UNIVERSITY OF BALTIMORE
LAW FORUM

VOLUME 30

ISSUE No. 2

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Dean’s Forum

The University of Baltimore School of Law (UBSL) was recently “ranked” in the top half of ABA law schools by an organization that did not take funding into account. The reasons are clear. UBSL continues to contribute to the development of competent legal professionals who serve the State of Maryland and the region through the private bar, business organizations, and legislative, judicial and executive branches of government. Over 140 UBSL graduates passed the July 2000 Maryland bar examination. Ninety percent of UBSL graduates were employed within nine months of graduation. Over three-quarters of the class obtained full time legal employment and approximately twenty percent held prestigious judicial clerkships.

UBSL legal clinics have been rated 18th in the U.S. for the practice oriented educational program they offer. The Appellate Practice Clinic develops student’s advocacy skills and the Internship program puts students in public and private sector settings including all levels of government. In addition our numerous clinics serve the less affluent citizens of our community directly in many ways through the Civil Clinic, the Community Development Clinic, the Criminal Practice Clinic, the Disability Law Clinic, and the Family Law Clinic. In the last two years UBSL has developed a Tax Clinic to represent financially qualified citizens in tax disputes under a grant provided by the Internal Revenue Service.

UBSL has developed three research centers that will enhance the University’s public service role. The Center for International and Comparative Law (CICL) was founded in 1994 and, funded by grant money, has developed programs for training federal judges in Brazil and helped to develop law schools in Kiev, Ukraine, Sarajevo, Bosnia, and Shandong, China. The CICL has brought the name of the University of Baltimore and the State of Maryland to the attention of many foreign governments and U.S. governmental agencies with which it has worked.

UBSL is presently in the process of forming a Center for Children, Families and the Courts with the ABA to centralize efforts throughout the U.S. for family court reform and unification. This will continue the law reform work of UBSL faculty for the establishment of family courts in Maryland. Additionally, with the generous donation of one of its graduates, UBSL will soon announce the opening of the Stephen L. Snyder Center for Litigation Skills. This Center’s goal fits well within the mission of the law school to provide its graduates with “the latest skills and techniques for productive careers in the public and private sector.

All of these programs require a skilled and dedicated teaching faculty. Although UBSL is known for the quality of its legal education, it has also emerged as a major contributor to the search for solutions to social problems. The faculty have been extensively engaged in legal reform at the state, national and international levels. From 1996 through 1998 the UBSL faculty produced 12 books, 17 book chapters and supplements, 49 law review articles and 19 articles in practice journals. The faculty has also recently added a concentration in E-Commerce to its curriculum so that its students will continue to have the skills to serve the needs of this community.

This is a commendable record for a law school that is “ranked” at the bottom of all ABA law schools when it comes to funding. This year we are making every effort to increase state funding and we are hopeful that our alumni and friends add the private support that is necessary.

We thank the editors of Volume 30 of the Law Forum for their work and welcome the new editorial board headed by Brian Kelly.

Eric C. Schneider
Interim Dean and Professor of Law
The University of Baltimore Law Forum has now completed over thirty years of existence and has continued to inform the Maryland practitioner of recent developments in Maryland law. The Forum Faces section features one of the newest members to the Court of Special Appeals, the Honorable Peter B. Krauser. The final issue of the Volume 30 editorial board also features articles by two former members of the Law Forum and recent University of Baltimore School of Law graduates.

In his article, Judges and Statutory Construction: Judicial Zombism or Contextual Activism, author Theo Ogune closely examines the principles of statutory construction and addresses the issue of whether courts should limit the consideration of a statute to the statute’s text, or employ such sources as the statute’s legislative history, purpose, and structure. The article also provides an insightful view of statutory construction policies employed by both the Supreme Court and the Court of Appeals of Maryland. This article is a must read after the historical 2000 Presidential election.

Holly Currier, a former Assistant Articles Editor, explores the application of the reasonable accommodations requirement of the Americans with Disabilities Act as applied to university students with learning disabilities. The author details problems that students and universities face in fashioning accommodation policies and procedures and suggests workable solutions that address the student’s needs while preserving the fundamental aspects of the education program.

The members of the Law Forum editorial board deserve acknowledgement for the countless hours of work that have gone into another fine edition. Bryson Filbert, as the Recent Developments Editor and Anne Bodnar, Assistant Recent Developments Editor, made sure the recent developments continued to highlight the new trends in Maryland law. Cathy Bowers, the Business Editor, efficiently and effectively managed the Law Forum’s finances. Josh Tearnan as Assistant Articles Editor helped choose and edit the Law Forum’s articles. John Muckelbauer, the Managing Editor, kept the staff and editorial board focused on our goals.

A few members of the Editorial Board whom I worked especially close with during the course of this last year were Anna Benshoof, Cheryl Matricciani, and Stacey Burnett. Anna as the Manuscripts Editor spent countless hours laying out the journal, as well as doing last minute editing in order to get the journal ready for publishing. Cheryl as the Articles Editor was the Law Forum contact with the outside world and was a trusted advisor on many important Law Forum decisions. Through Cheryl’s hard work, the Law Forum has once again published very informative and interesting articles for the Maryland legal community. Stacey Burnett, as the Production Editor kept the journal moving on time. Stacey deserves a special thank you for putting up with me throughout my tenure as Editor-In-Chief and for recently becoming Mrs. Walter W. Green.

As always, the University of Baltimore School of Law Administration has supported the Law Forum in its efforts to continue to improve the publication and to promote the University of Baltimore School of Law. In particular, the Director of Finance and Administration Nikhil M. Divecha and Faculty Advisor Robert Lande have supported and encouraged the Law Forum staff to achieve its goals.

I would also like to thank my parents, Carlton and Marion Green, for all of their love and support, and for encouraging and advising me through law school.

Finally, I wish my successor Brian Kelly the best of luck in the upcoming year as Editor-In-Chief. I know that he has the determination and dedication needed to continue the tradition of the Law Forum as an invaluable tool for the Maryland practitioner.

Walter W. Green
JUDGES AND STATUTORY CONSTRUCTION: JUDICIAL ZOMBISM OR CONTEXTUAL ACTIVISM?

by Theo I. Ogune, Esq.

I. INTRODUCTION

Joe Amicable resides in the City of Talks, where Lisa Low-Pride manages the federally insured Talks Commercial Bank. Joe is a well-liked, wealthy businessman, who, in addition to contributing enormously to the Talks economy, has always been a law-abiding citizen, doing all of his businesses “by the books.” Joe is a charismatic individual whose smooth-talking ability always got him whatever he asked for. Some time ago, he met with Lisa Low-Pride to go over his application for a business loan. He knew that Ms. Low-Pride loved the pretentious side of life. He decided, therefore, to aid his otherwise impeccable application by being overly polite to her. He told her that she was the second (to Mrs. Amicable, that is) most beautiful and attractive woman in Talks.

Intending to influence Ms. Low-Pride’s disposition towards the loan application, Joe disregarded the fact that three months prior to the meeting he had voted Ms. Low-Pride as the least attractive woman among twenty-five contestants in Talks’s annual beauty contest. He thought, however, that by now she had forgotten the beauty contest. He was mistaken. He also did not know about the federal statute that made it a crime for “anyone to knowingly make any false statement for the purpose of influencing in any way the action of an FDIC-insured bank upon any application for business loan.” Additionally, Joe did not know that this offense attracted a mandatory five-year incarceration at the federal penitentiary, and a lifetime ban from loan applications. Ms. Low-Pride contacted the appropriate federal authorities. Joe was subsequently convicted, and has appealed to your court. As a judge, would you, under the circumstances, affirm his conviction and send him to prison (or ban him from seeking loans from banks)? Or would you excuse such flattery as not relevant to a loan application? Your choice, indeed, depends on how you interpret the statute in question.

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Would you interpret it to prohibit such an irrelevant false statement?

If you were Justice Keen of the Supreme Court of Newgarth in Lon Fuller’s illustrative case of the Speluncean Explorers, you would abide by the statute’s text and send Joe to prison for five years.\(^1\) As with the Speluncean explorers, the language of the statute in Joe’s case appears plain and unambiguous. Joe’s situation seems to be covered by the statute. There is also no doubt that Joe’s flattery of the bank manager is a false statement,\(^2\) or that Joe intended to influence the consideration of his loan application. Similar to the Speluncean explorers, Joe must face the five-year mandate of the federal statute.\(^3\) But, is this the right result? Does the statute actually cover all false statements, including those not material to the loan application? Is Joe’s flattering statement equally a false statement as, say, if he had lied to the loan officer about owning a beach-front property in Ocean City, Maryland? What if, with a view to winning more favors, he had falsely bragged to her at a cocktail party that he had uncovered the recipe for Coke? Must he be punished because she happens to be the loan officer who is reviewing his loan application? Is it not an understatement to say that such irrelevant false statements, although juvenile, are not within the coverage of the statute in question? Yet the language of the statute prohibits all false statements. Indeed, this is precisely the debate driving the current controversy in statutory construction, especially in the United States Supreme Court.

Like Justice Foster of Newgarth, Justice Stevens would reverse Joe’s conviction. To Justice Stevens, such a federal statute does not cover all false statements; it covers only statements that are material to the loan application. Thus, the government must prove the materiality of falsehood as a separate element of the crime of making a punishable false statement. In contrast, Justice Souter, like Justice Keen of Newgarth, would find that the federal statute plainly does not require any proof of materiality as a separate element of the crime.

In United States v. Wells,\(^4\) the issue before the Supreme Court was the construction of § 1014 of the United States Code.\(^5\) In contest was whether the federal

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1. See Lon L. Fuller, The Case of the Speluncean Explorers, 62 Harv. L. Rev. 616 (1949): In the case of the Speluncean explorers, Roger Whetmore, with his fellow members of the Speluncean Society (an organization interested in cave-exploration), went on an expedition. As they explored a certain cave, the cave’s entrance gave way and closed them in; they were trapped. They tried diligently to escape, but were unsuccessful. It became eventually apparent that they were to stay in the cave for far longer than they had bargained. Although a rescue team was sent after them, the team failed to get them out on time. They spent 32 days in the cave. To avoid starving to death during those days, they killed and ate Roger Whetmore, who initially suggested that they resort to such survival tactics. Upon their rescue, they were charged with murder, and subsequently convicted and sentenced to hang. An appeal reached the highest court of the land, on which sat Justices Keen, Tatting, Foster, Handy, and Chief Justice Truepenny. The issue was the interpretation of the criminal statute, which read: “Whoever shall willfully take the life of another shall be punished by death.” Should the Court affirm the explorers’ death sentences? Chief Justice Truepenny affirmed, but admonished the governor to commute the sentences, since the statute applied unfairly to this excusable situation. Justice Keen would simply affirm, without any consideration of the excuses, since the statutory text was plain. Justice Foster considered the statute’s purpose and other extratextual factors, and voted for reversal. Justice Tatting chided Justice Foster for not limiting his decision to the text, but nevertheless abstained from deciding, because he found no way out of his dilemma. Justice Handy dwelt on public opinion, and voted for reversal. Because the votes were evenly divided the explorers’ sentences were affirmed. This hypothetical narration by Professor Fuller is a classic illustration of the arguments surrounding the theories of statutory construction.

2. See The American Heritage Dictionary of the English Language 692 (3d ed. 1990) (defining flattery as excessive, insincere or false praises that are often used to win favors).

3. Joe’s situation is sharply different from that of the Speluncean explorers. I would not have reversed the explorers’ sentences, because their act was not only atrocious, but also met any definition of murder one relies on.


5. See id. at 924. In Wells, the defendants were owners of a business venture, which leased office copiers for a monthly fee that covered the use and maintenance of such copiers. See id. In an attempt to raise money, they assigned their financial interests in various lease agreements to certain banks. See id. As part of the contracting process with the banks, they furnished the banks with false information. See id. First, they gave the banks versions of the lease agreements that falsely indicated that the monthly leasing fees they charged their customers did not include the
statute required the Government to prove separately that the “false statement” charged under the statute concerned a fact of consequence to a loan application. The statute’s language was similar to that quoted in Joe’s situation. Both the trial court and the intermediate court construed it as requiring a culpable false statement to relate to a material fact. The Supreme Court rejected that construction. Justice Souter, writing for the majority, looked primarily to the text of the statute. The text, according to him,

copiers’ maintenance costs, but that the customers were separately responsible for such costs. See id. According to the government, had the banks known that the defendants already charged their customers for maintenance and were responsible for servicing the copiers, the banks might have required the defendants to maintain a cash-flow reserve account. See id. In addition to this misrepresentation, the defendants forged their wives’ signatures in the personal guaranties to the banks. See id. They were subsequently convicted for knowingly making a false statement to federally-insured banks. See id.

6 See id.

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Farm Credit Administration, Federal Crop Insurance Corporation or a company the Corporation reinsures, the Secretary of Agriculture acting through the Farmers Home Administration or successor agency, the Rural Development Administration or successor agency, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation . . . shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

8 See Wells, 117 S. Ct. at 924-25.
9 See id. at 925.
10 See id. at 926-27.

was plain and unambiguous, and proscribed “any” false statement that satisfied the other elements of the statute. This is especially so, Justice Souter noted, as “[n]owhere does [the statute] further say that a material fact must be the subject of the false statement or so much as mention materiality.”

