelled during line-ups are admissible as evidence of an identifying characteristic, not as testimonial evidence, and therefore did not violate the Fifth Amendment. *Id.* at 155, 721 A.2d at 235 (citing *United States v. Wade*, 388 U.S. 218, 222-23 (1969)). Even requiring a defendant to recite the words spoken during the commission of a crime was not considered testimonial because the defendant’s voice was used as an identifying characteristic, and not to disclose his knowledge of facts. *Id.* The court analogized this case to *Vandergrift v. State*, where the court of special appeals held that a court may order a defendant to read a transcript aloud at trial. *Id.* at 156, 721 A.2d at 236 (citing *Vandergrift v. State*, 82 Md. App. 617, 639, 573 A.2d 56, 66 (1990)). In both *Hopkins* and *Vandergrift*, the court determined that the voice exemplar was not used as testimonial evidence. *Id.*

Rejecting Hopkins’ argument that the voice exemplar should have
been given prior to trial, the court noted that since the voice exemplar’s purpose was for identification, it made no difference that the trial court compelled the exemplar at trial as opposed to before trial. *Id.* (citing *Doe v. United States*, 487 U.S. 201, 210 (1988)). This finding was consistent with the court’s prior holding that requiring a suspect to display physical characteristics to aid identification did not cause a defendant to incriminate himself. *Id.* at 157, 721 A.2d at 236 (citing *Dyson v. State*, 238 Md. 398, 404, 209, A.2d 609, 619 (1965)).

Hopkins’ claimed that the exemplar was unnecessary because the witness physically identified him prior to the voice exemplar, and it was therefore testimonial in nature. *Id.* (citing *Doe*, 487 U.S. at 210). The court, however, noted that a defendant’s communications must convey factual information to be considered testimonial. *Id.* Furthermore, the court reasoned, the exemplar’s purpose was not to elicit testimonial evidence, but rather to bolster the witness’s testimony because the defense challenged the physical identification. *Id.*

After determining that the voice exemplar did not violate the Fifth Amendment, the court next addressed the admissibility of such evidence. The court found that it is within the trial judge’s discretion to admit the voice exemplar. *Id.* at 158, 721 A.2d at 237 (citing *Vandergrift*, 82 Md. App. at 639, 573 A.2d at 66 (1990)). The decision to admit the voice exemplar may be reversed only where there was an abuse of discretion. *Id.* (citing *Robinson v. State*, 348 Md. 104, 121, 702 A.2d 741, 749 (1997)).

Because the court had never before addressed when trial courts could admit in-court voice identification evidence, it looked to other jurisdictions for guidance. In *State v. Newman*, the Supreme Court of Nebraska held that non-testimonial voice exemplars were not automatically admissible, and may only be introduced at trial if such evidence is relevant and reliable. *Id.* at 159, 721 A.2d at 238 (citing *State v. Newman*, 548 N.W.2d 739, 752 (Neb. 1996)). In *People v. Scarola*, the court similarly held that the test of whether a voice exemplar is admissible depends on whether it is relevant and reliable. *Id.* (citing *People v. Scarola*, 71 N.Y.2d 769, 770 (1988)). After reviewing case law from other jurisdictions, the court examined evidentiary rules for the admissibility of the voice exemplar.

Maryland Rule 5-401 reads, in pertinent part, states that evidence is “relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable.” *Id.* (citing Md. R. Evid. 5-401). Maryland Rule 5-403 also provides that relevant “evidence [may] be excluded if its probative value is substantially outweighed by its prejudicial affect.” *Id.* The determination of whether the probative value of an in-court voice identification is substantially outweighed by its prejudicial effect is also within the trial court’s discretion. *Id.* (citing *People v. Davis*, 502 N.E.2d 731 (1987)). Because relevance and reliability are separate issues, as a threshold matter, the court noted that relevance should be determined first. *Id.* at 160, 721 A.2d at 238.

In *Hopkins*, the court found the exemplar relevant because the defense challenged the witness’s visual identification of Hopkins. *Id.* at 163, 721 A.2d at 239. The court recognized the potential prejudicial effect of requiring a defendant to utter the same words a suspect used while committing a crime, however, the court did not believe the exemplar’s prejudicial value substantially outweighed its probative value. *Id.* at 163-64, 721 A.2d at 239-40. (citing *Davis*, 502 N.E.2d at 783 (1987)).

After finding the exemplar relevant in this case, the court next addressed its reliability. *Id.* at 159, 721 A.2d at 238. In so doing, the court adopted the test set forth by the United States Supreme Court in *Neil v. Biggers*. *Id.* at 160, 721 A.2d at 238 (citing *Neil v. Biggers*, 409 U.S. 188, 199 (1972)). Under the Biggers test, factors for courts to consider when determining the reliability of identification evidence include:

1. the ability of the witness to hear the assailant speak, (2) the witness’s degree of attention, (3) the accuracy of any prior identifications that the witness made, (4) the period of time between the incident and the identification, and (5) how certain the witness was in making the identification.

*Id.* (citing *Biggers*, 409 U.S. at 199). In employing the Biggers test, the court followed the two-pronged test used by other jurisdictions. *Id.* First,
if the procedure used to obtain the exemplar was suggestive, the court examines the totality of circumstances to determine if the identification was reliable enough to avoid misidentification. *Id.* at 161, 721 A.2d at 238 (citing *Rodriguez v. Peters*, 63 F.3d 546, 556 (7th Cir. 1995)). The second prong requires the application of the *Biggers* factors. *Id.*

Hopkins argued the exemplar was unreliable and it was suggestive because he was the only African American in the courtroom. *Id.* at 165, 721 A.2d at 240. The court held that the prior visual identifications made the exemplar identification reliable. *Id.* The court dismissed the suggestiveness issue, citing *Webster v. State*, which held that a suggestive identification was admissible where it was reliable. *Id.* at 165-66, 721 A.2d at 240-41 (citing *Webster v. State*, 299 Md. 581, 601, 474 A.2d 1305, 1315 (1984)). Having found the exemplar “sufficiently reliable under the totality of circumstances,” the court of appeals applied the *Biggers* factors in *Hopkins*, and found the facts satisfied its requirements. *Id.* at 164-65, 721 A.2d at 240.

Relying upon the relevancy and reliability test set forth in *Biggers*, the court held the trial court did not abuse its discretion by admitting the exemplar into evidence. With this holding, the Court of Appeals of Maryland has crept its way to the edge of a very slippery slope upon which it must be cognizant not to cross, for fear of violating a defendant’s Fifth Amendment privilege against self incrimination by compelling him to essentially reenact the crime.
Recent Developments

Johnson v. State:
Defense Attorney’s Arrest for Contempt of Court in the Presence of the Jury Was Prejudicial and Denied Defendant the Right to a Fair and Impartial Trial

By Walter W. Green

In a case of first impression, the Court of Appeals of Maryland held that under the totality of the circumstances, the trial judge’s continuous interruptions, rulings on phantom objections, and arrest of defense counsel in the presence of the jury, constituted extreme prejudice and violated the defendant’s right to a fair and impartial trial. Johnson v. State, 352 Md. 374, 722 A.2d 873 (1999). The court determined that judges should not express their personal views in front of the jury because of the likelihood of a harmful effect on the defendant’s rights.

John Howard Johnson (“Johnson”) was indicted and tried in the Circuit Court for Baltimore City for first degree murder, unlawful use of a handgun in the commission of a felony, illegally wearing and carrying a handgun, and kidnaping. Id. at 376, 722 A.2d at 874. Throughout Johnson’s trial, the judge and Johnson’s defense attorney had heated disputes. Id. During opening statements, the judge interrupted defense counsel and threatened him with contempt in front of the jury. Id. at 376-77, 722 A.2d at 874. While defense counsel was examining a state’s witness, the judge began interfering with the questioning. Id. at 378-79, 722 A.2d at 875. When defense counsel asked the judge to stop, the judge had him arrested for contempt of court in front of the jury.

Id. Once the trial resumed, the judge sustained objections never made by the State’s Attorney. Id. at 380-81, 722 A.2d at 876. At one point, the trial judge accused defense counsel of stealing a court room marker used to identify evidence. Id. at 382, 722 A.2d at 876-77. The trial judge held defense counsel in contempt again, this time outside the presence of the jury, and once the trial resumed defense counsel requested a mistrial. Id. at 383, 722 A.2d at 877. The judge denied the motion for mistrial, and defense counsel informed the judge that Johnson was on trial and that the judge’s conduct was interfering with Johnson’s right to a fair trial. Id. at 383-84, 722 A.2d at 877.

The jury convicted Johnson of involuntary manslaughter, illegally wearing and carrying a handgun, and kidnaping. Johnson did not file a timely appeal and, therefore, his first appeal was denied. Id. The court of appeals affirmed his convictions. Id. The Court of Appeals of Maryland granted certiorari to determine whether Johnson was denied the right to a fair and impartial trial as a result of the trial judge’s conduct in front of the jury. Id.

The court recognized, however, that a trial judge is allowed discretion in his or her remarks during trial, as long as those remarks do not impair the defendant’s right to a fair trial because the judge’s opinions will usually impact the jury’s verdict. Id. (citing Bryant v. State, 207 Md. 565, 585, 115 A.2d 502, 511 (1955)). A judge who conducts a trial in an “impatient and brusque way” does not impair a defendant’s right to a fair trial. Id. (quoting Bryant, 207 Md. at 585, 115 A.2d at 511). The court held...
that to obtain a reversal of his conviction, a defendant must make “some clear showing that the judge’s statements influenced the jury against” him. *Id.* (quoting *Bryant*, 207 Md. at 585, 115 A.2d at 511).

In the instant case, the court of appeals took issue with defense counsel’s arrest for contempt of court in the presence of the jury. *Id.* at 387, 722 A.2d at 879. Without having before addressed the impact of defense counsel’s arrest on a defendant’s right to a fair trial, the court of appeals looked to *Suggs v. State*, 87 Md. App. 250, 257, 589 A.2d 551, 554-55 (1991), where the Court of Special Appeals of Maryland, applying a totality of the circumstances test, held that the arrest of an attorney in the presence of the jury, coupled with the judge’s poor jury instruction, was so prejudicial that it denied the defendant the right to a fair trial. *Id.* at 387-88, 722 A.2d at 879.