The majority’s interpretation of the statute in Wells exposes the need for a closer look at the principles of statutory construction. While the holding in Wells may be correct in that circumstance, the Court’s reading of the statute lacks judicial prudence. Although it is hard to argue that the defendants in Wells were not culpable, even with materiality as an element of the offense, the problem is the Court’s approach to the statutory issue. Because the Court paid more attention to the statute’s text than its overall substance and practicality, Wells reasoning is flawed. More specifically, it shows why jurisprudential wisdom in statutory construction must go beyond the passive decipherment of legislative grammar.

In contrast to the majority’s construction of the statute in Wells, Justice Stevens presented a similar hypothetical to Joe’s situation above to show the fallacy of a hard-nosed adherence to statutory text. The issue is whether courts and legal practitioners ought to pay more attention to jurisprudential absurdity as a symptom of statutory ambiguity. This Article projects that viewpoint - the so-called “golden rule” of statutory construction. Without such an approach, a flattery-mongering loan applicant as hypothetical Joe faces a five-year prison term. But, as Justice Stevens correctly observed in his dissenting opinion in Wells, “the ‘unusual’ nature of trivial statements provides scant justification for reaching the conclusion that Congress intended such peccadillos to constitute a felony.”

11 See id.
12 Id. at 927. Although Justice Souter also reviewed the statute’s history, his interpretation was driven by the text.
13 Even the Court’s discussion of the statute’s legislative history, see id. at 928, is an inadequate attempt at justifying its oversimplification of the statutory text.
14 See Wells, 117 S. Ct. at 938.
15 Id. at 938 (Stevens, J., dissenting).
This debate between the Wells majority and Justice Stevens illustrates the main controversy in statutory construction. While some argue that courts should limit the consideration of a statute to the statute’s text, others advocate the employment of such sources as the statute’s legislative history, purpose, and structure. The Supreme Court itself has not been especially consistent in its approach. This inconsistency buttresses the point that statutory construction is a judicial art, and courts may find it useful to vary their approaches according to the individual circumstances. An adherence to a one-sided approach, therefore, is an uncritical, if not a myopic, exercise.

This Article rejects as incomplete an exercise in construction that relies unwisely on a statute’s text. As illustrated with hypothetical Joe above, and also developed below, this author disagrees with the view that textual plainness is the only barometer for measuring textual ambiguity. To be unambiguous, a statute must be capable of a judicious, intelligible, and not an absurd application. This Article, however, also rejects, as an unnecessary usurpation of legislative authority, the unbounded resort to legislative history, especially where a statute’s meaning is starkly apparent from the text.

The author views statutory construction as a comprehensive act, which requires courts and legal practitioners to employ a combination of those interpretative tools that can render a statute judiciously intelligible. Part II of this article provides necessary background materials with which to understand this argument. Part III examines the common approaches to statutory construction. Part IV presents a case-note example of the Supreme Court’s “passive” approach to construction, with a specific critique of Justice Scalia’s textualism. Part V discusses a better approach to interpretation, using the Court of Appeals of Maryland as an example.

II. BACKGROUND
A. The Case-Law Syndrome

With the dominance of the case-law method in law-school instruction, it is easy for law graduates to underestimate the ubiquity of statutory analysis in legal practice. The case-law method, which is epitomized by the Socratic method, thrives on the premise that students are better taught to think like lawyers by learning how older lawyers and judges have thought before them. This Socratic journey begins usually in the first week of law school, when students are taught the valuable lesson of case-briefing. To succeed in this endeavor, the student must learn to dissect a judicial opinion - to understand who sued whom, who did what to whom, who has what


20 See Steven I. Friedland, How We Teach: A Survey of Teaching Techniques in American Law Schools, 20 Seattle U. L. Rev. 1, 20 (1996). In a survey by Professor Friedland, 46% of sampled law professors said their aim in teaching first-year students was for the students to improve their thinking ability, compared to 15% who said they wanted the students to learn substantive legal doctrine, and 31% who aimed at both objectives. See id.
For those who briefed *Thomas* as a first law-school exercise, little doubt exists that such was a mind-boggling experience. Most laborious was the attempt to demystify the court’s unorganized use of nineteenth-century legalese. Because the opinion is so poorly written, however, it makes an excellent apparatus for introducing new students to the case-law method of instruction. The students are expected not only to disentangle the factual intricacies of the case, but also to follow the court’s muddy analysis. At the week’s end, the amiable Professor Easton hopes to have oriented the students enough for what would permeate their first-year substantive courses - case analysis. As to those students who came to law school to learn “the law,” they must develop a new respect for judicial opinions, and overwrite the impression that law is couched in black and white. They must learn, instead, to use the judge’s oftentimes-flowery language as a blueprint for what may seem like a legal chess game. In Torts, for example, the students must be able to discern the assumption-of-risk theory from Judge Cardozo’s colorful articulation in *Murphy v. Steeplechase Amusement Co.*

From the language in *Murphy*, the Torts student must be able to argue, for instance, that the weak-at-heart who seeks amusement in a *House of Horror* assumes the risk of a heart attack. Or that one who goes on a bumper ride may not later claim damages for injuries from another participant’s bump. With a little creativity, and a proficiency in case-synthesis, the first-year law student becomes a learned analogist. This is the case-law method, whether standing alone or supplemented by the problem-method; law students are taught through casebooks. With judicial opinions like Judge Cardozo’s, Judge Hand’s, or Judge Friendly’s, such an education is intriguing, even though challenging. There are two main drawbacks, however. First, because the case-law method depends on appellate opinions, which present cases already developed and refined by lawyers and judges, it limits the extent to which students develop their originality. Second, and more

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22 6 N.Y. 397(1852): Mr. Thomas, the husband of an ill woman purchased a medicinal extract, believing it to be what the label portrayed. But the manufacturer’s employee mislabeled the bottle; the bottle actually contained a poisonous liquid. Mrs. Thomas drank the liquid and suffered physiological and psychological injuries. Unfortunately for the Thomases, Mr. Thomas did not buy the drug directly from the manufacturer, and New York law at the time required privity of contract for a suit to succeed against a manufacturer. With the case, however, the court changed the law. Winchester had to compensate Mrs. Thomas because the item sold was of a dangerous nature, and posed an imminent danger to unsuspecting customers, who also were more likely to consume the item than was the vendor who bought directly from Winchester. Thus, the genesis of New York’s product liability law ignited.

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25 250 N.Y. 479 (1929):

*Volenti non fit injuria.* One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at the ball game the chance of contact with the ball . . . . *The antics of the clown are not the paces of the cloistered cleric.* The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquillity. The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. *He took the chance of a like fate, with whatever damage to his body might ensue from such a fall.* The timorous may stay at home.

Id. at 482-83 (citations omitted) (emphasis added). The plaintiff in *Murphy* fractured his kneecap when he was thrown backward by “the Flopper,” a ride offered by the defendant to the public in its amusement park. The fun in riding “the Flopper” came from its jerky movement, the riders falling on one another, the screams and laughter. The plaintiff knew that he could fall, yet he got on the ride. *See id.* at 480-81.


25 See Weaver, supra note 21, at 591.
relevant to the discussion here, the case-law method relegates statutory law to the background, and distorts students’ ideas about actual legal practice. Because students become comfortable with approaching legal problems in a casebook fashion, they find it increasingly hard to develop an appreciation for statutory law.26

This mediocre attitude towards statutory law is more so fortified by the absence of courses in statutory construction from law school curriculum.27 Because law schools generally have not stressed the primacy of statutes in their curricula, emphasizing instead the *ratio decedendi* of judicial opinions,28 few students ever get to know or master statutory construction in their law school careers.29 Even where, as might be the case today, many law schools offer courses on legislation,30 these courses are not included in the required curricula.31 Some schools treat statutory construction only in the context of those substantive courses that derive primarily from codified law (tax courses, for example), hoping that interpretative skills would “rob off” on students.32 This approach - called “the pervasive method”33 - is, however, faulty because it attends primarily to substantive issues, not to the legislative process or interpretative principles.34 As Judge Posner noted, a law professor’s expertise in a particular statute is not a substitute for the systematic knowledge required for teaching legislation.35 What is ironic about this gap in law school instruction is that most legal disputes today are likely to concern legislative enactment - statutes, regulations, or ordinances.36 In fact, it would not be farfetched to say that more than fifty percent of cases decided annually by the United States Supreme Court involve statutory interpretation.37 The story is not too different in state courts. For instance, about half of the eighty cases decided between September 15, 1995 and May 17, 1996 by the Court of Appeals of Maryland required the court to interpret a constitutional or statutory provision.38 Yet most lawyers, and even trial judges, are not properly attentive to interpretation issues.39


28 See id.

29 See Richard A. Posner, *Statutory Interpretation - In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983); see also Otto J. Hetzel, *Instilling Legislative Interpretation Skills in the Classroom and the Courtroom*, 48 U. PITT. L. REV. 663 (1987) (arguing that “[r]everence for tradition in law and for our common law roots seems to have exercised a deadhand control in this area, restraining any increase in emphasis in legal education on the study of legislation and its interpretation”).


31 See Hetzel, supra note 29, at 664. The University of Baltimore, for example, offers the course *Legislation* as an upper-level elective course, not as part of its intense and well-respected legal skills program.

32 See id.

33 See *id*.

34 See *id*.

35 See Posner, supra note 29, at 801; see also William N. Eskridge, Jr., & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 691-92 (1987) (noting that, although substantive courses “can teach students a great deal about working with statutes, . . . they do not approach statutes as a systematic topic of inquiry and do not teach general skills of dealing with legislatures and their statutory products”).

36 See Hetzel, supra note 29, at 664.

37 Of the 99 Supreme Court cases sampled by this author from the period between April, 1999 and April, 2000, 51 addressed some form of statutory construction issue.


39 See Hetzel, supra note 29, at 664.
B. What is Statutory Construction?

Statutory construction, according to Professor Eskridge, is “the Cinderella of legal scholarship.”\(^{40}\) For years, it received little, if any, academic attention, despite its first significant root in Aristotelian writings.\(^{41}\) But, because civil obligations have derived much from the existence of codified provisions, statutory construction is at least as old as the quest to understand such obligations.\(^{42}\) As Professor Eskridge further observed, the general applicability of statutory directives has historically depended on how practical such directives are to individuals.\(^{43}\) Even as far back as the Code of Hammurabi in ancient Babylonia, and the Justinian Code of later Roman Empire, law’s legitimacy flowed from how amenable its contents were to interpretation.\(^{44}\) The interpreter’s job, far from being passive and abstract, was an involved and a contextual endeavor, which gave an interpreter the incidental power to dictate the direction of a statutory command.

In today’s society, the judge is that celebrated interpreter, mainly by virtue of a constitutional duty. Statutory construction, therefore, is the judicial attempt to give meaning to a statute, so as to decide whether and how the statute applies to a particular action. This quest for meaning is usually an artistic function,\(^{45}\) whose complexity depends on how ambiguous the statutory language is, and on the angle from which the judge tackles such ambiguity. Even with its various approaches, however, modern statutory interpretation developed from ancient legal hermeneutics, which emphasized a dynamic relationship between the interpreter and the author.\(^{46}\) Therefore, the judge’s approach to statutory construction must express a judicious connection between a statute’s enactment and its application and effects – it must be the judicial placenta between the legislative conception and the constitutional life of a statute.

Although legislative pronouncements have increased in modern times, and despite the distinguished intellectual history of statutory interpretation, American scholars did not become terribly attentive to this area of legal development until the early 1980s.\(^{47}\) Even then, there was no attempt to formulate a coherent system of interpretation that translated into a unique legal discipline.\(^{48}\) Statutory construction, unsettled and unbranded, has been a judicial “Hail-Mary,” with a case-by-case hope that a particular judge would be blessed with the wisdom of biblical

\(^{40}\) William N. Eskridge, Jr., Dynamic Statutory Interpretation 1 (1994).

\(^{41}\) See id. at 1-3.

\(^{42}\) See id. at 1.

\(^{43}\) See id.

\(^{44}\) See id. at 2.

\(^{45}\) See generally Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 527 (1947).

\(^{47}\) See id. at 1-2.

\(^{48}\) See id.
Solomon. To the extent that statutes direct more than they describe, they are skeletal in nature. Even though they could not exist without the “why” of the story they present, they recite only the “who,” “what,” and sometimes the “how,” but seldom express the “why.” They are the legislative expression of present public policy, which may not exist long enough to govern future conduct. Because statutes are the problem-responding announcements of individual policy goals, they differ from case law in the latter’s foundation on a fact-specific, two-party dispute. Statutes have been a part of the American legal and political system for ages. What is relatively foreign to the American polity, however, is the concept of codified law. American law, like its English antecedent, was not cast in a mosaic stone, but was a philosophical product of tentative legislation and judicial experimentation. As it epitomized the Crown’s legitimacy, and also represented an ecclesiastical attempt at equity, the English common law had to be fact-restrained. The law was “commonly” formulated by judges, who ironically were not “common men,” but mainly royal intelligentsia with lukewarm attitudes toward codes. The American law followed this disposition.

Codes, during the formative years of the United States, were unique to civil law regimes, such as the French and German systems. While the French and German political environments were ripe for codified law, the American experience counseled a reliance on the English common-law system. The French Code Napoléon, for example, resulted from the French revolution against the l’ancien régime. Moreover, pre-revolution French law

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49 The approach employed is akin to the last-minute attempt by a losing quarterback in a football game to salvage the game by throwing the ball to the end-zone, without regards to the relative positions of the players, hoping that one of his teammates would catch the ball and score a touchdown - what is commonly referred to as a “Hail-Mary” pass.

50 See supra note 46 and accompanying text.

51 ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 2 (1997).

52 Id. at 1 (emphasis added).
actually drew from various Roman codes.\textsuperscript{58} The American legal revolution, in contrast, did not disband the common-law system.\textsuperscript{59} American patriots, unlike the French, were not dissatisfied with the law as it existed in colonial times.\textsuperscript{60} They were aggrieved, instead, by the Crown’s obstruction of justice as in the subjugation of the judge’s independence.\textsuperscript{61} They sought, therefore, to discontinue the whimsical application of the existing law, not to replace the law with civil codes.\textsuperscript{62}

The American codification movement, as a result, was not ignited until the nineteenth century when Jeremy Bentham passionately advocated for importing the European civil codes.\textsuperscript{63} This movement derived essentially from the democratic exigency in making the law more accessible to those it sought to control.\textsuperscript{64} Before then, the country had consistently rebuffed various calls to enshrine a code system.\textsuperscript{65} Even Bentham’s two letters to President Madison in 1811 did not persuade the President to commission a federal codification taskforce.\textsuperscript{66} But, as it became increasingly difficult for the average citizen to know what the legal obligations were, attitudes towards codification began to change.\textsuperscript{67} The potential for political instability coming from the lawlessness that could result from the inaccessibility and uncertainty of the law prompted the nineteenth-century surge to codify the law.\textsuperscript{68}

The above is important in discussing how the U.S. law, even in today’s codified format, differs fundamentally from European codes. Any viable system of statutory construction must be informed by these historical differences. To appreciate also why American codes require a different interpretative approach from European codes, it is paramount to acquaint oneself with the fundamental distinction between codes and statutes, and with how one code system differs from another. The common-law lawyer may find it hard to grasp this distinction, especially as codes and statutes are used interchangeably. But, while a statute is the actual law, a code is the form in which the law exists. A code is the systemic communication of the law - the evidence of the law. It is different from statutes in that statutes are mere legislative proclamations by the legislature. In the case of the U.S. federal statute, for example, they are usually the acts of Congress signed by the President. Because American codes began as a way of putting the average citizen on notice,\textsuperscript{69} they are not codes in the actual philosophical sense. They are codes of publication convenience - they are not “substantive,” but “formal,” codes.\textsuperscript{70}

A formal code does not begin with the original attempt at philosophically formulating a coherent body of law.\textsuperscript{71}

\begin{flushleft}
\textsuperscript{58} See id. at 71.  \\
\textsuperscript{59} See id. at 3.  \\
\textsuperscript{60} See id. at 4.  \\
\textsuperscript{61} See id.  \\
\textsuperscript{62} See id.  \\
\textsuperscript{63} See id.  \\
\textsuperscript{64} See id. at 69-92. The greater part of the problem comes from the law being scattered in various locations. There was, of course, no organized system of legal publication, as in today’s official and national reporter systems. Even congressional acts were mostly in leaflets, and it was a cherished privilege to own copies. See generally id.  \\
\textsuperscript{65} See id.  \\
\textsuperscript{66} See Sanford H. Kadish, Codifiers of the Criminal Law: Wechsler’s Predecessors, 78 COL. L. REV. 1098, 1099 (1978). Bentham’s argument fared better with such states as Louisiana, the Dakota territory, California, Georgia, New York, Montana and Alabama, although not equally. See id.; see also Andrew P. Morriss, “This State Will Soon Have Plenty of Laws” - Lessons From One Hundred Years of Codification in Montana, 56 MONT. L. REV. 359 (1995); Lewis Grossman, Codification and the California Mentality, 45 HASTINGS L.J. 617 (1994).  \\
\textsuperscript{67} See Cook, supra note 56, at 12-18.  \\
\textsuperscript{68} See id.  \\
\textsuperscript{69} See id.  \\
\textsuperscript{70} See generally Jean Louis Bergel, Principal Features and Methods of Codification, 48 LA. L. REV. 1073 (1988).  \\
\textsuperscript{71} See id. at 1088.
\end{flushleft}
It does not involve any creative social engineering that is geared towards the normative comprehension of an ideal social order. It is, instead:

[A]n administrative undertaking aimed only at grouping together preexisting and scattered rules without modifying their content. It is nothing but a compilation for the purpose of facilitating, through their gathering, the knowledge of numerous rules, from varied and scattered sources. In other words, it is a purely formal gathering and unification of texts.\(^ 72\)

The important point here is that U.S. codes, as products of formal codification, do not present a syllogistic framework for future development.\(^ 73\) As “statute codes,”\(^ 74\) they lack rules of interpretation.\(^ 75\) They are after-the-fact compilations of mere statutory recitations,\(^ 76\) and do not comprehend those general principles that allow for a deductive application, as is the case with civil codes.\(^ 77\) Because they contain problem-responding enactment, formal codes rank experience over doctrinal logic.\(^ 78\) This is in line with the common law’s traditional caution against “freezing” the law in ancient philosophy.\(^ 79\) As a result, although common law codes are easy to update, they present a special problem for the interpreter because they are easily outdated by social change.\(^ 80\)

In contrast to common-law formal codification, substantive codification, as in civil codes, “consists of devising and shaping a coherent body of new or renovated rules within a whole aimed at instituting or reviewing a legal order,” and “presupposes a rather elaborate clear, precise and definite written law . . .”\(^ 81\) Consider the following elaboration:

A [substantive] code stems from the will of its authors to consecrate a doctrine and to translate a specific inspiration into positive law. Even though the innovative forces vary according to the circumstances, a true codification aims at instituting a coherent body of new or renewed legal rules destined to either establish a new order or to restore the preexisting order. It occurs only after a thorough research, a general reflection, and a creative effort through which choices have been made, guidelines laid down and, lastly, decisions taken. Thus, in France, the 1804 Civil Code was based on fundamental ideas which were quite new at the time: the uniformity of the law throughout the whole territory; the acknowledgement of legislation as the only real source of law; the comprehensiveness of the law regulating all social relations; the separation of law from morals, religion, and politics.\(^ 82\)

Ideally, the drafting of substantive codes begins with the philosophical writings of a celebrated jurist or a group

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\(^{72}\) Id. at 1089 (citations omitted).

\(^{73}\) See id. at 1092.


\(^{75}\) See Bergel, supra note 70, at 1092.

\(^{76}\) As Bergel notes, see id., this is done usually by grouping the law in an alphabetical order according to the subject-matters. See, for example, the Maryland Code, beginning with the Agriculture Article, and ending with the Transportation Article.

\(^{77}\) See Bergel, supra note 70, at 1090.

\(^{78}\) See id.

\(^{79}\) See id.

\(^{80}\) See id. at 1092. Because “statute codes” are easy to update does not mean that they routinely have been updated. Legislative politics may present a greater obstacle to a statute’s revision than its original enactment, especially given congressional schedules.

\(^{81}\) Id. at 1077-78.

\(^{82}\) Id. at 1078.
of eminent jurists, who the legislature may entrust to transform those writings into codes, or whose writings may begin as a specific commission by the legislature to draft the codes. As described in the quoted passage above, substantive codification strives to create a long-lasting framework and direction of the law. The focus usually is on uniformity and stability, as the codes are written with such a prospective vigor as to go beyond a simple, cyclical legislation. Regardless of what they are called - "complete comprehensive," "institutional comprehensive," "fully comprehensive," or "field comprehensive" - substantive codes are not mere compilations of individual statutes, but legislatively adopted statements of durable legal doctrines. They present "organized system[s] of general rules which will be easy to discover so that from these rules, through an easy process, judges and citizens may deduce the manner in which this or that practical difficulty must be solved." Unlike American "statute codes," they are not the spontaneous results of legislative politics, but, instead, embody a systematic conception of a coherent judicial philosophy. Thus, from a stated general principle, the interpreter of such a code can, through logical reasoning, deduce the solution to any given problem; there really is little need to consult the legislature for answers to interpretation questions. This is because the code should be "broad enough to be able to regulate various real situations." While the advantages of this system are numerous, it may be criticized as retarding law’s evolution and progress, especially in a system where the judge must contribute actively to law’s development. Hence, they should not be subjected to the same rules of interpretation that govern common-law statutes-codes.

III. NOTABLE APPROACHES TO STATUTORY CONSTRUCTION

Whatever differences exist among modern theories of statutory construction may relate especially to disagreements about (1) the judge’s function in American constitutional democracy, and (2) how the judge can perform that function without trampling the separation-of-powers doctrine. These disagreements, however, are overexaggerated, and may turn out to be merely a subtle projection of individual ideological bearings, which does not really translate into a patent homage to the Constitution. Although these approaches have certain similarities in their premises, and may even share a blurry aspiration to an otherwise unitary goal, three main theoretical camps can be distinguished: purposivism, intentionalism, and textualism.

A. Purposivism

Commonly associated with Henry Hart and Albert Sacks, this theoretical approach is premised on the idea that a statute’s proper interpretation cannot emerge without

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83 See id. Professor Bergel gives the following examples: Switzerland’s civil code that was drafted by E. Huber; France’s new family law coming from Dean J. Carbonnier’s writing; and the Napoleonic Code drafted by a commission of jurists. See id.

84 See id.

85 See id. at 1079.

86 See Donald, supra note 74, at 164-65.

87 See id. at 165-68.


89 See id. at 1129-31.

90 See T. Huc, Commentaire et pratique du code civil 37 (1892), quoted in Bergel, supra note 70, at 1080.

91 See id. at 1083.

92 See id. at 1079.
a close attention to the statute’s purpose.93 Because, in the legal-process tradition of Hart and Sacks, a statute culminates from the legislative purpose of addressing a particular problem, any reasonable attempt at discerning the statute’s meaning must include an understanding of that purpose.94 Where the statute’s literal interpretation would lead to absurd results, therefore, the statute must be interpreted in a manner consistent with the particular purpose.95 Consider the following example.

A statutory provision commands that “[c]orporations . . . organized and operated for religious, charitable . . . or educational purposes” may not be required to pay taxes.96 A certain University, which obviously is organized and operated for “educational purposes,” but does not consider African-American applicants for admission into its program, applies to the Internal Revenue Service (IRS) for a tax-exempt status based on the provision above. The IRS denies the request, citing the University’s discriminatory policy. The University appeals this determination to the federal court, relying on the statutory text. It argues that a literal interpretation of the text warrants it a tax-exempt status. This argument is forceful. There is nothing in the text that requires that, to deserve a tax-exempt status, the University must be nondiscriminatory in its organization and operation. To follow the statute’s text sheeplishly, however, would mean a governmental support of discrimination - an absurd, if not an unconstitutional, result. Hence, to the purposivists, the court must avoid such absurdity, and must, therefore, consult the purpose and policy behind the statutory section. This was precisely what the Supreme Court did in Bob Jones University v. United States.97

In that case, the Court disregarded the literal language of § 501(c)(3) of the Internal Revenue Code for the purposivist view that “underlying all relevant parts of the Code is the intent that entitlement to tax exemption depends on meeting certain common law standards of charity - namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy [against discrimination].”98 The Court found that the legislative purpose of § 501(c)(3) was “to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose . . . .”99 It noted that “[t]ax exemptions for certain institutions thought beneficial to the social order of the country as a whole . . . are deeply rooted in our history . . . .”100 A discriminatory organization, it follows, goes against such purpose.

The purposivist approach is based, of course, on the necessary assumption that the statutory interpreter can

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93 Professors Hart and Sacks, relying on Max Radin’s legal realism, had formulated two principal assumptions about legislation. They argued, first, that every statute has some form of purpose or objective and, second, that legislation involved an informed, deliberative and efficient process which governs the legislative quest for the particular purposive law. See generally HENRY HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1958); see also ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 62 (1962) (discussing the importance of purpose in statutory construction); LON L. FULLER, THE LAW IN QUEST OF ITSSELF (1940) (formulating the theory that law is a function of societal purpose); LON L. FULLER, POSITIVISM AND FAITH TO LAW, 71 HARV. L. REV. 630, 667 (1958) (arguing that statutory interpretation should be focused on a statute’s purpose and structure, not its words); MAX RADIN, STATUTORY INTERPRETATION, 43 HARV. L. REV. 863 (1930) (denouncing legislative intent in favor of a legislative purpose as a tool of statutory interpretation). Cf. Frankfurter, supra note 45, at 528 (observing that statutes are the practical media of communicating governmental purposes).

94 See supra note 93 and accompanying text.

95 See supra note 93 and accompanying text. This point is properly captured by the Court’s language in Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892) (emphasis added): “It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.”


97 461 U.S. 574 (1983). The factual narration in the text is a simplified version of the facts in Bob Jones. See id. at 577-83.

98 Id. at 586.

99 Id. at 588.

100 Id. (emphasis added).
readily discern the purpose of every statute. This assumption is indeed correct to some extent. Some statutes may actually contain purpose-sections - sections announcing the purposes of the statutes. In those circumstances, the judge’s job becomes a bit less complicated. But the job is not altogether easy, because a statute may contain more than one purpose in its text.

101 See Hart & Sacks, supra note 93, at 1156; see also Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be construed, 3 Vand. L. Rev. 395, 400-402 (1950).