The court of appeals also examined case law from other jurisdictions which had ruled that the arrest of defense counsel in the presence of the jury denied the defendant the right to a fair trial. *Id.* at 389-90, 722 A.2d 880 (citing *Ash v. State*, 225 P.2d 816, 819 (Okla. 1950); *Meek v. State*, 930 P.2d 1104, 1109 (Nev. 1996)). The court of appeals noted that “judges have the sovereign power to punish, to deprive persons of their liberty and property, and that alone requires that they restrain their irritation.” *Id.* at 389, 722 A.2d at 880 (quoting *Scott v. State*, 110 Md. App. 464, 489, 677 A.2d 1078, 1090 (1996)). The court concluded that the trial judge’s continuous attack on defense counsel denied the defendant a fair and impartial trial. *Id.* at 389, 393-94, 722 A.2d at 880, 882.

In addition to the trial judge’s ordering the arrest of defense counsel, the court of appeals also considered the effect of the trial judge’s other conduct impacting the defendant’s right to a fair trial. The court was specifically concerned with the interruptions, rulings on phantom objections, and answering of questions before allowing witnesses to answer. *Id.* at 390-91, 722 A.2d at 881. Although the court had not ruled upon the effect of a trial judge’s conduct on a defendant’s right to a fair trial, the court noted that in *Spencer v. State*, 76 Md. App. 71, 543 A.2d 851 (1988), the court of special appeals, applying a totality of the circumstances test, held that the trial judge’s accusation in the presence of the jury that defense counsel had lied to the court was reversible error because it impaired the defendant’s right to a fair trial. *Id.* at 391, 722 A.2d 881.

Additionally, other jurisdictions have ruled upon the effect of a trial judge’s conduct on the defendant’s right to a fair and impartial trial. *Id.* at 391-92, 722 A.2d at 881 (citing *Earl v. Wilson*, 904 P.2d 1029, 1033-34 (Nev. 1995)). Moreover, trial judges who verbally abuse lawyers and state their personal views in the presence of the jury, “‘destroy the balance of judicial impartiality necessary for a fair hearing.’” *Id.* at 392, 722 A.2d at 881 (quoting *People v. Wilson*, 174 N.W.2d 914, 915-16 (Mich. 1969)). Applying this reasoning to the instant case, the court of appeals held that under the totality of the circumstances, the trial judge’s conduct denied the defendant his right to a fair and impartial trial.

The holding in *Johnson v. State* stands for the proposition that although the defense counsel and trial judge may have personal differences, the judge should recognize that the position he or she holds is of such importance to our society that those personal differences must be put aside during trial. The Court of Appeals of Maryland is reminding trial judges that the defendant, not defense counsel, is the one on trial, and that a judge’s personal feelings toward defense counsel should not interfere with the defendant’s guaranteed right to a fair and impartial trial.
Kirwan v. Diamondback:
Records of University Parking Tickets Are Not Protected From Disclosure as Personal or Financial Records Under the Maryland Public Information Act or as Education Records Under Family Education Rights and Privacy Act

By Adam CIZEK

The Court of Appeals of Maryland held that the records of parking tickets issued to a university employee were not exempt from disclosure as personnel or financial records under the Maryland Public Information Act. *Kirwan v. Diamondback*, 352 Md. 74, 721 A.2d 196 (1998). Furthermore, the court held that records of parking tickets issued to students of the university were not protected as financial records under the Maryland Public Information Act or as educational records under the Family Educational Rights and Privacy Act. Additionally, the court held that disclosure of the records of these parking tickets does not violate the public policy considerations of the Maryland Public Information Act.

In February of 1996, a University of Maryland (the “University”) basketball player was suspended for three games after receiving money from a former coach to pay university parking tickets. *Kirwan*, 352 Md. at 79, 721 A.2d at 198. The Diamondback, a campus newspaper, commenced an investigation to determine whether the University was giving special treatment to players on the men’s basketball team. *Id.* at 80, 721 A.2d at 198. Additionally, the university argued that the records concerning the members of the men’s basketball team were protected from disclosure as financial records under the Maryland Public Information Act or as educational records under the Family Educational Rights and Privacy Act (“FERPA”) (codified in 20 U.S.C. § 1232(g)). *Id.* at 80, 721 A.2d 199.

In order to compel the University to disclose the requested information, the Diamondback filed suit in the Circuit Court for Prince George’s County. *Id.* The circuit court granted the Diamondback’s request. *Id.* The University appealed to the court of special appeals; however, the court of appeals granted certiorari before the intermediate appellate court heard the case. *Id.*

Beginning its analysis, the court noted that section 10-612 of the MPIA “establishes a public policy and a general presumption in favor of disclosure of government or public documents.” *Id.* (citing Md. Code Ann., State Gov’t § 10-612 (1995 & Supp. 1997)). The legislative intent of the MPIA was to ensure that “citizens of the State of Maryland be accorded wide-ranging access to public information concerning the operation of their government.” *Id.* at 81, 721 A.2d at 199 (quoting Fioretti v. Maryland State Board of Dental Examiners, 351 Md. 66, 73, 716 A.2d 258, 262 (1998)).

The University argued that Coach Williams’s alleged parking tickets were personnel records and, therefore, exempt from disclosure under the MPIA. *Id.* at 82, 721 A.2d at 200. The court noted that the statute does not define personnel records. *Id.* at 82, 721 A.2d at 200. The statute does, however, enumerate specific categories of personnel records: “(1) an application or (2) performance rating or (3) scholastic achievement.” *Id.* (quoting Md. Code Ann., State Gov’t § 10-616(a)(i) (1995 & Supp. 1997)).

The court concluded from these enumerations that the legislature intended to protect personnel records that concerned only employment and employment performance. *Id.* at 82-83, 721 A.2d at 200 (citing Md. Code Ann., State Gov’t § 10-616(a)(i) (1995 & Supp. 1997)). Reasoning that Coach Williams’s
parking record was not directly related to his employment or employment performance, the court held that an employee’s parking violations do not constitute personnel records the under MPIA. *Id.* at 84, 721 A.2d at 200-01.

Next, the court addressed the University’s argument that the records of parking violations are exempted financial information under the MPIA section 10-617(f). *Id.* at 84-85, 721 A.2d at 201. The statute does not define financial information. The statute does, however, list items that are financial information: “assets, income, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.” *Id.* at 85, 712 A.2d 201 (citing Md. Code Ann., State Gov’t § 10-616(f)(1995 & Supp. 1997)). The court concluded from this list that the legislature did not intend for parking tickets to be financial information.

Rejecting the University’s argument that parking tickets are financial information because they constitute a record of indebtedness, the court noted that a parking ticket is a fine not a debt. *Id.* (citing Md. Code Ann., Transp. II § 26-30b(a)(1)(i)(1995 & Supp. 1997)). Moreover, the court reasoned that the legislature clearly did not intend for parking violations to constitute financial information because section 10-616(h) of the MPIA broadly allows access to such information, with the narrow exception of obtaining records for marketing or legal services. *Id.* at 87, 721 A.2d at 202.

Relying upon the permissible denial language of section 10-618(a) of the MPIA, the University argued that disclosing the traffic citations is against the public interest. *Id.* at 88, 721 A.2d at 202-03. Section 10-618(a) permits a records custodian to “deny inspection of records . . . if the custodian believes that inspection would be contrary to public interest.” *Id.* Public interest denials, however, are limited to those categories enumerated in the statute, such as ‘examination information’ and ‘details of a research project.’ *Id.* (quoting Md. Code Ann., State Gov’t § 10-618 (1995 & Supp. 1997)). Traffic citations are not among the enumerated categories, therefore, the court rejected the University’s public interest argument. *Id.* at 88, 721 A.2d at 203.

Additionally, the University contended that disclosure of the records would result in an unwarranted invasion of privacy. *Id.* The MPIA does not automatically create a disclosure exemption because an unwarranted invasion of privacy may occur. *Id.* Section 10-612(b) favors disclosure, subject to an unwarranted invasion of privacy. *Id.* at 89, 712 A.2d at 203. The court concluded that an expanded definition of personnel records or financial records would be inconsistent with the construction principles established in section 10-612(b). *Id.*

Next, the University contended that the requested records were protected from disclosure as educational records under the FERPA. *Id.* The FERPA “defines educational records as ‘those records . . . which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” *Id.* at 90, 721 A.2d at 204 (quoting 20 U.S.C. § 1232g(a)(4)(A)).

The court found that the two main objectives of the FERPA were to protect the privacy of a student’s academic information and to prevent academic institutions from “operating in secrecy.” *Id.* at 90, 721 A.2d at 204. Furthermore, based on the legislative history of the FERPA, the court concluded that FERPA did not prevent the dissemination of records merely because a student’s name would be revealed. *Id.* at 91, 721 A.2d at 204.

Educational records have consistently been interpreted as those which relate to a students “academic performance, financial aid, or scholastic performance.” *Id.* (citing Red & Black Pub. v. Board of Regents, 262 Ga. 848, 427 S.E.2d 257 (1993)). The cases examined by the court distinguished the records of a student organization court, a university discipline board, and a campus security department from educational records of the FERPA. *Id.* In each case, the requested records did not directly concern academics. *Id.* The court of appeals found the requested documents in the instant case to be analogous to these records and, therefore, held that the records of parking violations were not protected as educational records under the FERPA. *Id.* at 94, 721 A.2d at 205-06.

The court’s decision in *Kirwan v. Diamondback* upheld the legislative intent of the MPIA by
ensuring that Maryland citizens will have access to public documents. By refusing to broaden the categories of exemptions from disclosure provided for in MPIA, the court prevented the erosion of the public’s right to access such documents. Furthermore, the court established precedent which will serve to deter future attempts to erode the public’s right to public documents. The continued access to public documents will help the citizens of Maryland monitor the activities of state facilities and help prevent corrupt activities more egregious than those sought to be exposed in the instant case.
Pappaconstantinou v. State:  
The Common-Law Requirement that a Confession Be Voluntary Does Not Apply When a Private Individual Elicits a Confession

By Jennifer Golub

The Court of Appeals of Maryland held that the common-law requirement of voluntariness does not apply to confessions elicited by private individuals. Pappaconstantinou v. State, 352 Md. 167, 721 A.2d 241 (1998). In so holding, the court found that questions of admissibility regarding confessions elicited by private individuals should be decided by the rules of evidence, more specifically, by the rules of relevance. This case is important to Maryland law because it sets forth a bright-line test allowing statements made to private individuals to be admissible if they are relevant.

Pappaconstantinou (“Pappas”) was employed at Auto Row Auto Parts (“Auto Row”) in Waldorf, Maryland. Id. at 170, 721 A.2d at 242. He was fired following suspicion that he was stealing from the company. Id. at 170, 721 A.2d at 242-43. After his termination, Pappas met with Auto Row employees, at which time he signed a statement admitting that he had stolen from the company and had been justly terminated. Id. at 170, 721 A.2d at 243.