102 See, e.g., 29 U.S.C. § 651(1999) (declaring the purpose of the Occupational Safety & Health Act (OSHA)):

   Congressional statement of findings and declaration of purpose and policy
   (a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.
   (b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—


104 See infra Part III (D).


The difficult aspect is deciding which purpose applies to the presenting situation. In that case, the purposivist approach is a much more complicated endeavor, as the search for the particular statute’s purpose may even be more confusing than the ambiguous text. For, where the statute’s purpose is not codified, the judge must sift legislative records to decide on a purpose - a job that may be akin to chasing a moving target. It is mainly for this reason - the use of legislative history - that opponents of purposivism criticize the method. But, although such criticisms continue to intensify, purposivism remains a common approach to statutory construction.

B. Intentionalism

Like the purposivist approach, intentionalism thrives on the use of legislative history, and also seeks to readily go beyond a literal interpretation of statutory text to answer the absurdity question. The basic notion of intentionalism is that an exercise in statutory construction must revolve around the legislative intent of a statute. The interpreter asks: what was the intent of the legislator in drafting the particular statutory provision - “what were the drafters thinking and why were they thinking this rather than something else when they wrote the text?”

30.2 U. Balt L.F. 16
Legislative intent should not be confused with legislative purpose, even though attempts to differentiate the two concepts may indeed be laborious.108 One can distinguish the concepts by looking closely at the questions implicated. While “purpose” asks the “why” question, “intent” goes more to the “how” and “what.” As to purpose, the interpreter asks why the legislators enacted a particular statute - the general goal of the statute. For intent, the issue is how the legislators intended to use a particular provision to achieve the statutory goal (or purpose). One asks: How did the legislators mean to apply the provision? What did they intend to communicate or achieve when they used such and such words? Did they intend the particular result to which the court’s interpretation leads? “Intent,” thus, reveals more of the text’s intended meaning, and “purpose” is simply the broad goal of the statute.

As Professors Eskridge and Frickey noted, there are at least three variants of intentionalism - three kinds of intent that the statutory interpreter may seek: actual intent; conventional intent; and imaginatively reconstructed intent.109 As to actual intent, the statutory interpreter seeks to understand what all of the enacting legislators actually intended by the provision.110 This is not an easy task, especially bearing in mind the number of legislators involved in the formulation of such intent.111 Thus, the interpreter may rely on conventional intent. Conventional intent can be gleaned from the statements of those who worked closely with the statute throughout its enactment - the legislation’s sponsors and floor managers, for instance.112 This may be done through such legislative records as committee reports and records of floor debates.113 This is a “de facto representative intent” in the sense that the intent of few legislators is imputed to the whole legislature. The third variant of intentionalism - Judge Posner’s imaginative reconstruction - presents a two-part analysis.114 First, the interpreting judge tries to “put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him.”115 If this inquiry is fruitless, “the judge must [then] decide what attribution of meaning to the statute will yield the most reasonable result . . . .”, bearing in mind “it is [the legislators’] conception of reasonableness, to the extent known, rather than the judge’s, that should guide the decision.”116 Notwithstanding the variant of intentionalism employed, the idea is that the judge must act “as the enacting legislature’s faithful servant, discovering and applying the legislature’s original intent.”117 This indeed is the most commonly employed of the approaches to interpretation.118

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108 In fact, courts have variously employed the words in a confusing manner, sometimes, using them interchangeably. See, e.g., Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (emphasis added) (“But even assuming the correctness of the Court of Appeals’ implicit premise—that a legislative purpose to interfere with the constitutionally protected right to abortion without the effect of interfering with that right . . . could render the Montana law invalid—there is no basis for finding a vitiating legislative purpose here. We do not assume unconstitutional legislative intent even when statutes produce harmful results . . . .”); Leavitt v. Jane, 518 U.S. 137, 143 (1996) (emphasis added) (“Every legislature that adopts, in a single enactment, provision A plus provision B intends (A+B); and that enactment, which reads (A+B), is invariably a ‘unified expression of that intent,’ so that taking away A from (A+B), leaving only B, will invariably ‘clearly undermine the legislative purpose’ to enact (A+B). But the fallacy in applying this reasoning to the severability question is that it is not the severing that will take away A from (A+B) and thus foil the legislature’s intent.”).

109 See Eskridge & Frickey, supra note 17, at 325-32.

110 See id. at 326.

111 See Radin, supra note 93, at 869-70 (observing that legislative intent could not be the intent of all the legislators voting for the statute).

112 See Eskridge & Frickey, supra note 17, at 327.

113 See Landis, supra note 106, at 888-89 (discussing the values of legislative records in discerning legislative intent).


116 Id. at 287. This approach can be summarized thus: the first issue relates to what the legislators would have wanted, and the second is what they would have found reasonable or acceptable. Notice that these questions are related on a continuum.

117 Eskridge & Frickey, supra note 17, at 325.

118 See id.
C. Textualism

Unlike both purposivism and intentionalism, textualism denounces the use of legislative history. To the textualists, statutory interpretation must not involve the quest for legislative purpose and intent through legislative records. Instead, the proper aim is to understand “the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris.”

Intent and purpose, according to textualists, are objectified by statutory text, not discoverable from legislative history. Even where the text leads to absurd results, and the judge must search for understanding outside the particular provision, the judge should look only to the structure of the statute, interpretations of similar provisions, and canons of statutory construction. The judge should also use these aids if the desire is merely to confirm the literal interpretation of a text.

The textualist approach derives indeed from those scholars who, influenced by public-choice theory (and law and economics jurisprudence), strongly reject the purposivist and intentionalist reliance on legislative history. There are two main versions of textualism.

There is the stricter version, which depends solely on the text as the supreme source of meaning. Relying on this version, “[w]e do not inquire what the legislature meant; we ask only what the statute mean.” This method begins and ends with the literal interpretation of the text, paying no attention to legislative intent. Thus, if a statute states that “no one shall drive less than fifty miles per hour on Interstate 95, between Richmond, Virginia and Baltimore, Maryland,” the strict textualist would not care if Senior Citizen Smith drives thirty-five miles per hour because of bad eyesight or inclement weather. She would neither inquire whether the legislature intended the law to apply with the same vigor at all times, nor consider the fact that the legislature’s purpose in enacting the law was to curb “joy-riding” on the freeway. The second variant of textualism is, however, “less ambitious.” It relies on a statute’s text not as a replacement but as evidence of the statute’s legislative intent or purpose. Following this scheme, “[t]here is no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression of its wishes.”

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120 See id.


122 The public-choice theory rejects Hart and Sacks’s view that legislators are rational people striving to enact purposive laws for public benefit. See Philip P. Frickey, From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation, 77 MINN. L. REV. 241, 250 (1992). Relying on public-choice postulates, law and economics scholars argue that statutes represent broad interest-group purposes in the form of legislative compromises. See id. Thus, statutory construction must be restrained to the codified evidence of these legislative compromises - the statutory text; any attempt to look for a broader purpose outside the text would lead to a deviation from what actually made it through the legislative process. See id.

123 See Eskridge & Frickey, supra note 17, at 340.

124 See id.

125 Id. (quoting Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 HARV. L. REV. 417, 419 (1899), reprinted in OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 203, 207 (1920)).

126 See id.

127 Id.

128 See id. at 341.

129 Id. (quoting United States v. American Trucking Ass’ns., 310 U.S. 534, 543 (1940)).
The basic textualist arguments above are the basis of today’s prominent and highly reinvigorated textualism - what Professor Eskridge calls The New Textualism.130 In the new textualists’ view, the judge’s interpretative scheme must be confined to the four corners of a statute, because “[i]f the question of a statute’s domain may not often be resolved by reference to actual design, it may never properly be resolved by reference to imputed design.”131 Statutory provisions, hence, must be interpreted on the basis of ordinary (as opposed to legislative) context and word-usage, and consistent with the whole body of law within which the provision fits.132 The notoriety of this textualist brand followed Justice Scalia’s ascension to, first, the Court of Appeals for the District of Columbia, and, second, the United States Supreme Court.133 His vigor in projecting a textualist approach to interpretation is premised on his dissatisfaction with both the purposivist and intentionalist methods.134

**D. The Theoretical Battle About Legislative History**

The philosophical war among the purposivists, intentionalists, and textualists is actually an academic battle over the use of legislative history in statutory construction.135 Between the purposivists and intentionalists, the battle concerns what the interpreter should seek in legislative history - purpose or intent.136 The dispute between the purposivists and intentionalists on one hand and the textualists on the other stems from the latter’s general disdain for any reliance on legislative history.137 The arguments for and against these three camps are well stated. Beginning with purposivism, the problematic nature of a successful quest for legislative purpose, especially through legislative history, negates any sole reliance on this method. This is because, for the most part, legislative purpose may be neither rational nor unitary. A statute’s purpose may be as reasonable as a lobbyist’s desires, or as divisive as the ideological or political camps of legislators. While, for example, Congress may sometimes aspire to a unitary goal, it is no gainsaying that it may also produce 535 individual goals that might be difficult to coordinate.138 As noted by one commentator, “[y]ou couldn’t [even] get two-thirds of [] Congress to vote for the Ten Commandments.”139 “Thus, Congress may not in fact produce purposive statutes;140 “[t]he complex compromises endemic in the political process suggest that legislation is frequently a congeries of different and sometimes conflicting purposes.”141 This makes a statutory

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130 See Eskridge, supra note 121, at 623. Professor Eskridge uses the word New Textualism to describe the new and modified wave of the old plain-meaning method. See id. at 623. Contrasted with the new textualism, the old plain-meaning rule requires the interpreter to begin a statutory analysis with the statute’s text, and to seek legislative history only when the text is not plain. See id. at 626. Justice Antonin Scalia and Judge Frank Easterbrook are two of the most notable new textualists. See generally Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849 (1989) [hereinafter, Scalia, Originalism]; Easterbrook, Domains, supra note 16; Frank Easterbrook, The Role of Original Intent in Statutory Construction, 11 HARV. J.L. & PUB. POL’Y 59 (1988) [hereinafter, Easterbrook, Original Intent]; Frank Easterbrook, Textualism and the Dead Hand, 66 GEO. WASH. L. REV. 1119 (1998) [hereinafter, Easterbrook, Textualism]; Scalia, Common-law Courts, supra note 119; Scalia, Rules, supra note 16.

131 Easterbrook, Domains, supra note 16, at 537, 544.


133 See id. at 651.


136 See generally Radin, supra note 93.

137 See generally Scalia, Common-law Courts, supra note 119.

138 See JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND POLICIES 34 (2d ed. 1995).

139 See id. (internal quotation marks omitted) (reporting the comment of one interviewee in the author’s survey).

140 See Eskridge & Frickey, supra note 17, at 334.

141 See id. at 335.
More challenging than the search for legislative purpose, however, is the search for intent. The subjective nature of intent, and the multiplicity of congressional intent, makes it problematic for even a veteran statutory interpreter to succeed in its extrication. While the intent of some legislators in including a particular provision in a statute may be that they actually believed in the provision, other legislators may have simply decided to avoid a filibuster. Therefore, as Professors Eskridge and Frickey noted, any reliance on actual or conventional search for a provision’s legislative intent may lead to indeterminate results. Judge Posner’s imaginative reconstruction is similarly flawed. Its assumption that the judge could reconstruct the past understanding of a prior legislature does not account for the individual biases that may infiltrate the judge’s view of that history. Additionally, the method neglects any social change that may have taken place subsequent to the statute’s enactment, as to devalue the particular legislature’s previous understanding. In all, such imaginative reconstruction, with a noisy ring of subjectivity, works little or no trick to change what is actually a mere record of political quibbles into a judicious approach to construction.

The textualists’ qualms with purposivism and intentionalism do not end with the points above. Instead, they vigorously project the disregard for legislative history. To be sure, they rely adamantly on a statute in question, even for a context. They search through a statute’s structure and through other similar statutes for the statute’s legislative intent. A reliance on legislative history, according them, gives judges an unlimited power to manipulate a statute. For, “under the guise or even delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their proclivities from the common law to the statutory field.”

To the textualists, such judicial activism is unconstitutional and must not be encouraged through the acceptance of legislative history as an interpretative tool. But, as noted earlier, and would be argued further below, this criticism is myopic. It overlooks the nature of American codes, which sometimes require the judge to view beyond the text of a statute. It also ignores the fact that the enforcement of a legislative mandate is more probable with an understanding of the process of formulating that mandate, than with an academic reliance on the uniformity of grammatical rules. In fact, to dismiss legislative intent or purpose is tantamount to giving judges the latitude to engage unconstitutionally in judicial legislation. This is especially so as any intent garnered from an attenuated text (because a statutory text becomes attenuated if unclear) negates the respect for legislative supremacy. After all, if the legislators had expressed their intent clearly through the text, it is unlikely that both the lawyers and the trial judge would miss it. Otherwise, the intent is not that clear, but is what an individual judge infers.

The textualist argument against judicial activism is flawed primarily because of an erroneous definition, and a misplaced demonization, of such activism. Judicial activism, to the textualists, occurs when the judge discards the statutory text and relies on legislative history to arrive at a preferred result. This, indeed, borders on a violation of the judge’s oath of office. Judicial activism, contrary to the textualists’ definition, is actually a judge’s attempt to balance justice with the respect for legislative supremacy.