Criminal charges were subsequently brought against Pappas for theft in the Circuit Court of Maryland for Charles County. Id. Pappas filed a pre-trial motion to suppress his statement, which the trial court did not address at the pre-trial stage. Id. At trial, Pappas renewed his motion to suppress. Id. The trial court determined that Pappas’s confession was admissible because it was voluntary and competent evidence. Id. at 170-71, 721 A.2d at 243. A jury found Pappas guilty of twelve counts of theft under $300 and one count over $300. Id. at 170, 721 A.2d at 243. Pappas appealed to the Court of Special Appeals of Maryland, which affirmed. Id. at 171, 721 A.2d at 243. The Court of Appeals of Maryland granted certiorari and affirmed the court of special appeals. Id.

The issue before the court was whether Pappas’ confession to his employer should have been excluded from evidence at trial for lack of voluntariness. Id. at 170, 721 A.2d at 242. Pappas contended that he confessed because his former employer promised not to prosecute if he admitted to the thefts. Id. at 171, 721 A.2d at 243. He acknowledged that no governmental actors were involved in eliciting his confession. Id. Arguing that no distinction exists between statements made to government agents and statements made to private individuals, Pappas urged the court to extend Maryland’s common-law voluntariness doctrine to statements made to private individuals. Id. In the alternative, Pappas argued that the voluntariness doctrine’s requirement that the statement be made to a “person in authority” should include statements made to employers. Id. at 172, 721 A.2d at 243. The State, on the other hand, argued that admissibility depended solely upon the reliability of the statement. Id. at 172, 721 A.2d at 244.

To be admissible, the court stated, a confession must be “(1) voluntary under Maryland non-constitutional law, (2) voluntary under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article 22 of the Maryland Declaration of Rights, and (3) elicited in conformance with the mandates of Miranda.” Id. (quoting Ball v. State, 347 Md. 156, 173-74, 699 A.2d 1170, 1178 (1997)). The court determined that the constitutional requirements of federal due process and Miranda warnings do not apply to private actions. Id. at 173, 721 A.2d at 244. Thus, the issue in Pappaconstantinou turned on whether Pappas’s confession was admissible under Maryland law. Id. at 172-73, 721 A.2d at 244.

In reaching its conclusion, the court reviewed Maryland case law, which, in summary, required incriminating statements to be excluded from evidence when made directly to an “officer or sheriff, or in the presence and with at least the implicit sanction of legal authority.”
Id. at 178, 721 A.2d at 246. The seminal case in Maryland, Nicholson v. State, held that a confession is inadmissible if it is induced by a police officer’s threat or promise of advantage. Id. at 174, 721 A.2d at 245 (citing Nicholson v. State, 38 Md. 140, 153 (1873)). In the second case, State v. State, the defendant alleged that he was threatened by his father in the presence of the deputy sheriff and warden was inadmissible for lack of voluntariness. Id. at 178-79, 721 A.2d at 247 (citing Watts v. State 99 Md. 30, 35, 57 A. 542, 544 (1904)). In the second case, Scott v. State, the defendant alleged that he was threatened by his father in the presence of the police. Id. at 179, 721 A.2d at 247 (citing Scott v. State, 61 Md. App. 599, 602, 487 A.2d 1204, 1205 (1985)). The court in Scott stated in dicta that the lack of an agency relationship does not “preclude a finding that the confession was involuntary.” Id. (quoting Scott at 604, 487 A.2d at 1206).

The court, however, distinguished Watts and Scott because both involved confessions obtained in the presence of the police and “[n]either case stands for the proposition that a confession elicited by purely private conduct is subject to Maryland’s common-law voluntariness requirement.” Id. at 180, 721 A.2d at 247. Thus, in order for a confession to be rendered involuntary, the confession must be given in the presence of at least one person having legal authority over the accused. Id. As such, the court concluded that Maryland’s common-law requirement of voluntariness does not apply when a private individual, acting without police intervention, elicits a confession, as was the case here. Id. at 180, 721 A.2d at 248.

Next, the court rejected Pappas’s alternative argument that “persons in authority” should not be limited to state actors and should include persons, such as employers, who “have real authority over the accused and the power to carry out a threat or promise.” Id. The court stated that the requirement of voluntariness protects citizens from “overreaching” police. Id. at 180-81, 721 A.2d at 248. Consequently, excluding confessions obtained by private persons does nothing to further the goal of deterring overreaching police conduct. Id.

Rejecting both of Pappas’s voluntariness arguments, the court stated that whether a statement made to a private actor is admissible depends on whether it is trustworthy, competent, and accurate. Id. at 181, 721 A.2d at 248 (citing Jacobs v. State, 45 Md. App. 634, 646, 415 A.2d 590, 597 (1980)). The court held that the issue of trustworthiness was to be reviewed under the Maryland Rules of Evidence, which permits the admissibility of all relevant evidence. Id. (citing Md. R. Evid. 5-402). Relevant evidence, the court stated, is evidence which makes the existence of a fact “more probable or less probable than it would be without the evidence.” Id. (citing Md. R. Evid. 5-401). The court noted, however, that Maryland law allows for the exclusion of relevant evidence where there is a danger of unfair prejudice, confusion, or delay. Id. (citing Md. R. Evid. 5-601).

The trial court, the court stated, determines whether evidence is relevant and admissible. Id. at 182, 721 A.2d at 248 (citing McCleary v. State, 122 Md. 394, 408, 89 A. 1100, 1106 (1914)). Once the trial judge determines admissibility, the jury may hear the evidence and give it “whatever weight it chooses” and decide whether threats or promises were present which would have rendered the defendant’s confession involuntary. Id. at 182, 721 A.2d at 249. Finding that the trial court did not err in determining that Pappas’s written statement was “sufficiently reliable” to be admitted into evidence at trial, the court of appeals affirmed the trial court. Id. at 183, 721 A.2d at 249.

Following the decision in this case, the voluntariness requirement is not extended to apply to statements made to private actors. This holding may result in private actors taking the law into their own hands by coercing confessions and handing them over to the police. In other words, private actors may, in effect, perform a law enforcement function having a coercive, overreaching effect - the kind of effect the voluntariness requirement attempts to alleviate.
Recent Developments

Somuah v. Flachs

A Client has Cause to Discharge an Attorney when the Client has Any Good Faith Basis For Being Dissatisfied with the Attorney, Even though the Attorney had Performed Competently

By Kofi Asamoah

The Court of Appeals of Maryland held that a client may discharge an attorney when the client has a good faith basis for being dissatisfied with the attorney, even when the attorney had performed competently and committed no serious misconduct. Somuah v. Flachs, 352 Md. 241, 721 A.2d 680 (1998). The court further held that if this good faith discharge occurs, the attorney could recover for the services rendered prior to been discharged on a quantum meruit theory, however, in contingency fee contracts, the attorney could only recover if and when the contingency generating the fee occurs.

Millicent Somuah (“Somuah”) and her daughter sustained serious injuries in an automobile accident while travelling through Maryland in May 1992. Id. at 247, 721 A.2d at 683. Attorney Jeremy Flachs (“Flachs”) visited and interviewed Somuah while she was still recovering in a hospital in Maryland, at which time Somuah retained Flachs to represent her in a personal injury claim on a contingent fee basis. Id. After Flachs had spent a considerable amount of time and money to investigate the claim and to collect and preserve evidence, Somuah discharged Flachs in August 1992 after Flachs informed Somuah that he was not licensed to practice law in the State of Maryland. Id. at 248, 721 A.2d at 683. Somuah refused to pay Flachs for the services rendered prior to the discharge. Id.

Flachs sued Somuah in the Circuit Court for Prince George’s County to recover reasonable fees for the legal services rendered for Somuah prior to his discharge. Id. Following a jury trial, the court entered judgment in favor of Flachs. Id. Somuah appealed to the Court of Special Appeals of Maryland, which affirmed, holding that “[Flachs’s] failure to inform [Somuah] that he was not licensed in Maryland did not constitute good cause to discharge [Flachs], so as to preclude his right to immediate compensation for the reasonable value of services rendered prior to [Flachs’s] discharge.” Id. at 249, 721 A.2d at 684. The Court of Appeals of Maryland granted certiorari and reversed. Id.

Beginning its analysis, the court of appeals rejected the court of special appeals’ conclusion that a client’s right to discharge an attorney was limited to situations where the attorney-client contract was invalid, or when the attorney had violated any of the rules of professional responsibility, a law, or the attorney-client agreement. Id. at 250, 721 A.2d at 684. Explaining the broad powers of a client, the court of appeals opined that an “attorney’s authority to act for the client is freely revocable by the client,” even for subjective reasons.

Id. The court noted that the confidential nature of the relationship, coupled with the dangers of friction and loss of confidence, warrants a client’s right for such power to end the relationship when necessary. Id. at 251, 721 A.2d at 684. The court reasoned that a client’s power to discharge an attorney is implied in the retainer agreement and therefore a client who discharges an attorney, even without good cause, does not breach the agreement if the discharge was “based on a reasonable subjective dissatisfaction with the attorney’s services.” Id. at 251, 721 A.2d at 684-85. The absolute right of a client to discharge an attorney, according to the court, is not altered in any way by a contingent fee contract. Id. at 251, 721 A.2d at 685.

Because this was the first time the court addressed what constitutes a proper basis for terminating an attorney-client relationship, the court discussed its prior rulings concerning appropriate circumstances under which an attorney’s compensation may be forfeited and rulings by other jurisdictions that have addressed causes for termination of an attorney-client relationship. Id. The court noted that in other jurisdictions almost any good faith reason the client asserted constituted cause for termination, and most courts
permitted recovery on the theory of quantum meruit. *Id.* at 252, 721 A.2d at 685.