143 See Eskridge & Frickey, supra note 17, at 328.

144 See id. at 330.

145 See id. at 330-31.

146 See Easterbrook, Domains, supra note 16, at 544-46. See generally Eskridge, supra note 121, at 655.

147 See id.


149 Id.

150 See id.

151 See id.

152 See infra Part IV.
Passivity in statutory interpretation - what I call judicial zombism - is foreign to the American common-law root, and disharmonious with the institutional notion of justice. Judicial stewardship must not be a passive participation in constitutional democracy. Textualism is simply judicial passivity, akin to ignoring the distress calls of a crime victim upon the robotic view that you are not a police officer. These issues will now be explored in detail.

IV. JUDICIAL PASSIVITY
A. Brogan v. United States:153 A Case-note of Judicial Passivity

A classic example of judicial passivity is the Supreme Court’s modern construction of the False Statements Accountability Act.154 In Brogan, the Court construed §1001 of the Act as proscribing the denial of an accusation by federal agents that one has obtained a bribe, even where

154 18 U.S.C. § 1001 (2000). Section 1001(a) currently states:

Whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
(2) makes any materially false, fictitious, or fraudulent statement or representation; or
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both.”

First enacted in 1863, the predecessor to § 1001 was intended to curb fraudulent claims with government agencies. See Brogan, 118 S. Ct. at 813. In 1934, Congress broadened the statute to include its present language, which goes beyond claims or statements that are made to defraud the government. See id. As a result of this expansion by Congress, the government has used the statute to prosecute a wide range of defendants. See id.

Federal prosecutors have typically relied on § 1001 to bring charges against individuals for any false statements to federal agents. See generally Tim A. Thomas, Annotation, What Statements Fall Within Exculpatory Denial Exception to Prohibition, Under 18 U.S.C.A. § 1001, Against Knowing and Willfully Making False Statement Which is Material to Matter Within Jurisdiction of Department or Agency of United States, 102 A.L.R. Fed. 742 (1991). The statute, even in its current text, does not seem to distinguish voluntary from responsive false statements. See 18 U.S.C. § 1001(a)(2) (2000). Accordingly, courts have applied it to both situations. See Thomas, supra, at 742. Moreover, in contrast to the 1893 Act that applied to only filed false claims, the broad language of § 1001 does not differentiate between verbal and written statements. See id. Thus, courts tended to apply it to both types of statements.

The Supreme Court first examined the scope of § 1001 (formerly, 18 U.S.C. § 80) in United States v. Gilliland 312 U.S. 86 (1941). Gilliland involved several defendants who willfully and fraudulently reported inaccurate amounts of petroleum produced from certain oil wells. See id. at 87. The Court rejected the argument that § 1001 applied to only those matters in which the government had a financial or proprietary interest. See id. at 93. The court, tracing the legislative history of the statute, noted that the statute resulted from Congress’s answer to the call by the Interior Secretary as to the serious problem of fraudulent claims, particularly in the 1934 era. However, Congress later broadened the statute to include all false statements made to government agents. See id. Instead, the Court observed that the statute was intended to “protect the authorized functions of governmental departments and agencies from perversion which might result from . . . deceptive practices.” Id.

Subsequent to Gilliland, prosecutions under § 1001 broadened in scope. See Giles A. Birch, Comment, False Statements to Federal Agents: Induced Lies and the Exculpatory No, 57 U. Chi. L. Rev. 1273 (1990) (arguing that courts should dismiss § 1001 charges if agents induce lies from suspects). In 1953, federal prosecutors brought, for the first time, § 1001 charges against a defendant for merely lying to federal agents in the course of an investigation. See United States v. Levin, 133 F. Supp. 88 (D. Colo. 1953). In Levin, the defendant was convicted for lying to FBI agents in the course of investigating the defendant for a stolen emerald ring. See id. After Levin, several defendants were prosecuted for lying to federal agents. See Birch, id. at 1276. These prosecutions subsequently extended to mere denials of wrongdoing. See id.

As a result of the potential for abuse and injustice, many federal judges were troubled by how broadly § 1001 was applied. See id. at 1279. This was especially so as § 1001 prosecutions raised two serious issues: departure from the original intent of the statute, and the near violation of the Fifth Amendment. See id. Thus, in 1962, the United States Court of Appeals for the Fifth Circuit, in Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962), formulated the “exculpatory no” doctrine. See Birch, id. at 1280. The doctrine became a defense to § 1001 charges, excusing the mere false denial of wrongdoing. See generally Paternostro,
the Government has not yet proven such a crime.\textsuperscript{155} The
Court ruled that § 1001 did not exclude a mere denial of
wrongdoing.\textsuperscript{156} The Court rejected the “exculpatory no”
doctrine as not within the text of § 1001.\textsuperscript{157} In so holding,
the Court overruled those past decisions embracing the
“exculpatory no” doctrine.\textsuperscript{158}

By abrogating the “exculpatory no” doctrine as a
defense to § 1001 charges, the Court has undone more
than forty years of restricting the broad language of the
statute.\textsuperscript{159} The Court’s decision hence refurbishes the
problems that prompted the “exculpatory no” doctrine.
Without any limitations on its reach, § 1001 presents two-
layered chances for prosecuting the unwary suspect.\textsuperscript{160}
To assure a conviction, federal investigators could simply
engineer a mere denial of wrongdoing that may very well
derive from a suspect’s fear of self-incrimination. As noted
by one commentator, “the authority to force suspects to
admit their guilt either by words or silence, is an unusual
power in the hands of an investigative agent.”\textsuperscript{161} This is an
absurdity, and the potential for prosecutorial abuse is
enormous. Equally striking is the court’s belated loss of
confidence in its earlier acquiescence in the “exculpatory
no” doctrine. Although the Court has had ample
opportunities to abolish the “exculpatory no” doctrine,\textsuperscript{162}
it waited more than forty years to do so.\textsuperscript{163} The Court’s
ruling raises several questions regarding approaches to
statutory construction.

Justice Scalia did not see any need to deviate from
what he interpreted as Congress’s command through the
text of § 1001.\textsuperscript{164} According to Justice Scalia, the text, as
applied to Brogan’s situation, was unambiguous.\textsuperscript{165} It
categorically proscribed giving “\textit{any} false statement of
whatever kind” to a federal investigator.\textsuperscript{166} In falsely
answering “no” to the agents’ question, in Justice Scalia’s
view, Brogan made a false statement within the purview
of § 1001.\textsuperscript{167} Whether that statement amounted to a mere
denial of wrongdoing was irrelevant. This was because
there was nothing in § 1001 that excused a mere denial of

\textsuperscript{155} See Brogan, 118 S.Ct. at 807. Brogan was convicted for lying to
federal agents from the Department of Labor and the Internal
Revenue Service. \textit{See id.} He was an officer of a union that
represented workers of JRD Management Corporation in New
York (“JRD”). \textit{See id.} He was alleged to have collected some
cash or gifts (bribe) from JRD. \textit{See id.} Federal agents went to his
home to question him about the bribe. \textit{See id.} While there, they
asked him if he received cash from JRD. He replied “no.” \textit{See id.}
Unknown to him, the agents had, before going to his home,
obtained some records showing that he received the money in
question. \textit{See id.} Hence, after he denied receiving the money, the
agents produced the records, and advised him that it was a federal
offense to lie to agents. \textit{See id.} at 808. Brogan was subsequently
charged and convicted under the False Statement Act in the United
States District Court for the Southern District of New York. \textit{See id.}
The United States Court of Appeals for the Second Circuit
affirmed Brogan’s conviction. \textit{See id.} The Supreme Court granted
certiorari. \textit{See id.} The Court, Justice Scalia writing, affirmed
Brogan’s conviction. \textit{See id.}

\textsuperscript{156} See Brogan, 118 S.Ct. at 809.

\textsuperscript{157} See \textit{id.}

\textsuperscript{158} See, e.g., Moser v. United States, 18 F.3d 469 (7th Cir. 1994);
United States v. Taylor, 907 F.2d 801 (8th Cir. 1990); United States
v. Equihua-Juarez, 851 F.2d 1222 (9th Cir. 1988).

\textsuperscript{159} See Birch, \textit{supra} note 153, at 1277.

\textsuperscript{160} \textit{See id.}

\textsuperscript{161} \textit{See id.} at 1287.

\textsuperscript{162} \textit{See id.}

\textsuperscript{163} Particularly notable is the fact that the Court’s decision comes
four years after the Fifth Circuit, which originated the “exculpatory
no” doctrine, rejected the doctrine. \textit{See United States v. Rodriguez-
Rios, 14 F.3d 1040 (5th Cir. 1994).}

\textsuperscript{164} \textit{See Brogan, 118 S. Ct. at 809.}

\textsuperscript{165} \textit{See id.} at 808.

\textsuperscript{166} \textit{See id.}

\textsuperscript{167} \textit{See id.} at 809.
wrongdoing. Thus, the “exculpatory no” doctrine departed from the statute’s text. Again, relying on the text, Justice Scalia also rejected the contention that § 1001 was meant to punish only those statements that perverted governmental functions.

Justice Scalia’s analysis is consistent with the textualist approach to statutory construction. As a professed textualist, he would not “restrict the unqualified language of [§ 1001] to the particular evil that Congress was trying to remedy.” To do so, would “render democratically adopted texts mere springboards for judicial lawmaking.” This position reiterates his view that the Court ought to interpret the law as Congress enacted it.

The argument above is forceful. There is nothing illogical about assuming that a statute means what its text conveys. One should ordinarily have faith in the legislature to draft clear and unambiguous law. A statute’s meaning should naturally come from its text. Section 1001 seems clear from its text. The meaning that Justice Scalia ascribes to it is reasonable. When closely examined, however, Justice Scalia’s reading is not the only reasonable reading of § 1001. Despite what the textualists may think, congressional grammar is not as perfect as one would anticipate. Although it is a good idea to follow Justice Scalia’s advice and apply the meaning that “a wise and intelligent person” ascribes to § 1001, judges possess different levels of wisdom and intelligence. As such, the textualist approach becomes “as open to arbitrary judicial discretion and expansion as the use of legislative intent, or other interpretive methods, if the text-minded judge is so inclined.”

A text is amenable to different interpretations, and, thus, manipulable. The Court’s decision in Hubbard v. United States buttresses this point. In Hubbard, an opinion in which Justice Scalia concurred, the Court reversed how it originally interpreted § 1001 in United States v. Bramblett. The issue in Bramblett was the meanings of “department” and “agency” in § 1001. The Bramblett Court concluded that these words meant all branches of the government. Forty years later, the Court was not so sure. Although nothing about these words in § 1001 changed to show them in a different light, the Hubbard Court ruled that “department,” as used in this section, excluded the judiciary. Thus, the Court recognized the “judicial function” exception to § 1001.

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168 See id.
169 See id.
170 See id.
171 Id.
172 See Scalia, Common-law Courts, supra note 119, at 17.
173 See id.; see also supra Part III.
174 See id.
175 See id.
176 See Brogan, 118 S.Ct. at 809.
177 It must be reasonable for six of nine justices to agree with Justice Scalia.
The Court saw Bramblett as a seriously flawed decision, because “the Bramblett Court made no attempt to reconcile its interpretation with the usual meaning of department.” The problem with this reasoning is precisely why the vacuous reading of a text is flawed. As Justice Scalia stated in Hubbard, the potential for mischief is great in a mistaken reading. Why, for example, did the Hubbard Court interpret “department” to exclude the judiciary? What is usual about this definition?

Most often, a statutory text is not as plain as it appears at first blush. Justice Scalia, in Brogan, interpreted the text, “any false statement” to mean all false statements, including a “no” response to a question. However, when read with the word, “makes,” the phrase, “any false statement” excludes a responsive pleading, as in defendant Brogan’s one-word denial of wrongdoing. Although a statement may mean “that which is stated . . . in words of facts or opinions,” the word “make” is susceptible to a wide range of interpretations, all of which suggest an affirmative act. Even Justice Scalia has in the past concurred in such an “affirmative” definition. In Patterson v. MacLean Credit Union, he joined Justice Kennedy in holding that the phrase “to make” meant “to form.” Whereas, the dictionary defines “form” in at least forty-one ways, the most relevant of which means “to construct or frame (ideas, opinions, etc) in the mind.” These words are not derivative but initiative in nature. The usual meaning of “make” in Brogan’s situation, therefore, was the initiative act of doing, not the reactive or defensive one of responding. To be sure, the word “no” is used normally with a comparative; it is a negative response (a derivative). So, even if it is a “statement,” it is not the affirmative declaration required by § 1001.

The terms “knowingly and willingly,” and the apparent flavor of § 1001, fortify the argument above. Although Brogan conceded “knowingly and willfully” responding to the agents’ question, these words show how disputable the Court’s interpretation is of “making a false statement” under § 1001. The word “knowingly” underscores the fact that § 1001 does not apply to all false statements. What if the question to Brogan was whether he received a bribe, as opposed to receiving some cash? In that case, “no” to be a false response, he must know that receiving some cash translates into receiving “a bribe.” But, is whether one received a bribe not a triable issue for the jury to decide? For Brogan, therefore, to knowingly answer falsely, he would have had to be his own jury, as the federal agents already are his judges. This questionable result becomes clearer when one considers the word “willfully.” To “willfully” make a statement is to volunteer or take the initiative to declare words of facts or opinion. A constructive duress contaminates such element of will in a criminal investigative circumstance. It is unlikely that one “willfully” responds to a federal agent’s inculpatory question, especially when one does not fully appreciate the right to remain silent in that situation. Little wonder the statute does not state, “whoever knowingly and willfully

188 Id. at 702 (emphasis added) (internal quotation marks omitted). For its “usual” meaning of “department,” the Court relied primarily on how 18 U.S.C. § 6 defined that word, see id. at 700, even though it faulted the Bramblett Court for relying on 18 U.S.C. § 287 (the so-called statutory cousin of section 1001), see id. at 702-703 (a part of the majority opinion in which Justice Scalia concurred).