The court further reasoned that because the attorney-client relationship is analogous to an employer-employee relationship, a contract to employ an attorney is terminable at will if the client becomes dissatisfied with the services of the attorney. *Id.* at 255, 721 A.2d 687. The court noted that a client who has no basis for being dissatisfied with the attorney’s performance, or who has discharged the attorney in bad faith, is deemed to have no just cause for discharge whereas a good faith basis for a client’s dissatisfaction is a proper cause for discharge. *Id.* Proof of incompetence, misrepresentation, fraud, deceit, or a violation of the Rules of Professional Conduct are not requirements for discharge, rather any good faith basis for a client’s dissatisfaction with the attorney’s representation would justify a discharge. *Id.*

The court determined that after the initial contact between Flachs and Somuah, it was reasonable for Somuah to have expected that Flachs could handle any court proceeding. *Id.* at 257, 721 A.2d at 688. Therefore, Flachs’ later disclosure that he could not represent Somuah without engaging local counsel provided Somuah with a good faith basis to be dissatisfied with the representation. *Id.*

The court held that if a dissatisfied client discharged an attorney based on a good faith reason, though not serious misconduct warranting forfeiture of fees, the attorney was entitled to recover compensation for the services rendered prior to the discharge. *Id.* at 258, 721 A.2d 688. Such recovery amount, the court determined, depends on the reasonable value of the benefits the client received and the nature and gravity of the cause of the discharge. *Id.*

The court rejected Somuah’s argument that Flachs’s failure to inform her that he was not licensed to practice in Maryland constituted an unlawful practice of law and precluded Flachs from recovery. *Id.* at 262, 721 A.2d at 690. The court, instead, determined that although Flachs’s mere investigation of the personal injury claim, by gathering and preserving evidence in Maryland where he was not licensed, did not constitute an unauthorized practice of law. *Id.* The court concluded that although Flachs was discharged for good cause, the basis for his discharge did not justify the forfeiture of his compensation for the services rendered. *Id.* at 264, 721 A.2d at 691.

The court reasoned that permitting a discharged attorney to recover on a quantum meruit theory prevents unjust enrichment to the client for the services the attorney rendered prior to discharge. *Id.* at 263, 721 A.2d at 691. Furthermore, noted the court, the quantum meruit recovery balances the interest of preserving the right of the client to discharge his attorney without undue restrictions against “the attorney’s right to fair compensation for services competently rendered prior to discharge.” *Id.* at 264-265, 721 A.2d at 691.

Among the factors to be considered in determining the reasonable value of the services of a discharged attorney, the court noted that the most salient factor is the extent to which the attorney’s services have benefited the client. *Id.* at 265, 721 A.2d at 692. Reiterating its adoption of the “New York Rule,” the court emphasized that a client’s discharge of an attorney without cause prompts an immediate accrual of the attorney’s quantum meruit action, even in contingency fee contracts. *Id.* at 267, 721 A.2d at 693. In *Somuah*, however, the court held that because the client had a good faith basis for being dissatisfied with the attorney coupled with the contingent nature of the fee contract, Flachs’s quantum meruit recovery was conditioned upon Somuah’s recovery in her personal injury action. *Id.* 267-268, 721 A.2d 693.

The dissent argued that Somuah terminated the attorney-client relationship without a material breach on the part of Flachs, and therefore, the quantum meruit recovery “unconditionally accrued at the time of termination.” *Id.* at 276, 721 A.2d at 697 (citing *Skeens v. Miller*, 331 Md. 331, 628 A.2d 185 (1993)). By holding otherwise, the dissent argued, the majority has in effect overruled *Skeens*. *Id.*

In *Somuah v. Flachs*, the court of appeals enunciated a client’s “good faith basis” for discharging an attorney, providing an intermediate standard between “good cause” and “without good cause.” This, the court
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explained, would preserve the client’s absolute right to discharge an attorney if the client has a reasonable basis to be dissatisfied with the attorney. The court’s distinction between “good cause” and “good faith basis” for discharging an attorney may create some confusion in its application. Trial judges may find it difficult to distinguish a “good faith basis” from a “good cause” for discharge. Based on the evidence in the case, the court could have simply concluded that Somuah discharged Flachs without good cause, and would have arrived at the same result that Flachs could recover his fees on quantum meruit theory.
**State v. Bell:**
A Defendant’s Knowing and Voluntary Waiver of a Jury Trial Does Not Require Specific In-Court Advice to Defendant with Respect to the Unanimity Requirement

By Cheryl F. Matricciani

The Court of Appeals of Maryland held that a defendant may knowingly and voluntarily waive the right to a jury trial without specific reference to the unanimity requirement during in-court advice given to a defendant regarding whether to elect a court or jury trial. *State v. Bell*, 351 Md. 709, 720 A.2d 311 (1998). The court’s ruling clarified the knowing and voluntary standard that a trial court must apply when accepting a defendant’s waiver of a jury trial under revised Maryland Rule 4-246(b).

Wilbur Bell (“Bell”) appeared before Judge Michele D. Hotten (“Judge Hotten”) in the Circuit Court for Prince George’s County on charges of second degree rape, assault and battery, attempted rape, and assault with intent to rape. *Id.* at 711, 720 A.2d at 312. At the start of trial, Bell informed the court of his intent to waive a jury trial. *Id.* at 712, 720 A.2d at 313. Bell was questioned by both his attorney and Judge Hotten about his decision and Bell was advised that the State must prove the charges beyond a reasonable doubt, before either a twelve-person jury, or a member of the bench. *Id.* at 714, 720 A.2d at 313. Bell acknowledged that his decision to waive a jury trial was made freely and voluntarily. *Id.* The court accepted Bell’s waiver and Bell was subsequently convicted on all counts. *Id.* at 712-13, 720 A.2d at 312.

The Court of Special Appeals of Maryland reversed the decision, holding that the circuit court had failed to sufficiently advise Bell of his right to a jury trial because Bell was not instructed on the unanimity requirement setting forth that all twelve jurors must agree to render a guilty verdict. *Id.* at 712, 720 A.2d at 312. The Court of Appeals of Maryland granted certiorari on the State’s petition to consider whether Maryland Rule 4-246(b) requires an examination of the defendant regarding jury unanimity. *Id.* at 713, 720 A.2d at 313.

The court of appeals addressed the requirement that a defendant knowingly and voluntarily waive the right to a jury trial by reviewing an earlier decision where the court considered the requirement that a defendant have “full knowledge” of the right to a jury trial as specified by former Maryland Rule 735(d). *Id.* at 714, 720 A.2d at 314. In *Countess v. State*, 286 Md. 444, 408 A.2d 1302 (1979), the court held that the term full knowledge, includes, among other factors, the defendant’s understanding “that in a jury trial all 12 jurors must agree that he is so guilty but in a court trial the judge may so find.” *Id.* at 715, 720 A.2d at 314 (quoting *Countess*, 286 Md. at 455, 408 A.2d at 1307-08).

The court emphasized that its decision in *Countess* was made before the January 1, 1982, modification of Rule 735 which deleted the full knowledge requirement. *Id.* at 716, 720 A.2d at 314. The court noted that in the current form of Maryland Rule 4-246, the full knowledge requirement has been replaced so that “a trial court may now accept a waiver if it is satisfied that the waiver is made ‘knowingly and voluntarily.’” *Id.* at 716-17, 720 A.2d at 315.

The court then examined the knowing and voluntary standard in absence of the full knowledge requirement. *Id.* at 717, 720 A.2d at 315. Specifically, the court addressed whether explicit reference to the unanimity requirement during in-court advice is necessary for the defendant to knowingly waive the right to a jury trial. *Id.* The court analyzed the modification to former Rule 735(d) in accordance with the canons of statutory construction, which required the court to “ascertain and effectuate the intention of the legislature.” *Id.* (quoting *Oaks v. Connors*, 339 Md. 24, 35, 660 A.2d 423, 429 (1995)). In so doing, the court first looked to the actual language of the statute, and then to the purpose of the legislation to determine “what different standard,
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if any, was created when the rule was modified.” Id.

In analyzing the plain meaning of former Rule 735(d), the court reviewed the definition of the words “full” and “knowingly.” Id. at 719-20, 720 A.2d at 316. Determining that full means complete and entire, and knowingly means conscious or intelligent, the court concluded that full knowledge under Countess, compelled the court to completely explain all aspects of a defendant’s right to a jury trial, including, the jury’s function at trial and the defendant’s right to be tried by a jury. Id. at 720, 720 A.2d at 316. (quoting The Random House Dictionary of the English Language 573, 672 (unabr. ed. 1983); Black’s Law Dictionary 672, 872 (6th ed. 1990)). The court further noted that in contrast to the full knowledge requirement, a knowing and voluntary waiver under current Rule 4-246 requires a defendant to do the following: (1) recognize that the defendant is surrendering the right to a jury trial, (2) possess a general understanding of the nature of a jury trial; and (3) voluntarily waive that right. Id.

The court next explored the legislative intent and found that at the time of Countess, the Rules Committee proposed an entire redraft of Rule 735. Id. at 723, 720 Md. at 318. Specifically, the Rules Committee recommended that a court could not accept a defendant’s waiver of the jury trial right until the court was satisfied that the defendant understood: (1) the right to be tried by a jury of twelve persons or by a judge without a jury, and (2) that a finding of guilt in a jury trial required that all twelve jurors agreed to the defendant’s guilt. Id. (citing Seventy-Fifth Report of the Standing Committee on Rules of Practice and Procedure, 2-3 & app. (Oct. 26, 1981)). The court noted that both proposals were rejected, with the motion to remove the unanimity language passing by a vote of 5-2. Id. at 724, 720 A.2d at 318 (citing Rules Order, 8 Md. Reg. 1928-30 (1981); Minutes of Meeting of Court of Appeals, 3 (Nov. 6, 1981)). The court emphasized that the rejection of the Committee’s proposals “implies that we wished to move away from the rigidity of the former rule 735 and Countess.” Id. The court concluded, therefore, that under Rule 4-246, the judge must be certain only that the defendant knowingly and voluntarily waived the right to a jury trial. Id.

In determining whether a waiver of the jury trial right is knowing and voluntary, the court adopted a facts and circumstances analysis as applied in two earlier court of appeals opinions. Id. at 724-25, 700 A.2d at 319. In Hall v. State, 321 Md. 178, 183, 582 A.2d 507, 510 (1990), the court upheld a conviction finding that the defendant possessed the essential knowledge of the right to a jury trial even though the trial court had failed to provide the defendant with details about this right, including the jury selection process. Id. In Tibbs v. State, 323 Md. 28, 31-32, 590 A.2d 550, 551 (1991), the trial court questioned the defendant to decide if he understood what a jury trial was and determined that he waived the right freely and voluntarily. Id. at 725-26, 720 A.2d at 319. The defendant’s affirmative response, the court concluded, did not amount to the required comprehension of the jury trial right required by the rule. Id.

Applying a facts and circumstances analysis to the instant case, the court reasoned that although the trial court did not advise Bell of the unanimity requirement, Bell was instructed on the fundamentals of a jury trial. Id. at 726-27, 720 A.2d at 320. In particular, the court found that the trial court cautioned Bell that a jury consists of twelve people, and that a jury or judge would have to find Bell guilty beyond a reasonable doubt. Id. at 727, 720 A.2d at 320. The court, therefore, held that under the circumstances, Bell’s discussion with defense counsel and the trial court provided Bell with adequate information about his right to a jury trial such that he possessed the requisite knowledge to knowingly waive his right to a jury trial. Id. at 730, 720 A.2d at 321. The court did, however, recognize that this issue should be revisited, and referred the question of whether a defendant should be expressly advised of the unanimity requirement to the Rules Committee for consideration and recommendation. Id.