189 See id. at 716.

190 Brogan, 118 S.Ct. at 808.

191 See id. at 807 (citing Webster’s New International Dictionary 2461 (2d ed. 1950)).

192 See Random House Webster’s College Dictionary 820 (1992 ed.).


194 See Webster’s, supra note 192, at 523.

195 Relying on the Court’s reasoning in Hubbard.

196 See Webster’s, supra note 192, at 919.

197 See Brogan, 118 S.Ct at 807.

198 See id.

199 See Webster’s, supra note 192, at 1524.
The literal reading of the text, therefore, does not furnish a complete understanding of § 1001.

B. Rethinking Justice Scalia’s New Textualism

The textualist approach to statutory construction is appealing in many respects. A statute’s text is the most relevant evidence of its command. The out-of-text statements by legislators, presented to support the truth of a statute must be excluded as “legislative hearsay.” Because such congressional statements, for the most part, are not consensual, they lack constitutional legitimacy. They may also be susceptible to judicial manipulation. As observed in the preceding section, Justice Scalia clutches to this rationale as the basis for his brand of textualism. This projection is consistent with his shift in focus from the formalist argument that textualism is consistent with the separation-of-powers principle to the functionalist attitude that it curtails judicial legislation.

The main appeal of textualism, however, is the predictability and uniformity that is achievable by limiting judicial decisions to statutory text. For, as Justice Scalia notes, when the judge’s interpretative job goes beyond the textual rule of law, there exists the danger that “equality of treatment is difficult to demonstrate . . . predictability is destroyed [and] judicial arbitrariness is facilitated . . .”. Consider, for example, the Court’s decision in Holy Trinity Church v. United States.

In that case, the Court construed a statute that made it “unlawful for any person . . . to . . . in any way assist or encourage the importation or migration of any alien . . . into the United States . . . to perform labor or service of any kind . . .”. The issue was whether the Holy Trinity Church violated this provision when it brought a minister into the United States. The statute, in another section, exempted certain occupations but did not exempt ministers. Yet the Court ruled that Congress did not intend to prohibit ministers from coming into the country when it enacted the statute, citing congressional records. This is so, according to Justice Brewer, because the United States was a Christian nation that would not exclude ministers from its shores.

Although it has been suggested that Justice Brewer’s religious background influenced his opinion in Holy Trinity, his reliance more on congressional records than on a seemingly clear text is remarkable. Even for ardent followers of legislative history, Justice Brewer’s use of congressional records to support his “Christian nation” rationale in Holy Trinity borders on judicial politicking. The textualist argument, therefore, is reasonable in such a situation. There may be times when judges go too far in using legislative history. These judges “run the risk of imposing their own notion of public interest upon the inferred purpose of the language they interpret.” The risk is heightened when the majority of judges in the particular court share the same social, religious or political views. The result may be judicial legislation, removed from statutory construction. This problem, however, is not peculiar to the use of legislative history.

200 See supra Part III (C).


202 Scalia, Rules, supra note 16, at 1175.

203 143 U.S. 457 (1892).

204 Id at 458.

205 See id.

206 See id. at 458-59.

207 See id at 465. The Court, relying on committee reports, noted a difference between “brain toilers,” a category to which ministers belonged, and “manual laborers,” the importation of whom was the “evil” Congress sought to correct through the statute. Id at 463.

208 See id. at 466.

209 See William N. Eskridge, Jr & Philip P. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy, at 523, n. 2 (2d. ed. 1995) (pointing to the fact that Justice Brewer was a minister’s son).

As noted previously, a statute’s text is as manipulable as congressional records. To completely ignore a statute’s history, for a stringent adherence to its text, does not account for the danger inherent in the semantic manipulation of text, or erase the differences in how judges comprehend the English language. Justice Scalia’s brand of textualism is fallacious in three crucial respects. First, it erroneously assumes that the English or legal language is scientifically precise, and that all judges are bound by the same rules of grammar. Second, it flagrantly ignores how important context is (or what context is most important) to communication, especially statutory communication. Lastly, Justice Scalia’s personal practice exposes a hypocrisy that defeats the textualist claim to judicial consistency in statutory interpretation.

As in Brogan, Justice Scalia’s approach confines a statute to a narrow-minded universe. It cuts off the head and tail of the statute and traps the body in a vacuous “text-tube,” and then calls for its magical revival via judicial lexicology. But, even if lexicology were a science, the English language, or the legal language, for that matter, does not enjoy the luxury of scientific precision. The idea that a disputed text is plain and unambiguous, in a sense, invites the view that the lawyers arguing over such a text are either poorly educated or engaged in frivolity. At a minimum, it suggests the omnipotence of the judicial lens. Such an idea disregards the fact that judges often disagree as to the plainness of a text.211 This is especially so as the legal language is even more complicated than the ordinary English language. Otherwise, there would be no need for legal training. Justice Scalia understands this point. Indeed, in his Confirmation Hearing before the Senate Committee on the Judiciary, he had noted: “[W]e do not normally have a lawsuit in front of us if the language of a statute is clear.”212

Justice Scalia understands also that political compromises affect a statute’s clarity.213 The problem is further complicated when the statute is a social legislation.214 When one adds the congressional logistics involved in legislating to “any frailty in draftsmanship, and the malleability and imperfections of English words, the likelihood that one would find plain language diminishes dramatically.”215 The textualists begin to fail when, because they denounce extra-textual sources, they so readily find plain language.

According to Professor Plaas, Justice Scalia, in his textualist approach, is quick to conclude that a provision is plain and amenable mainly because he defines “plain” in a broad manner.216 The broader he defines “plain,” the narrower the chances that a provision is vague or ambiguous.217 By avoiding the conclusion of vagueness and ambiguity, “he rationalizes his reliance on interpretive devices that may not have been considered or relied on in the legislative process.”218 This leads him to a result-oriented analysis.219 In other words, he more easily manipulates the text of a provision. Take, for example, his dissenting opinion in Babbit v. Sweet Home Chapter of Communities for a Greater Oregon.220 The issue in

211 One need only sift through the Supreme Court’s opinions in the past two years to understand that a statute’s plainness is in the eyes of the beholder.

212 Confirmation Hearing before Senate Comm. on the Judiciary, 99th Cong. 65 (1986)(statement of Antonin Scalia, Supreme Court nominee).

213 See Stephen A. Plaas, The Illusion and Allure of Textualism, 40 VILL. L. REV. 93, 105 (1995) (commenting on Justice Scalia’s dissenting opinion in Johnson v. Transportation Agency, 480 U.S. 616, 671 (1986)). In that case, Justice Scalia said: “To make matters worse, [the majority] assays the current Congress’[s] desires with respect to the particular provision in isolation, rather than (the way the provision was originally enacted) as part of a total legislative package containing many quids pro quo” (emphasis added). See Johnson, 480 U.S. at 671.

214 Plaas, supra note 213, at 105.

215 Id.

216 See id. at 106.

217 See id.

218 Id.

219 See id.

Babbit was the logical construction of the Endangered Species Act.\textsuperscript{221} Section 9 of the Act prohibits a person from “taking” a species.\textsuperscript{222} The question for the Court was what the Act meant by “take.” The Act defines “take” to include “harm,” but does not define the latter.\textsuperscript{223} The Department of Interior, in its regulations of fish and wildlife services, defines “harm” to include the modification of the species’ habitat in a way that injures or kills members of the species.\textsuperscript{224} The Court considered whether this definition was correct.\textsuperscript{225} To answer this question, the Court relied on its analysis in \textit{Chevron U.S.A., Inc. v. NRDC}.\textsuperscript{226}

The Court found the word “take” to be ambiguous and so deferred to the agency.\textsuperscript{227} The majority, relying on the Act’s legislative history and the ordinary meaning of “harm,” adopted the agency’s definition.\textsuperscript{228} Justice Scalia, on the other hand, did not find any ambiguity in the provision, and, therefore, saw no need to defer to the agency. He relied, instead, on such interpretive devices as the dictionary, Blackstone commentaries and statements by the Solicitor of the Fish and Wildlife Service.\textsuperscript{229} He then construed “take” not to include “harm” as defined in the agency’s regulations. Instead, “take” and “harm,” according to him, fell within “the sense of affirmative conduct intentionally directed against a particular animal or animals,” not the indirect action of modifying the animal’s habitat.\textsuperscript{230}

One may advance many theories as to why Justice Scalia thought that how he defined “harm” in \textit{Babbit} was the only way to define the word, but none of the theories points to the efficacy of the textualist approach. The word “harm” in the \textit{Babbit} situation is not plain and unambiguous but susceptible to many definitions. But, even if one were to follow its ordinary meaning, there is nothing unreasonable about “harm” being the indirect result of modifying an animal’s habitat.\textsuperscript{231} An animal is “harmed” when one destroys its habitat. It is also harmed when it is met by the hunter’s bullet. The point is that, without an appropriate context, a seemingly plain word may be lost in a semantic war, which war the textualists use vigorously to avoid legislative history.

On most occasions, Justice Scalia finds his context in statutory words.\textsuperscript{232} When the words do not furnish sufficient context, he resorts to the Whole-Act Rule, and finds context in other parts of the statute that use similar

\textsuperscript{221} Id. at 690.

\textsuperscript{222} The Endangered Species Act specifically provides: “[W]ith respect to any endangered species of fish or wildlife . . . it is unlawful for any person . . . to . . . (B) take any such species within the United States . . .” 16 U.S.C. § 1531 (1988 & Supp.).

\textsuperscript{223} Section 3(19) defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.” 16 U.S.C. § 1532(19) (emphasis added).

\textsuperscript{224} See 50 C.F.R. § 17.3 (1994).

\textsuperscript{225} Babbit, 515 U.S. at 690.

\textsuperscript{226} 467 U.S. 837 (1984). \textit{Chevron} stands for the proposition that courts would construe an ambiguous statute as the governmental agency that enforces the statute construes it. Thus:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

\textit{Id.} at 843-44.

\textsuperscript{227} Babbit, 515 U.S. at 690.

\textsuperscript{228} See \textit{id.}

\textsuperscript{229} See \textit{id.} at 717-721.

\textsuperscript{230} See \textit{id.} at 720.

\textsuperscript{231} This is even more reasonable than Justice Scalia’s interpretation of “willingly making a false statement” to include the derivative “no” answer in \textit{Brogan}.

The textualist approach assumes that words maintain an independent existence. But words are alive only to the extent of the dynamics between the speaker and the perceiver. To quote Professor Plaas, “judges should not be free to read the notes of a song written by Congress without listening to the music.” While it is rational to construe a statute according to its text, Justice Scalia’s textualism ignores the fact that “words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they were used . . .”

Justice Scalia’s argument against legislative context is that it is not reliable, and it creates the danger of “judicial freewheeling.” As to unreliability, he cites the fact that, most often, legislators are not well versed in a statute’s text because they neither write the actual law nor pay attention when such is read on the floor of the House. This “congressional passivity” argument, however, neither makes up for the textualists’ sole or enormous reliance on statutory text, nor rights a “judicial passivity.” If the history of a law cannot be trusted to shed light on the law, why should the language of the law be trusted? As to judicial freewheeling, that danger also permeates the textualist approach. As noted above, judges do not follow uniform rules of grammar. In fact, Brogan’s reading of § 1001 derives from the majority’s (more specifically, Justice Scalia’s) semantic freewheeling. Hence, if the majority is wrong in interpreting § 1001, a new law is made, and the textualists’ fear of judicial freewheeling is nevertheless realized.

Philosophical and literary theories indicate that universal objectivity in statutory interpretation is an illusion, because the interpreter’s perspective will always mingle with the text. Judicial philosophy is ordinarily governed by individual social, political and economic ideologies. To be sure, Justice Scalia’s grammatical compass (and, so, his textualism) is more often influenced by his conservative ideology than his textualist fellowship. As such, he is notoriously guilty of judicial freewheeling. On many occasions, Justice Scalia has deviated from his textualism, but very cleverly presents his opinions in a textualist shell. His “textualist malpractice” is most

233 The idea of the Whole Act Rule is that each section of a statute should be interpreted in the context of the whole act. See Eskridge & Frickey, supra note 209, at 644-645 (“The key to the whole act approach is . . . that all provisions and other features of the enactment must be given force, and provisions must be interpreted so as not to derogate from the force of other provisions and features of the whole statute.”).

234 See id.

235 Plaas, supra note 213, at 127.

236 See Eskridge & Frickey, supra note 17, at 342, n. 81 (relying on Shell Oil Co. v. Iowa Dep’t of Revenue, 109 S. Ct. 278, 281 n.6 (1988), quoting NLRB v. Federbush Co., 121 F.2d 954, 957 (2nd Cir. 1941)).