In Bell v. State, the court held that advice given to a defendant with respect to the unanimity requirement is no longer necessary for a trial court to accept a defendant’s waiver of the right to a jury trial. When deciding to waive the constitutional right to a jury trial, it is paramount that a defendant understands the purpose and function of the jury. Such understanding
encompasses the fact that a jury of twelve peers must unanimously decide the defendant’s fate. Without this pivotal piece of information a defendant may opt for a bench trial based on a mistaken belief that it takes only one person on the jury to find the defendant guilty, and, therefore, the probability of being found guilty is the same if either a judge or a jury hears the evidence. This decision by the court of appeals provides room for this mistaken belief. By providing an explanation of the unanimity requirement, the court ensures that a defendant does not unintentionally relinquish the constitutional right to a jury trial.
Recent Developments

State v. Evans:
A Warrantless Search Incident to Arrest Is Constitutional, Regardless of Whether the Police Intend to Charge the Defendant Upon Apprehension

By Stacey E. Burnett

The Court of Appeals of Maryland held that a search incident to a valid arrest is constitutional even where the police had no intention of immediately charging the suspect. State v. Evans, 352 Md. 496, 732 A.2d 469 (1999). The court ruled that the trial judge may not exclude certain cocaine evidence seized from two accused drug dealers when the police detained and searched, but did not “book” them for possession of illegal drugs. In so doing, the court concluded that, for a valid arrest, the police need only subject a defendant to the officers’ immediate control, based on probable cause that the suspect committed a crime. The court reiterated its position that requiring the police to intend a formal prosecution of all apprehended suspects would lead to the needless waste of police and judicial resources.

In Evans, the court consolidated two cases, State v. Evans and State v. Sykes-Bey, both having similar facts and identical issues. Evans, 352 Md. at 501, 732 A.2d at 424. In June of 1994, as part of a police task force to fight drug activity in Baltimore City, an undercover officer purchased drugs from defendant Dwight Evans (“Evans”). Id. at 501, 732 A.2d at 425. Approximately five to ten minutes after the transaction, other members of the task force stopped and searched Evans, seizing cocaine and marked money used in the undercover deal. Id. Although the police detained Evans to verify his identity, they did not transport him to the police station or bring him before a court commissioner, but instead, released him. Id. at 502, 732 A.2d at 452-26. One month after the incident, Evans was formally charged, and the grand jury indicted him for various drug offenses based on evidence seized from the undercover operation. Id. at 502, 732 A.2d at 426. Evans moved to suppress the evidence, arguing that it was illegally seized because the earlier encounter with the police did not constitute an arrest. Id. The trial court denied the motion, and Evans was subsequently convicted. Id. at 502-03, 732 A.2d at 426.

Defendant Charles Sykes-Bey (“Sykes-Bey”), in February of 1994, encountered a similar undercover operation, during which an officer purchased cocaine from an individual who was with Sykes-Bey. Id. at 504, 732 A.2d at 427. The undercover agent approached Sykes-Bey for drugs, but Sykes-Bey told the agent that he sold only “weight cocaine.” Id. The agent, wanting to buy “dimes” instead, bought crack cocaine from Sykes-Bey’s compatriot. Id. at 505, 732 A.2d at 427. The police, immediately thereafter, stopped and searched Sykes-Bey, and seized the cocaine. Id. As with Evans, the police did not take Sykes-Bey to the station house, or formally charge him until approximately one month later. Id. Sykes-Bey moved to suppress the seized evidence, claiming that, because he was not “arrested” prior to, or contemporaneously with the search, the evidence was not legally seized. Id. The trial court denied the motion and Sykes-Bey was convicted of various drug offenses. Id. at 506, 732 A.2d at 428.

The Court of Special Appeals of Maryland reversed both Evans’s and Sykes-Bey’s convictions, holding that the detention in both situations did not constitute an arrest, and therefore, the search was unconstitutional. Id. The Court of Appeals of Maryland granted certiorari on both cases to consider what constitutes an arrest for purposes of the search incident to arrest exception. Id. at 506, 732 A.2d at 428-29.

To address the issue of whether Evans and Sykes-Bey were arrested when detained, the court first defined the term “arrest” as set forth in Bouldin v. State, 276 Md. 511, 350 A.2d 130 (1976). Evans, at 512, 732 A.2d at 430-31. The court observed that the Bouldin court defined an arrest to include the taking, seizing, or detaining of another person (1) by touching or putting hands on him; (2) or by any act that indicates an intention to take him into...
custody and that subjects him to the actual control and will of the person making the arrest; or (3) by the consent of the person to be arrested. Id. at 513, 732 A.2d at 431 (citing Bouldin, 276 Md. at 515-16, 350 A.2d at 133). As to whether the police must intend an immediate prosecution to make an arrest valid, the court found no support in either Bouldin or in other Maryland case law requiring such intent. Id. at 513-14, 732 A.2d at 431. The court therefore concluded that the intent to prosecute was not a prerequisite to a valid arrest. Id. at 514, 732 A.2d at 431.

The court next focused on Sykes-Bey’s contention that after stopping and searching a defendant, the police must immediately charge the defendant to effectuate a valid search incident to an arrest. Id. at 524, 732 A.2d at 436-37. The court found no distinction between a “formal” arrest and a “custodial” arrest for the purpose of invalidating an otherwise constitutional search, but acknowledged that the terms are used in similar context by the U.S. Supreme Court and other courts. Id. The court further agreed with the dissenting opinion of the court of special appeals that requiring officers to immediately charge every person they detain to transform the detention into a valid arrest would contradict the principles behind the Fourth Amendment and violate public policy. Id. at 524, 732 A.2d at 437.

The court found that a lawful arrest requires probable cause that a suspect committed a crime, and a detention of the suspect that subjects him to the arresting officer’s will or control; the intention of immediately charging the suspect is not required. Id. at 515, 732 A.2d at 432. Applying these elements to the facts in Evans, the court concluded that the officers had probable cause to believe Evans and Sykes-Bey had committed a crime. Id. The court further found that because the police detained the defendants in order to verify their identities, the defendants were subjected to the officers’ control. Id. The court therefore held that the encounters between the police and the defendants constituted valid arrests. Id.

The court, having found the arrests valid, then determined whether the searches incident to the arrests were valid. Id. at 516, 732 A.2d at 432-34. The court reviewed the long-standing rule that arresting officers may validly search suspects incident to an arrest for weapons that may endanger an officer’s safety, and for evidence of the crime that may be vulnerable to destruction. Id. at 517, 732 A.2d at 432-33 (citing U.S. v. Robinson, 414 U.S. 218, 225-26 (1973); Chimel v. California, 396 U.S. 752 (1969)). The officer’s initial probable cause for arresting the suspects, according to the court, is sufficient for a search incident to the arrests; the officer does not need any additional suspicion to believe the suspect has weapons or evidence. Id. at 516-17, 732 A.2d at 433 (citing U.S. v. Robinson, 414 U.S. 218, 225-26 (1973)).

The Evans court, acknowledging that its justifications and requirements for a valid search incident to arrest may not be identical to those under the Fourth Amendment, determined that its holding incorporates the fundamental factors. Id. at 519-20, 732 A.2d at 434 (citing Knowles v. Iowa, U.S., 119 S. Ct. 484 (1998)). The court cited several Maryland cases applying the Fourth Amendment rule that warrantless searches incident to arrest are valid for the purpose of uncovering weapons and evidence. Id. at 517-19, 732 A.2d at 433-34. Therefore, the court concluded that because the arrests of Evans and Sykes-Bey were lawful, the searches incident to the arrests were valid. Id. at 23-24, 732 A.2d at 434.

The holding by the Court of Appeals in State v. Evans that an arrest is constitutional even if the police have no intention of immediately charging the suspect comports with both prior Maryland and federal constitutional jurisprudence. By not including the formal charging process as a requirement for a valid arrest, the court in State v. Evans created a wider range of situations that may be deemed valid arrests. Accordingly, searches incident to such arrests will also be lawful. This rule allows prosecutors to choose carefully which suspects to charge by first examining the strength of the evidence obtained from the search. As a result, suspects may be subjected to fewer unnecessary formal arrests and charging procedures. With fewer defendants in the system, court dockets and attorneys’ caseloads will be less burdensome, resulting in a more efficient criminal justice system.


**Recent Developments**

**Taylor v. State:**

A Conviction Following a Violation of a Defendant’s Right to be Present During Jury Communication will be Reversed Unless the Record Demonstrates a Lack of Prejudice to the Defendant

By Martha Arango

The Court of Appeals of Maryland held that a trial court’s error in communicating with the jury in the absence of the defendant is presumed to prejudice the defendant, unless the record shows that the communication was not prejudicial. *Taylor v. State*, 352 Md. 338, 722 A.2d 65 (1998). Thus, regardless of the accuracy of the trial court’s answers to the jury’s questions, the conviction will be reversed if there is not a clear showing that the defendant was not prejudiced.

Lisa Taylor (“Taylor”) was tried in the Circuit Court for Baltimore County on charges of conspiracy to distribute heroin and possession of heroin with the intent to distribute. *Taylor*, 352 Md. at 340, 722 A.2d at 66. After jury deliberations began, the jury submitted three written questions to the judge. *Id.* Without notifying the defendant or the State, the judge reconvened the jury in the courtroom and gave the jury oral instructions on the questions. *Id.* The questions sought information on probable cause, the proper procedure in a warrantless entry, why a witness had not testified, and sentencing procedures. *Id.* The court instructed the jury that the questions posed were questions of law and not factual issues that the jury needs to consider. *Id.* Approximately an hour later, the judge informed Taylor’s counsel and the State about the jury’s questions that the judge answered, explaining that she did so in order to avoid delay in the deliberation process. *Id.* at 342, 722 A.2d at 66.

Taylor’s counsel, while acknowledging the accuracy of the court’s response, objected to the court’s procedure on the basis of Maryland Rule 4-326(c), which requires the court to notify the defendant and the State’s Attorney of any communication from the jury that relates to the case before responding to the jury’s inquiry. *Id.* at 343-44, 722 A.2d at 67. Based upon the procedural error, Taylor’s counsel moved for a new trial. *Id.* at 344, 722 A.2d at 67. The court denied Taylor’s motion, stating that the procedural error was harmless. *Id.* at 344, 722 A.2d 67-68. The jury returned a guilty verdict on both counts and Taylor was sentenced to ten years imprisonment without parole. *Id.* at 340, 722 A.2d 66.

The Court of Special Appeals of Maryland affirmed the circuit court’s holding on the same grounds. *Id.* at 344-45, 722 A.2d 68. The Court of Appeals of Maryland granted Taylor’s petition for writ of certiorari. *Id.* at 345, 722 A.2d 68.

As a preliminary matter, the court discussed the trial court’s violation of Maryland Rule 4-326(c) and Maryland Rule 4-231(b). The court of appeals acknowledged that the trial court violated Rule 4-326(c) when it communicated with the jury without notifying Taylor. *Id.* Maryland Rule 4-231(b) establishes a defendant’s right to be present at a preliminary hearing and at every stage of the trial. *Id.* at 339, 722 A.2d 66 n.2. The court noted that a judge’s communication with the jury is a stage of the trial at which the defendant has a right to be present. *Id.* at 345, 722 A.2d 68 (citing *Bunch v. State*, 281 Md. 680, 685, 381 A.2d 1142, 1144 (1978)). The court therefore found that the trial court violated Rule 4-231(b) when it excluded Taylor from participating in answering the jury’s questions. *Id.*

The issue before the court was whether Taylor’s conviction should be upheld because the trial court’s violation of Rules 4-326(c) and 4-231(b) was harmless error. Generally, a conviction will be upheld if the trial court’s error was harmless, i.e., one which does not influence the verdict. *Id.* at 346-47, 722 A.2d 68-69 n.7(citing *Dorsey v. State*, 276 Md. 638, 659, 350 A.2d 665, 678 (1976)). The defendant’s absence at any stage of his trial is harmless error if, beyond a reasonable doubt, the violation was not prejudicial to the defendant. *Id.* at 346, 722 A.2d 69 (citing *Noble v. State*, 293 Md. 549, 559, 446 A.2d 844, 848 (1982)).
Furthermore, when the State will be the beneficiary of the error, the State bears the burden of showing that the error was not prejudicial to the defendant. *Id.* at 354, 722 A.2d 72 (citing *Dorsey*, 276 Md. at 658, 350 A.2d at 678).

To reverse a conviction, the court noted, a defendant does not need to show injury-in-fact. *Id.* at 348-49, 722 A.2d 70. Thus, “if the record is silent as to prejudice resulting from a violation of the defendant’s right to be present, an appellate court will not ‘speculate’ as to harm; instead prejudice will be presumed, and the conviction will be reversed.” *Id.* at 349, 722 A.2d 70 (quoting *Noble*, 293 Md. at 560, 446 A.2d at 849). Conversely, the court continued, a conviction will be sustained “if the record affirmatively shows that the denial of the right to be present at a stage of a criminal trial did not prejudice the defendant.” *Id.* at 350, 722 A.2d 70 (citing *Noble*, 293 Md. at 563, 446 A.2d at 851).

An example of where the record did not show prejudice to the defendant was in *Noble v. State*, in which the court held that a defendant was not prejudiced by his absence at a voir dire bench conference between the judge and the prospective juror at which the judge excused the prospective juror for bias. *Id.* at 347-48, 722 A.2d 69. The court in *Noble* reasoned that the defendant was not harmed by his absence at the bench conference, because the court’s ruling was favorable to the defendant. *Id.* at 348, 722 A.2d 69.

In reaching its holding, the court further relied on its previous ruling concerning ex parte communications that constitute harmless error. In *Midgett v. State*, 216 Md. 26, 139 A.2d 209 (1958), a case analogous to *Taylor*, the court reversed the defendant’s conviction and held that the defendant’s right to be present was violated when the judge responded to questions from the jury in the defendant’s absence. *Id.* at 350, 722 A.2d 70-71 (citing *Midgett*, 216 Md. at 36-37, 139 A.2d at 214).

In the case at bar, the court concluded that Taylor was deprived of her right to be present during a stage of the trial and that the State failed to prove that Taylor was not prejudiced by her absence during the court’s communication with the jury. *Id.* at 354, 722 A.2d 72-73. The State did not meet its burden by simply noting the correctness in the trial court’s response to the jury. *Id.* at 354, 722 A.2d 73. Applying *Noble*, the court reasoned that prejudice was presumed because the record was silent regarding the violation of the defendant’s right to be present. *Id.* at 355, 722 A.2d 73.

In *Taylor v. State*, the court’s holding is unambiguous in requiring that trial courts either follow procedure or make a clear showing on the record that the defendant is not prejudiced by a violation of his or her rights. The court also established that in order to rebut a presumption of prejudice, there must be more than a mere showing that the court’s supplemental jury instructions were substantively accurate.

The court sends a clear message that the Rules are compulsory and that the judge’s motives and intentions will not be considered if the Rules are violated; rather, the record must show that the defendant was not prejudiced by the violation.
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HOUSE BILL 190: TOBACCO TAX

By Holly A. Currier

After much discussion, debate, and compromise, a law was passed by the Legislature and signed by the Governor dictating a thirty-three cents per pack increase in the tax on cigarettes. While not the one dollar increase proposed by the Governor, the thirty-three cents per pack tax increase will significantly contribute to reducing smoking by adults and youth, and increase the amount of funding from a portion of the national tobacco litigation settlement allocated to assist in the conversion of tobacco crops to other money crops. Specifically, the Tobacco Tax Bill (crossfiled with Senate Bill 143) not only provides for a tax on cigarettes, but also for a tax on all other tobacco products at a rate of fifteen percent of the wholesale price. The Bill addresses the fact that only the state may tax tobacco products, and that additional taxes by any county or municipal corporation will not be permitted. Further, any cigarettes being sold outside of Maryland or the United States shall not be subject to this new tobacco tax.

Additionally, the Legislature included financial provisions in this Bill to provide for activities to reduce the tobacco use in Maryland. Specifically, the Governor was required to provide in the annual budget not less than twenty one million dollars to fund such activities. Examples of the anti-tobacco use activities are (1) media campaigns to reduce smoking initiation, (2) media campaigns designed to educate the public regarding secondhand smoke, (3) enforcement of laws prohibiting the sale of tobacco products to minors, (4) smoking cessation programs, and (5) anti-tobacco education campaigns for use in the schools of Maryland.

This Bill furthered the Maryland’s mounting efforts in the war against tobacco in several ways, namely by providing for a tax on tobacco products, increasing funding for anti-tobacco education campaigns and funding programs designed to assist farmers convert their tobacco crops to other money crops. Lastly, both this Bill and the recent victory for Maryland in the national tobacco litigation settlement exhibit the state-wide trend towards reducing the number of Marylanders who choose to partake of tobacco products and the state’s strong position against the use of tobacco.

The effective dates for this Bill vary according to section. The range of effective dates varies from July 1, 1999 to July 1, 2000. Please refer to the Bill itself for the specific effective dates per section.
SENATE BILL 554: COMMERCIAL LAW - YEAR 2000 COMMERCE PROTECTION ACT

By Anabelle Berges

Senate Bill 554 (crossfiled with House Bill 3) establishes the legal remedies available for Maryland government, business, commerce, and consumers for damages caused by Year 2000 information technology failures. The Bill limits the available remedies to remedies provided under the Bill, or to specific remedies provided under a contract. In addition, a person is only liable under this Bill where the failure to be Year 2000-Ready is the proximate cause of the damages.

The law also provides an affirmative defense for a person whose product or service is not Year 2000-Ready. The law states that the person must have “determined and implemented actions necessary for the person to become Year 2000-Ready” as stated under current law. Senate Bill 554 sets forth the following four factors that the court shall consider when determining whether the person has met the affirmative defense: (1) whether the person has inventoried its products and services to determine whether they are Year 2000-ready; (2) whether the person can evidence a plan to make its products and services to be Year 2000 ready; (3) whether the person has contacted its critical suppliers to determine whether they have Year 2000 readiness plans; and (4) whether the person has fully implemented a plan to make its products and services Year 2000 ready.

The Bill also allows an audit, information technology review, or other review of whether a product is Year 2000-Ready to be discoverable and admissible in evidence in a civil action pursuant to a Year 2000 claim.

The requirements set forth in Senate Bill 554 will likely discourage persons from filing Year 2000 related lawsuits. Small businesses will benefit from the affirmative defense and limited remedies provided by the Bill.

This Bill took effect on June 1, 1999.
HOUSE BILL 172: VESSELS - OPERATING WHILE UNDER THE INFLUENCE OF DRUGS OR ALCOHOL

By George Mahffey, Jr.

Prior to the passage of House Bill 172, the results of a blood test were only admissible under Maryland law as to a criminal prosecution for driving under the influence of drugs, alcohol, or controlled dangerous substances. The impetus for this law, set forth in section 10-308 of the Court and Judicial Proceedings Article and section 8-738 of the Natural Resources Article of the Annotated Code of Maryland, was the prevention of drinking and driving. House Bill 172 now extends the admissibility of blood tests for criminal prosecutions to those operating or attempting to operate a vessel while under the influence of drugs, alcohol or controlled dangerous substances.

As with the old law, this new Bill seeks to protect the public from those persons operating vessels and cars while intoxicated. Additionally, with the continuing efforts to clean up the Chesapeake Bay, this new Bill will help hold accountable those who cause or may cause accidents resulting in contamination of the Bay or other Maryland waterways by fuel, oil, or other hazardous substances.

This new Bill took effect October 1, 1999, and amends section 10-308 of the Courts and Judicial Proceedings Article and Section 8-738 of the Natural Resources Article of the Annotated Code of Maryland.
HOUSE BILL 233: COURTS & JUDICIAL PROCEEDINGS - PEACE ORDERS

By Anna R. Benshoof

House Bill 233 (crossfield with Senate Bill 146), authorizes an individual to file a petition with the court seeking relief against a respondent for the commission of certain acts. This Bill adds to the Maryland Annotated Code, Courts and Judicial Proceedings Article, sections 3-1501 through 3-1509 under the new “Subtitle 15. Peace Orders” and repeals and reenacts, with amendments, Courts and Judicial Proceedings Article, section 4-401, and Family Law Article, section 4-510.

Specifically, House Bill 233 creates a new form of relief in the form of a Peace Order for individuals who are harassed, stalked, assaulted, sexually assaulted, or in fear of imminent serious bodily harm by a non-spouse. The Bill essentially creates a new form of Protective Order for application in non-marital situations. The petition for a Peace Order must be filed within thirty days of the commission of the alleged act. Upon a finding that respondent committed the alleged acts and may commit future acts, the court may issue a temporary Peace Order in an ex parte proceeding to protect the petitioner.