237 See Scalia, Common-law Courts, supra note 119, at 34.
obvious in civil-rights and environmental-law cases, especially cases that affect disadvantaged litigants. An example of this point is his opinion in Independent Fed’n of Flight Attendants v. Zipes, where the meaning of § 706(k) of Title VII was in contest.244

The issue in Zipes was whether the plaintiffs could recover attorney’s fees from losing intervenors.245 Section 706(k) provided that “a court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fees as part of the costs.”246 One would expect this text to be plain to Justice Scalia. This time, however, Justice Scalia deviated from his textualist tradition, and was quick to find ambiguity in the text.247 Hence, uncharacteristically, he not only looked to such extrinsic evidence as the American legal position that winners are not entitled to fees from losers,248 but also relied on legislative history.249 He held that plaintiffs could not recover attorney’s fees under his reading of § 706(k), “in light of the competing equities that Congress normally takes into account,” and since his reading furthered “congressional policy in favor of ‘vigorous’ adversary proceedings.”250 To the proponent of legislative history in statutory construction, this sounds awfully familiar.

Another striking example of where Justice Scalia uncharacteristically deviated from his textualist approach is Lukhard v. Reed.251 The Court in Lukhard decided the issue of whether, pursuant to the Aids to Families with Dependent Children Act (AFDC),252 a personal injury award was “income” or “resources,” for the purpose of assessing eligibility for benefits under the Act.253 The word “income” ordinarily connotes gain or profit.254 A personal injury award is not commonly understood as a gain or a profit but a financial attempt to put the plaintiff in his or her original position.255 Yet Justice Scalia ignored the dictionary and common usage (textual devices), and, instead, opted for legislative intent.256 He couched this reliance on legislative intent in textual terms, holding that, because other statutes excluded personal injury awards from income, congressional silence as to the AFDC statute showed Congress’s intent to include such awards in an applicant’s income pool.257 He also relied on post-enactment statements of those involved in passing the statute.258

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243 See id.

244 491 U.S. 754 (1989). See Plaas, supra note 213, at 111, for an excellent discussion of Justice Scalia’s opinion in Zipes.

245 Zipes, 491 U.S. at 755.


247 Justice Scalia had, in other cases, found “plain” texts that were muddier than § 706(k). See Babbit, where Justice Scalia found that ESA’s language was plain even when “harm” was not defined in the act, and was subject to several meanings. Additionally, he had on at least one occasion stated that Title VII was “a model of statutory draftsman.” See Johnson v. Transportation Agency, 480 U.S. 616, 657 (1987) (Scalia, J., dissenting) (arguing that Title VII is so clear as to be against affirmative action).

248 See Zipes, 491 U.S. at 758.

249 See id. at 761.

250 Id. at 761-766.
Apart from the two cases above, Professor Plaas lists at least four other cases in which Justice Scalia’s deviation from textualism is so flagrant that his decisions are irreconcilable. These decisions expose the fact that Justice Scalia’s textualism may be motivated by other considerations than consistency, predictability and judicial restraint. His socio-political ideology is a logical suspect. This is supported by the fact that even when he agrees with the so-called liberal Justices, he goes out of his way to distance his opinions from theirs by hiding under different issues. In California Federal Savings & Loan Ass’n v. Guerra, for example, the issue was whether California law providing special protections for pregnant female employees discriminated against men, pursuant to Title VII, which prohibits employment discrimination based on sex. Justice Scalia, even while agreeing with Justice Marshall in answering this question in the negative, contended that the Court should have limited its analysis to the preemption issue also raised in the case. This is a suspicious reasoning because preemption was not really a strong contention in that case. One may wonder if Justice Scalia was trying to avoid sanctioning the ruling in United Steel Workers of America v. Weber, a decision that he had vigorously argued to be overturned.

For Justice Scalia, like those judges who seek to hide their judicial politicking, textualism presents a principled front. It offers a cherubic mask of judicial neutrality. While judges who rely on a statute’s text appear detached from politics, those who use legislative history are more likely to expose their political biases. The textualists appear consistent and neutral because an opinion couched in textual terms very effectively masks the writer’s underlining ideological biases.

V. CONTEXTUAL ACTIVISM

Brogan is a typical example of where dogged adherence to statutory text leads to jurisprudential absurdity. While a false exculpatory statement may seem to fit in the text of § 1001, the majority’s literal interpretation is judicial passivity, if not jurisprudential zombism, far from the common sense of justice. As Justice Stevens correctly noted, even though § 1001 can literally be read to prohibit false statements by federal undercover agents

259 See Plaas, supra note 213, at 112-121.
261 See id. at 274. Title VII states:

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

262 See id. at 280.

263 See id.
265 See Johnson, 480 U.S. at 1472 (Scalia, J., disenting) (criticizing the Court’s decision in Weber). Weber addressed a similar issue to that in Guerra. The issue in Weber was whether, under Title VII, an employer’s affirmative-action program (concerning employee training and promotion) for black employees amounted to discrimination against a white employee. See Weber, 443 U.S. at 196. The Court answered this question in the negative, holding that such a voluntary and temporary measure geared towards correcting the historical discrimination against black employees, even when race-conscious, was not prohibited by Title VII. See id. at 208. At the time of Weber, Justice Scalia was not on the Supreme Court, but upon joining the Court, he has been relentless in arguing (as he did in Johnson) that Weber should be overruled. For such a committed textualist, you would expect Justice Scalia to consistently find the text of Title VII to be plain in its prohibition of employment discrimination, whether based on sex or race.

266 Justice Scalia confuses “justice,” which should always inform judicial decisions, with “writ[ing] into our law [a] species of compassion inflation.” See Brogan, 118 S. Ct. at 810.
to drug traffickers, it is not likely that the Court would subscribe to such a construction. Justice Stevens was also correct when he observed that the majority’s analysis wrongfully deviated from a well-established principle that counsels against applying a criminal statute where doing so would lead to a broader result than Congress intended. Because it is not unquestionably obvious that § 1001 is intended to punish exculpatory statements, since the text is subject to two permissible meanings, the rule of lenity should have been applied to construe the statute in favor of the defendant, Brogan. Justice required the Brogan Court to choose a restrictive, not Justice Scalia’s harsh, punitive construction, if indeed the idea is to force Congress to clarify § 1001.

Although justice does not call for the judicial usurpation of legislative authority, statutory construction is “something more than judicial passivity.” Textualism, in fact, promotes the usurpation of legislative authority. At the very least, it promotes injustice. It overlooks the fact that statutory construction is an art, not a science. In the alternative, it suggests that such artistry should be confined to grammatical creativity, devoid of historical context. But one need not rely on the science of etymology to understand that the meaning of a word may depend on the user’s purpose in communicating. The meaning of a legal text must not be detached from the “why,” as well as

plain" language, he assents to the rule where there is reasonable doubt as to what a text conveys. See, e.g., Deal v. United States, 508 U.S. 129 (1993) (recognizing that the Rule of Lenity may apply in certain situations, but finding no need to apply it to the petitioner’s situation because the word “conviction” in 18 U.S.C. § 924(c)(1) is unambiguous).

See Chisom, 501 U.S. at 380. In fact, not only is there an alternative permissible meaning of § 1001, for more than forty years, courts have read the provision to exclude mere denials of wrongdoing. See supra Part IV.

See Brogan, 118 S. Ct. at 817 (“The objectors’ principal grievance [as to the force of § 1001] . . . lies . . . with Congress . . . .”). In McNally, the court applied the Rule of Lenity and strictly construed the mail fraud statute to exclude “depriving another of the intangible right of honest service” from the statutory language “scheme or artifice to defraud.” See McNally, 483 U.S. at 330. The Court, in an opinion joined by Justice Scalia, left it up to Congress to clarify the statutory language. See id. Congress did so by stating that “‘scheme or artifice to defraud’ includes scheme or artifice to deprive another of the intangible right of honest services.” See 18 U.S.C. § 1346 (1988). See generally Eskridge & Frickey, supra note 209, at 674.

See Scalia, Common-law Courts, supra note 119, at 61.

See id. at 15.
from the “how” or “what,” of the text. A major flaw in textualism is that it is one-sided. Its disregard for legislative purpose exposes a gap in its foundational projection of the separation-of-powers doctrine, and does not accord it the constitutional legitimacy that its proponents so desire.

A. The Role of the Judge in an Era of Codes

As discussed earlier, the nineteenth-century surge to codify American law did not overthrow the common-law system. Instead, the resultant code-system was to exist alongside, if not employed to facilitate the common law. Implicit in this idea is the recognition that law must not exist in a vacuum but must be functionally viable to respond to societal changes. This logic, which has long fueled the role of the common-law judge - to apply and develop the law in real circumstances - also projects the constitutional role of the judge in American modern democracy. Even with the separation-of-powers doctrine, the common-law judge was not to become a juristic invalid, whose legitimate posture in policing the majority could easily be thwarted by the same majority. To the contrary, the judge’s constitutional role suggests a judicial activism that must be guided by the constitutional duty of protecting justice, not frozen in the formal codification of legislative enactment. This role, however, does not permit the imposition of the judge’s will on the legislature.274

The judge has to weigh the quest for justice against the respect for legislative supremacy; this is what should be understood as judicial activism. On the one hand, the judge, in interpreting a statutory provision, must protect justice and individual liberty by guarding against jurisprudential absurdity. On the other hand, care must be taken so that individual will and force may not override the legislative expression of a legitimate majoritarian will. This is the problem that the common-law judge faces.275

To solve this problem, the judge must begin with the Constitution - the most potent acceptance of majoritarian rule by the minority, and the single best protection for the minority.276 The judge must use the Constitution as a judicial compass in finding and curtailing jurisprudential absurdity. But, in a common-law system, the judge must not stop with the Constitution. For, where the legislature has enacted an unclear statute, “it is the province of the courts to liquidate and fix [its] meaning and operation.”277

The Constitution, though the threshold of liberty, does not complete the quest for justice. The quest for justice is intricately linked with the judicial ability to “liquidate” and “fix” a bad law, not only to invalidate the law simply on constitutional grounds. But, the judge also must perform this duty without violating the Constitution, because “[i]t can be of no weight to say that the courts, on the pretense of repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature.”278 The limit of the judge’s function in “liquidating” and “fixing” a problematic statute is the issue one must address. Some who engage in judicial passivity try to justify such a choice in terms of judicial restraint and passive virtues.279 The basic contention is that the judge must not play too active a role in interpreting a statute, as to rely on the political origin of the statute in “liquidating” and “fixing” the statute’s meaning. To evaluate this argument, however, one must not ignore the nature of the system within which the judge must function. There are two questions that must be addressed. First, what is a bad and an unjust law? Second, how does the judge liquidate and fix such a law without implicating individual will and force at the expense of constitutional legitimacy? It is indeed the second question that has been the source of much controversy in statutory construction, and the main focus of this Article.

A bad and an unjust law, for purposes of interpretation, is one that lacks clear and general applicability. That type of law is one whose meaning is not apparent from its text, or whose application defeats

274 See The Federalist No. 78 (Alexander Hamilton).


276 See The Federalist No. 51 (James Madison).

277 The Federalist No. 78 (Alexander Hamilton) (emphasis added).

278 Id.

279 See supra Parts III and IV. For an excellent presentation of the arguments, see Calabresi, supra note 275, at 1-10.
its purpose because it results in absurdity. Such a law, if criminal, promotes what I call a Type-IA Error - punishing those whose conducts would not be proscribed by a rational majority, but by the law’s textual ambiguities.280 A law is also bad if it has outlived its usefulness; if its enforcement absolutely makes no sense in present society - it is an anachronistic law.281 Most bad laws, without judicial intervention, result not only in the violation of constitutionally stipulated rights but also in the denial of fundamental justice, recognizing that justice is a function of the times – a function of societal Zeitgeist. These bad laws may be the products of inadequate draftsmanship, or the consequences of a socio-cultural lag. The latter is what Judge Calabresi calls “the problem of legal obsolescence,” which he describes as “the combination of the [law’s] lack of fit and lack of current legislative support.”282 Both sources of bad laws are, nevertheless, linked to the American codification movement discussed earlier.

As already indicated, the American code-system is not perfect. Although today’s statutes may be more detailed and better drafted than before,283 they still are inadequate to require only a passive interpretation. Because the codes are not elaborate in stating the legal principles that must govern interpretation, they are ravaged with gaps. These gaps defy juristic logic, as to oftentimes require more than a textual construction. This is so regardless of whether these gaps are due to sheer inefficiency in drafting, as with the Internal Revenue Code, or the unintended result of legislative logistics, as in the case of political compromises.

The American judge, therefore, is at a loss if required to interpret these bad laws as the civil-law counterpart would a civil code.284 This is especially so where the laws also suffer from Judge Calabresi’s syndrome of legal obsolescence, where “[c]hanged circumstances, or newer statutory and common law developments, render[ ] some statutes inconsistent with a new social or legal topography.”285 In those situations, the judge is confronted with a law that is so outdated as to make its application irresponsible and unjust. A bad and unjust law, thus, is one whose legislative purpose is undermined by gaps in drafting and changes in social circumstances. What then is a judge to do, as the common-law tradition requires the judge “to think of the law as functional, as responsive to current needs and current majorities, and as abhorring discriminations, special treatments, and inconsistencies not required by current majorities?”286

Judge Calabresi is right in advocating a solution through a judicial-legislative balance, with which the court’s role is “no more and no less than the critical task of deciding

280 This error in judgment can be distinguished from Type-1 and Type-11 errors. Type-1 error is where the court concludes that a conduct is illegal where it is not; Type-11 error is the conclusion that a conduct is not illegal where it is. See Daniel L. Rubinfeld, Econometrics in the Courtroom, 85 COLUM. L. REV. 1048, 1051 (1985); see also CURT R. BARTOL & ANNE M. BARTOL, LAW AND PSYCHOLOGY: RESEARCH AND APPLICATION 183-84 (2d ed. 1994).