Should the respondent violate the Peace Order, respondent may be subject to a finding of contempt, criminal prosecution, and imprisonment not to exceed ninety days or a fine not to exceed one thousand dollars, or both.

House Bill 233 became effective on October 1, 1999.
SENATE BILL 319: ASSISTED SUICIDE - PROHIBITION

By John R. Muckelbauer

Beginning October 1, 1999, Maryland expressly prohibited assisted suicides. Senate Bill 319, and its companion House Bill 496, prohibits anyone from participating in the assisted suicide of another. The Bill amends Maryland Annotated Code, Article 27, section 4116 in prohibiting such practice. Anyone found in violation of the law will be subject to a sentence of up to a year in jail, a $10,000 fine, or both. The law makes it illegal for one person to knowingly assist in another’s suicide. The law, however, provides an exception for a health care professional who withholds or withdraws a life sustaining procedure in accordance with state law or reasonable medical procedure.

In passing the legislation, Maryland joins a list of 35 other states that have explicitly prohibited assisted suicide. Currently, eight states prohibit assisted suicide through common law. Only one state, Oregon, expressly allows for the practice to occur. Three states, Wyoming, Utah, and North Carolina, that do not have statutes criminalizing the practice have abolished the common law crimes and may allow for such a procedure.
HOUSE BILL 1129: STATE POLICE - DNA TESTING

By Stacey E. Burnett

House Bill 1129, entitled “Testing of Violent Criminals,” repeals and reenacts, with amendments, Maryland Annotated Code, Article 88B, section 12A, which requires that defendants convicted of specific violent crimes provide a DNA sample under certain circumstances.

The Bill added specific crimes of violence to Article 88B, section 12A, including murder, in any degree, robbery, in any degree, first degree assault, and attempts to commit any of the listed crimes of violence. A violent offender will be required to provide a DNA sample as a condition of sentence, or if not sentenced, as a condition of probation. Failure to comply with an order to submit a DNA sample within ninety days of notification will constitute violation of probation. The DNA sample shall be submitted to the Department of State Police instead of the Department of Public Safety and Correctional Services.

The House Bill 1129 became effective October 1, 1999.
HOUSE BILL 434: ESTATES & TRUSTS - LIEN FOR PAYMENT OF INHERITANCE TAX

By Bryon S. Bereano

On April 6, 1999, the Maryland General Assembly passed House Bill 434. The purpose behind the bill was to alter the duration of a lien for unpaid inheritance taxes on an estate administered by a foreign personal representative.

The House Bill faced no opposition, passing the Maryland House of Delegates on March 18, 1999 by a vote of 137-0 and passing the Maryland Senate by a vote of 46-0. The Bill was sponsored by Delegates Michael Finifter and Bobby Zurkin, both from Baltimore County.

House Bill 434 alters section 5-505 of the Estates and Trusts Article of the Annotated Code of Maryland. Section 5-505 provides for a lien against the property of an estate either when the inheritance tax has not been either paid or satisfaction is secured from the Register of Wills by a foreign personal representative of the estate. Under the current version of section 5-505, the lien against the property of the estate would last for a period of four years from the date of death of the decedent. As a result of House Bill 434, the four year time period for the lien is removed.

The removal of the four year time period for the lien by House Bill 434 is significant for the personal representative of an estate. Previously, a foreign personal representative of an estate had to concern themselves with the lien for only a four year period. With the four year period removed, however, a foreign personal representative cannot simply wait out the four year period. The lien no longer expires after four years. Now the property of the estate is subject to a lien for unpaid inheritance tax until either the money has been paid or satisfaction by the Register of Wills has been secured.

This Bill took effect on July 1, 1999.
HOUSE BILL 758: ESTATES & TRUSTS - GUARDIANSHIP OF PROPERTY OF MINOR OR DISABLED PERSON - POWER OF CIRCUIT COURT

By Adam Cizek

Section 13-214 of the Estates and Trusts Article of the Annotated Code of Maryland enumerates the powers granted to the guardian of a minor or disabled person. House Bill 758 authorizes two additional powers. Under the Bill, a guardian may seek circuit court approval to make gifts from the principal and income of the estate and disclaim any property or interest in property on behalf of the minor or disabled person. The Bill further established that these powers are in addition to and in no way are intended to limit the powers enumerated under section 13-214 of the Estates and Trusts Article.

House Bill 758 was proposed in response to the Internal Revenue Service’s (IRS) determination that gifts made by Maryland guardians are not excluded from the decedent’s estate for federal gift and estate tax purposes. The IRS concluded that because Maryland’s “Substituted Judgment” statute does not expressly authorize guardians to make gifts from the estate, such gifts are included in the decedent’s estate regardless of circuit court approval.

House Bill 758 will permit more effective estate planning for the estate of minor and disabled persons. By specifically authorizing circuit courts to approve guardian gifting and disclaiming, the estate of minor and disabled persons will be able to utilize the annual federal gifting tax exemptions and preserve the estates federal unified tax credit.

This Bill took effect on October 1, 1999.
HOUSE BILL 759: ESTATES & TRUSTS - CONVERSION OF SOLE PROPRIETORSHIPS TO LIMITED LIABILITY COMPANIES BY PERSONAL REPRESENTATIVES AND FIDUCIARIES

By Walter W. Green

House Bill 759 repealed and reenacted, with amendments, the Estates and Trusts Article of the Annotated Code of Maryland, sections 7-401 and 15-102. This Bill allows a personal representative or fiduciary to convert a decedent’s sole proprietorship to a limited liability company. House Bill 759 became effective October 1, 1999.

Under amended Section 7-401, where the decedent was the owner of a sole proprietorship, the personal representative may convert the business to the form of a limited liability company. The previous statute provided for the personal representative to continue an unincorporated business for a limited period of time, or to incorporate a business in which the decedent was engaged at the time of death.

Under amended Section 15-102, a fiduciary is also given the power to convert a sole proprietorship in which the decedent was engaged at the time of his death to a limited liability company. The statute previously only allowed a fiduciary to continue as or become a limited partner of a partnership, or to incorporate any business or venture which formed a part of the fiduciary estate.
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Recent Developments

HOUSE BILL 388: FAMILY LAW - MARRIAGE OF CERTAIN MINORS

By Anne Bodnar

Effective October 1, 1999, House Bill 388, titled “Marriage of Certain Minors,” clarifies the circumstances in which a minor may lawfully enter into a marriage. In addition, this law establishes a bright line minimum age standard under which no minor is permitted to marry, regardless of that individual’s circumstances.

In particular, this law states that no minor under the age of fifteen may get married. However, a minor who is sixteen or seventeen years old may marry, but only if they meet certain conditions. Sixteen or seventeen year old minors must have the consent of a parent or guardian and this parent or guardian must stipulate that such individual is the requisite age. Alternatively, no consent is necessary if the sixteen or seventeen year old minor can present evidence from a licensed physician that the woman wishing to be married is either pregnant or had already given birth. Minors who are fifteen years old, however, are only allowed to marry if they can have both the parental/guardian consent and are either pregnant or have given birth.

By establishing this bright line rule requiring that a minor must be at least fifteen years old to enter into marriage, regardless of the circumstances, Maryland has recognized that minors below a certain age are incapable of making an informed decision about marriage. This law clarifies a henceforth murky area of family law and protects the interests of minors who are too young to resolve such an issue on their own.
HOUSE BILL 738: FAMILY LAW - DOMESTIC VIOLENCE - RELIEF

By Holly A. Currier

House Bill 738 provided additional protection to those persons eligible for relief from abuse (PEFR), who are filing a petition for a temporary ex parte order or a protection order. Specifically, the Bill now authorizes a presiding judge to provide additional protection for the children of such PEFR’s and to order the respondent to stay away from the children while they are in the care of a child care provider. In addition, the law provides protection for the child care provider while the children are under their supervision. Traditionally, children have been given protection from the abusers of the victim while they are in school or at home. With many PEFR’s working outside of the home, child care is a necessity for both school aged and younger children. When a PEFR has filed for a temporary ex parte order or a protective order, the risk to the safety of both the PEFR and the children of the PEFR is increased. Respondents in such petition for relief may seek to appear at the place of child care and further threaten the victim and the children.

Thus, this Bill not only extends additional protection to some of the youngest and innocent victims of domestic violence while they are outside the home, but provides some additional sense of security to those PEFR’s who must work and place their children in child care.

This Bill took effect on October 1, 1999.
SENATE BILL 480: FOSTER CARE - CHILD SUPPORT OBLIGATIONS

By Martha Arango

Senate Bill 480 repealed and reenacted, with amendments, Annotated Code of Maryland, Family Law Article, section 5-525(i). The Bill restricted an individual’s ability to be a foster parent to other children until the individual first provides support for his or her own children.

Under current regulations, a foster family must have sufficient income and financial stability to provide reasonable living conditions for their own family group without depending upon the reimbursement for basic foster care. The new law requires the Social Services Administration to adopt regulations that mandate background checks of foster care applicants, who are also biological or adoptive parents, for delinquent child support obligations.

Under this new law, the applicants will be given a certain time period to satisfy any past due child support obligations before any action is taken with respect to the placement of a foster child in the individual’s home.

This Bill went into effect on October 1, 1999.
HOUSE BILL 139: PATIENT PROTECTION ACT

By Cheryl F. Matricciani

House Bill 139 repealed and reenacted, with amendments, the Annotated Code of Maryland, Insurance Article, section 15-113. Specifically, the Bill requires an insurer, nonprofit health service plan, HMO, dental plan, or any other person that provides health benefit plans subject to State regulation to adopt reimbursement schedules that the carrier must adhere to when paying health care providers. Furthermore, a carrier cannot adopt a reimbursement schedule that reduces the amount of reimbursement to a health care provider based on the number or cost of medical services proposed or recommended by the health care provider. Bonuses and other incentive-based compensation to health care providers is allowed if the bonus does not deter the delivery of medically appropriate care to the enrollee.

Finally, the Bill requires the carrier to provide a copy of the carrier’s reimbursement schedule (1) with any new contract offered to health care practitioners who do not have a contract with the carrier, (2) once a year, at the request of a health care practitioner with whom the carrier has a contract to provider services, and (3) ninety days before any proposed change in the reimbursement schedule or in the methodology used to determine bonuses or other incentive-based compensation. The Maryland Insurance Administration may adopt regulations to carry out the requirements of the Bill.

This Bill will take effect on January 1, 2000.
Recent Developments

HOUSE BILL 315: ANTI-DISCRIMINATION ACT

By Richard Dirk Selland

Article 49B of the Maryland Annotated Code currently prohibits discrimination in employment, public accommodations, housing, education, and health and welfare services. It also protects against discrimination based on race, creed, color, religion, age, national origin, ancestry, sex, marital status, and physical or mental handicap. The legislation (SB 138 / HB 315) proposed in 1999 would have simply amended Article 49B to add “sexual orientation” to this list. It would have given lesbians, gay men, and bisexuals the same civil rights protections given to other minority groups that have been recognized as being targeted for discrimination.

The Maryland Human Relations Commission would have enforced the law in the same way it now enforces protection against discrimination. Persons who experience discrimination would file complaints with the Commission which would investigate the complaints and enforce the law as appropriate.

With the help of Maryland Governor Parris N. Glendening, history was made in Maryland as HB 315 moved to the Senate. Breaking precedent on March 12, 1999, the Governor testified before the House Judiciary Committee and reminded them that he signed similar protections into law in 1991 as County Executive of Prince George’s County “and Western Civilization hasn’t collapsed as a result.” The House voted 80 to 56 in favor of the Bill marking the first time such legislation passed one side of the legislature. However, the Bill was subsequently stalled in the Senate Judicial Proceedings Committee where it has not mustered enough votes to leave the Committee.

Other sexual orientation issues:

A bill to ban same-sex marriages in Maryland, HB 1128, co-sponsored by Delegates Carmen Amedori (R-Carrol) and Emmett Burns (D-Balt. Co., City) was handily defeated in the House Judiciary Committee on March 26. The Bill sought to limit the definition of marriage to “a legal union between a man and a woman as a husband and wife.”

Maryland’s proposed Hate Crimes Act, HB 969, a bill which would add additional penalties to crimes committed against someone based on their sexual orientation, was voted on favorably by the same committee on March 27, 1999 and moved to the full House for a vote where it passed overwhelmingly 111 to 23. The Bill has subsequently stalled in the Senate Judicial Proceedings Committee where it has not musteried enough votes to leave the Committee.
HOUSE BILL 177: HOLOCAUST VICTIMS - INHERITANCE TAX AND INCOME TAX - INSURANCE POLICIES

By Cheryl F. Matricciani

House Bill 177 allows Holocaust victims an income tax subtraction modification for (1) income related to tangible or intangible property that was seized, misappropriated, or lost during the Nazi regime; and (2) reparation/restitution payments to Holocaust victims, the victim’s spouse or descendant. Additionally, interest on the proceeds received on insurance policies issued between January 1, 1929 and December 31, 1945 to Holocaust victims is excluded from state income tax and inheritance tax.

The Bill also requires the Insurance Commissioner to arrange for a toll-free telephone number to assist persons seeking to recover insurance proceeds covering the life or property of a Holocaust victim. Insurance companies doing business in the State are required to act expeditiously in resolving claims of Holocaust victims. Further, insurance companies shall resolve claims irrespective of any statute of limitations or notice requirements required by law. The Insurance Commissioner may require insurers to file a report concerning the insurance policies issued to, and claims filed on behalf, of Holocaust victims. An insurer that violates specified provisions of the bill is subject to a civil penalty of up to $100,000 for each day the violation continues.

This Bill took effect on July 1, 1999. The subtraction modification will be applicable to all taxable years beginning after December 31, 1998.
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SENATE BILL 420: WORKERS’ COMPENSATION - DEPARTMENT OF NATURAL RESOURCES

By Kofi Asamoah

Senate Bill 420 (crossfiled with House Bill 311) was a consolidation of amendments to sections 9-207 and 9-503 of the Labor and Employment Article of the Annotated Code of Maryland. The amendment to section 9-207 of the Labor and Employment Article broadens the covered employees for workers compensation purposes in the Department of Natural Resources to include “a paid law enforcement employee.” The prior provision covered only a registered crewmember or a firefighter of the Department of Natural Resources.

The amendment to section 9-503 seeks to broaden the scope of covered employees who are presumed to have an occupational disease covered under the Workers’ Compensation Act. With this amendment, a paid law enforcement employee of the Department of Natural Resources is presumed to have a compensable occupational disease if the employee suffers from lyme disease that was not preexisting at the time the employee was assigned to a position in an outdoor environment.

Prior to the enactment of this Bill, the coverage for occupational diseases such as lyme disease was limited to paid police officers, fire-fighters, fire fighting instructors, state fire marshalls and deputy sheriffs. With the passage of this Bill, paid law enforcement employees of the Department of Natural Resources who contract lyme disease in the line of duty will be covered under the Workers Compensation Act.

These amendments became effective October 1, 1999.
HOUSE BILL 751: CIGARETTE RESTITUTION FUND

By Brent Bolea

On July 1, 1999, House Bill 751 took effect. The Cigarette Restitution Fund will derive revenue from tobacco settlements. House Bill 751 designates purposes for which such revenues should be expended. For example, disbursements are to be utilized for such things as campaigns to decrease tobacco use and programs to find alternative crops for land now used by Maryland tobacco farmers. The Bill also allocates revenues towards the enforcement of laws regarding tobacco sales, primary health care in rural areas, and the prevention, treatment, and research concerning cancer, heart disease, and lung disease.

Finally, House Bill 751 established certain responsibilities for the Governor. For instance, the Governor must develop mission statements for each program receiving fund revenues and report annually by program. The Governor is also required by the Bill to report as to the types public benefits of projects which are to be funded by tobacco settlement revenues.
Recent Developments

**HOUSE BILL 1: ETHICS LAW - REFORM OF LEGISLATIVE ETHICS PROCESS**

By Bret Frankovich

House Bill 1 (crossfiled with Senate Bill 1) was proposed to change provisions of the law that govern the employment of legislators’ relatives, appointment of an advisory counsel to the Joint Committee on Legislative Ethics, gifts made to members of the Maryland General Assembly, and the use of prestige of public positions.

This new law restricts members of the Maryland General Assembly from employing relatives to conduct any type of legislative business. Members also may not employ a relative of another member from the same legislative district to engage in the same. The term “legislative business” includes business that uses directly controlled public funds of the particular member in question. The law is a positive step in regulating nepotism, for the people of Maryland to elect persons and not families to serve them.

The law also appoints an attorney to the Ethics Committee. It is important to note that the counsel will not have prosecutorial functions, but will be engaged in an advisory capacity. The counsel will advise, assist, and provide information to members regarding conformity with the applicable ethical laws and standards. Names of members obtaining this assistance in most cases will remain confidential and efforts to gain this advice shall not be construed as evidence of any particular wrongdoing. This aspect is important because there are so many ethics laws on the books that the need for this advice is of paramount importance. It is also important in the wake of the misfortunes of the federal independent counsel statute that the counsel has no powers to prosecute. The Joint Committee, if they find need, shall turn over these matters to an investigatory committee and in the case of criminal infractions, the matter will be turned over to the proper state prosecuting authorities.

Another substantial aspect of the new law provides that regulated lobbyists may not “knowingly” give gifts to legislative members, officials, employees or any other persons to gain favor or “impair the impartiality” of these named persons. While this law is needed, it will be difficult to regulate. The Maryland General Assembly seems to be attempting to regulate this arena in an age where lobbyists control more than the voting blocks.

Finally, the law disallows legislative members and officials from intentionally using their offices for private gain. The language resembles a slight comparison to corporate law principles of the fiduciary duties of officers and directors. The law’s underlying emphasis seems to be that legislative members are public servants and their office is not to be used as a forum for personal financial gain.

This Bill took effect on October 1, 1999.
HOUSE BILL 722: MOTOR VEHICLE ADMINISTRATION - PRIVACY PROTECTION ACT OF 1999

By Jennifer Golub

The purpose of this House Bill 722 (crossfiled with Senate Bill 387) is to “prohibit disclosure, except under certain circumstances, of Motor Vehicle Administration records containing certain personal information unless the individual who is the subject of the record consents to the disclosure in writing.” This consent authorizes a person to obtain certain personal information. Personal information is defined in the Act as that which identifies a person including that person’s address, driver’s license number “or any other identification number, medical, or disability information, name, photograph or computer generated image, Social Security number, or telephone number.” Personal information does not include that person’s “driving status, offenses, zip code, or information regarding vehicular accidents.” The custodian of records at the MVA cannot disclose personal information without written consent from the “person in interest,” the person who is the subject of the records. Nor can the custodian disclose any personal information for reasons of surveys, marketing, and solicitations, phone or otherwise, without written consent. The person in interest may withdraw consent by notifying the custodian of records at the MVA.

This Act, however, is not an overall ban on the release of information. There are many grounds for the release of such information as listed in the State Government Article of the Annotated Code of Maryland, section 10-616(p). For example, information shall be released in connection with a civil or criminal proceeding or for use by an insurer in connection with rating, underwriting, claims investigation, and anti-fraud activities, and simply to obtain correct information. Some additional reasons a custodian may be required to disclose such information is for use by law enforcement to carry out its function in connection with matters of vehicle or driver safety, theft, emissions, alterations, recalls, performance of parts, and removal of nonowner records.

The Motor Vehicle Administration will charge a fee for information obtained pursuant to the Act and the information can not be used for any purpose other than that for which it was furnished. This Act repeals and reenacts State Government section 10-611; State Government section 10-616(p); and Transportation section 12-112. This Act was passed by the House on its third reading with a vote of 130-3 and passed the Senate on its third reading by a vote of 45-1.

SENATE BILL 505: PARKING ACCESS FOR INDIVIDUALS WITH DISABILITIES

By Catherine Bowers

Senate Bill 505 (crossfiled with House Bill 132), entitled “Parking Access for Individuals with Disabilities,” repeals and reenacts, with amendments, the Transportation Article, sections 13-616, 13-616.1, and 13-616.2, of the Maryland Annotated Code. Specifically, this Bill clarifies and adds specific physical conditions that qualify an individual for special registration plates, placards, and temporary placards.

Significantly, the Bill specifies that a licensed physician, chiropractor, optometrist, or podiatrist must certify that an individual suffers from one of the specified disabilities listed in the Bill, such as lung disease, cardiovascular disease, or inability to walk without an assistive device, in order for that individual to qualify for special registration plates, placards, or temporary placards. Medical professionals are also limited by the Bill which allows them to certify only what they are competent to judge. In addition, under repealed section 13-616, a person issued special registration plates was not required to pay parking meters in the state. However, the new law changes this requirement and holders of special plates do not pay meters only where the meters do not meet the Americans with Disabilities Act accessibility the State’s Motor Vehicle Administration to verify the licensure of a certifying medical professional.

This Bill took effect October 1, 1999.
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