281 See CALABRESI, supra note 275, at 6.

282 See id. at 2.


284 See Peter L. Strauss, The Common Law and Statutes, 70 U. COLO. L. REV. 225, 235 (1999) (“[T]he kind of statute undergirding the civilian attitude, the Code Civile, [for example], has characteristics that support the more distinctly separated judicial and legislative role characteristic of western European legal systems”). As noted earlier, European codes:

[E]merge in a single legislative act, after exquisite intellectual consideration, as an integrated whole. They are rarely if ever amended; and if amended, only after equivalent study and attention to the integrated effects of change. A cohesive, comprehensive, enduring text, not easily changed in any forum, the Code Civile, say our Restatements - invites scholarly explication and judicial modesty.

Id. This type of code hardly needs a rigorous examination of its political history for a proper interpretation, because such history is either evident in the text or can be gleaned without the help of the legislature.

285 CALABRESI, supra note 275 at 6.

286 Id.; see also HELEN SILVING, SOURCES OF LAW 79-125 (1968).
when a retentionist or a revisionist bias is appropriately applied to an existing statutory or common law rule.\textsuperscript{287} Although it may be tenuous to advocate Judge Calabresi’s version of judicial activism,\textsuperscript{288} it is enough to note that judicial activism in a bad-law situation must not violate the judicial-legislative balance. Because a bad law is one which undermines justice, “liquidating” and “fixing” such a law involves a \textit{judicious} application of the law, not Justice Scalia’s textual imperialism over legislative will. The judge’s role, even in an era of codes, must go beyond textual idolatry, to include the judicial safeguard of justice and liberty for all.

By examining the law’s history, the judge aims at “majoritarian” justice, and avoids the constitutional difficulty of imposing independent will and force on legislative intentions - Hamilton’s hope.\textsuperscript{289} Moreover, where the legislative intentions are oppressive and unresponsive to current constitutional notions of justice and liberty, the law must be presumed unconstitutional. Notice that this judicial-legislative balance does not translate into the merger of the judiciary and the legislature, but into a dynamic relationship that projects our cherished system of checks and balances.\textsuperscript{290} Indeed, the judiciary merges with the legislature where the judge imposes an independent intent without regards to legislative due process. The judge, by not paying attention to legislative intent or purpose, but by applying the law according to individual understanding and will, becomes a default legislator. We must, therefore, formulate any approach to statutory construction with the above in mind.

\textbf{B. Contextual Activism as a Practical-Reasoning Alternative to Textualism}

Judicial activism done within the context of legislative supremacy and legal pragmatism is what I call \textit{contextual activism}. The judge’s job is to “judge.” The art of “judging” requires the employment of those techniques that lead to a practical solution to any issue at stake. It should not matter whether the judge uses legislative history, simply looks at statutory amendments, or examines a text in harmony with other provisions, so long as the focus is on avoiding a nonsensical construction. The best approach must consult any source that would shed light on an ambiguous text. Where it is necessary, the judge should fuse historical facts with textual aids. In other words, the judge should engage in what Professors Eskridge and Frickey call the “funnel of abstraction” or “practical reasoning” method.\textsuperscript{291} With such an approach, the judge does not passively interpret a provision, but actively seeks a just and constitutional result. The result is “just” because it comports with what is already published as prohibited. It is constitutional because it does not stray from a legitimate legislative goal.

Statutory construction should include an understanding and the use of a statute’s background in interpreting its text.\textsuperscript{292} While recognizing the primal nature of statutory text, the interpreter should apply historical factors to accentuate the textual language. The text, usually, must be the starting point, whereby one considers a problematic text in the context of the whole statutory scheme.\textsuperscript{293} That statutory scheme, in turn, should be understood by a look at the historical undertones of the statute’s enactment; generally, this should involve the cautious use of legislative history to discern the statute’s purpose.\textsuperscript{294} Where there are more than one possible purpose, it is important to study them contemporaneously,

\textsuperscript{287} \textit{Calabresi}, supra note 275, at 164-65 (emphasis in original).

\textsuperscript{288} \textit{See id.} at 163-66 (arguing that judges should be allowed to overrule a problematic statute, especially when such is not in synchrony with modern times).

\textsuperscript{289} \textit{See The Federalist No.} 78 (Alexander Hamilton).

\textsuperscript{290} \textit{See Calabresi}, supra note 275, at 164.

\textsuperscript{291} \textit{See Eskridge & Frickey, supra} note 17, at 353.

\textsuperscript{292} \textit{See id.} at 353-62.

\textsuperscript{293} \textit{See id.} at 354-55.

\textsuperscript{294} \textit{See id.} at 356, 358.
and to see how they work together to give meaning to the text. With a “smoking-gun” legislative history, if not planted to derail the focus of the statute to where a loser legislator or lobbyist wants it, the judge’s job is dramatically reduced. The judge should also examine those evolutive factors as to understand how changed circumstances affect the statutory meaning.

Instead of Professors Eskridge and Frickey’s emphasis on a hierarchical consideration of these contextual factors, however, the contextually active judge focuses more on the harmony among the relevant factors; apart from the statutory text, no one factor is more important than the other. Moreover, the level of inquiry into these factors must not go as deep as to transform the context into the law. Additionally, unlike what Professors Eskridge and Frickey suggest in their practical-reasoning method, the contextual activist need not engage in Judge Posner’s imaginative reconstruction. Such imaginative reconstruction permits the judge to impute an individual legislative amateurism into the interpretive process. This is an attempt at lawmaking, to which the textualist objection is warranted. The relevant notion, instead, is to have a sufficient background for understanding a text. There is no need for a “psychic” reconstruction of defunct congressional thought-process.

While one may find context in legislative records, such records must be used with caution. A statutory context must not overshadow the text. Legislative history, while an appropriate context, is not the law. To overemphasize this history is to stand a chance of losing sight of the actual law that went through the enactment process. Thus, contextual activism does not mean the unbounded resort to legislative history. As it rejects the vacuous and mindless dependence on text, so does it denounce the irresponsible reliance on the scattered verses of legislators. Statutory interpretation, instead, is “judging,” an endeavor that must be based on judicial sensibilities, and aim at legal practicability.

C. The Maryland Approach as an Example of Contextual Activism

It has been argued that there is no difference between the Supreme Court and state courts in how they approach the interpretation of statutes. According to Judge Abner J. Mikva and Professor Eric Lane, “approaches to statutory interpretation are not divisible into ‘state’ and ‘federal.’ Differences in interpretative approaches are the product of individual judicial sensibilities and not, for the most part, particular jurisdictions.” Along this line, Professor Lane further contends that state courts are not unique in their application of common-law techniques in construing statutes. In his views, federal courts, like state courts, use the common law to fill the gaps in statutes. Because judges, whether “federal” or “state,” must “decide” cases, the common law is an inevitable technique on both benches, not one restricted to the state bench. Instead of jurisdictional differences, factors that determine whether a judge will impose his or her individual will on a statute include the statute’s clarity, the intensity of the individual will, and the judge’s sense of responsibility towards statutes in general.

The views above are partially right. While it may be right that “individual judicial sensibilities” account for a large part of a judicial decision, differences in the political dynamics of the two jurisdictions may control such sensibilities differently. Thus, the tune of the common-law technique applied may derive from jurisdictional sensibilities. In state courts, for example, the electoral or republican nature of the relationship between courts and citizens may require judges to employ a more pragmatic approach to statutory interpretation. Thus, the state judge’s sense of responsibility towards a statute may be more

295 See id. at 356.
296 See id. at 353-54.
297 See id. at 356-57.
judicious and less detached than found in a one-tracked approach as in textualism. Because the politics of selecting federal judges differ from that of state judges, the aggregate make-up of individual judicial sensibilities may be different for both benches. Moreover, judicial sensibilities derive considerably from individual ideological or political persuasions. Regardless of the reasons, there should be no serious dispute over whether there are certain differences between the Supreme Court and state courts in their approaches to statutory construction. Take the Court of Appeals of Maryland, for example.

Maryland’s approach is a classic example of contextual activism, far from the Supreme Court’s inconsistent homage to legislative context. Like several state high courts, the Maryland Court of Appeals relies primarily on the legislative context of a statute for the meaning of its text. The focus is on avoiding an interpretation that would lead to absurd results, because such results could not have been the intent of the enacting legislature. Judge Wilner’s articulation of the Maryland approach is an excellent description of contextual activism. Thus:

[I]n construing a statute, [the] objective is to ascertain and give effect to the intent of the Legislature. If the language of the statute is clear and unambiguous and expresses a meaning consistent with the statute’s goals and apparent purpose, our inquiry normally ends with that language. If, on the other hand, the language is susceptible to more than one meaning and is therefore ambiguous, we consider not only the literal or usual meaning of the words, but their meaning and effect in light of the setting, the objectives and purpose of the enactment, and, in those circumstances, in seeking to ascertain legislative intent, we consider the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable result, or one which is inconsistent with common sense.304

Maryland courts have variously relied on what they call “the cardinal rule of statutory construction” - to ascertain and effectuate the intent of the legislature. This cardinal rule, I argue, does not usually operate beyond what should be called “the papal rule of statutory construction” - that courts must not effectuate that expression of intent that is inconsistent with common sense, or leads to absurd results. In performing this function, courts must start with the text of a statute. Logically, where the text is plain and unambiguous in its expression of the legislative intent, there is no need to continue the inquiry. The problem, however, is that the judge who ignores context, or who is quick to find plain text, is at a high risk of not effectuating the intent of the legislature. Such a judge is one who also thinks that the intent of the law is different from that of the legislature; a position that is conducive for “judicial freewheeling.”

Although I have noted earlier that legislative intent may be difficult to discern, the court can use the statute’s purpose as a basis for understanding such intent. In ascertaining intent, the judge must note that the members of a legislature are rational people, and, therefore, would not intend an absurd result, but one that comports with common sense. This is precisely what the Maryland high court does with great consistency and efficiency. Regardless of how recent Maryland began keeping legislative record, the Maryland Court of Appeals has done well in tracing the legislative history of a statute, and in discerning the intent of a particular provision. Certain factors may account for this efficiency, and for the state court’s better use of legislative context than done by the Supreme Court. For one thing, as compared to Congress, state legislatures are more unified in their goals and intent. Although local constituencies in state legislatures may approximate the diversity found in Congress, state lawmakers, on the whole, seem to have fewer distracters to confront. It is one thing for Baltimore City to compete for legislative attention against another Maryland county, it is quite another for Maryland to go against states like California, Texas and Florida in Congress. The members of Congress simply have more diversified interests competing for their attention.305 Therefore, it may be more


305 See KINGDON, supra note 138.
difficult to ascertain congressional intent than it is to ascertain the intent of a state legislature. 306

Whatever may be the reason, Maryland courts have consistently followed the rule stated by Judge Wilner in *Chesapeake Charter*. The state high court seems to have done this in all of the 163 cases that this author reviewed. While the court emphasized certain aspects of the rule in some cases, it never strayed from the rule in all of the cases. In some cases, the court seemed to emphasize the clarity of a text; and, in other situations, it dwelt on legislative context. The logic of this differential emphasis is precisely why courts cannot depend on any one principle of interpretation to attack a statutory problem. The issue in a case must depend on the particular circumstance. While a statute may present a problem of serious textual ambiguity, another statute may implicate such absurdity questions as to require a reliance on legislative history. Either way, the focus must remain on discerning and effectuating that legislative intent that is consistent with the particular circumstances. The Court of Appeals of Maryland reiterated this approach in *Sacchet v. Blan*. 307

The issue in *Blan* was whether “manslaughter by automobile” should be classified as a “crime of violence,” for the purpose of determining the rate to be applied in calculating an inmate’s good-conduct credits. 308 Section 700 (d) of Article 27 of the Maryland Annotated Code is the statutory authority under which the Division of Correction (“D.O.C.”) awards good-conduct credits to an inmate, which generally results in an earlier release of the inmate. 309 In calculating these credits, this section differentiates between crimes of violence and other crimes. 310 While those convicted of violent crimes are awarded credits at a rate of five days per month, other

306 See supra Part III (D).
308 See id. at 92, 724 A.2d at 669.
310 See id., § 700(d)(2)&(3).
involuntary manslaughter.” The inmate, Blan, argued, in contrast, that this phrase actually expressed the legislature’s intent to focus only on the two common-law forms of manslaughter – voluntary and involuntary manslaughter. Otherwise, the legislature would have expressly mentioned manslaughter by automobile, especially having amended other phrases in the same subsection, with a view to clarifying the list of crimes of violence.

The court of special appeals found Blan’s argument persuasive, basing its ruling upon the failure of the General Assembly to amend the subsection as suggested, despite the past opportunities. The court of appeals, however, went beyond this point, noting that the answer to the issue did not lie in either “any supposed plain meaning of the phrase ‘manslaughter, except involuntary manslaughter’. . . [or] in any purported inaction with respect to the same language by successive Legislatures.” This is because each of these two factors is amenable to different, but equally, plausible interpretations, “if all we look to is the single, contested phrase as if in a vacuum.” Therefore, “viewing statutory language in isolation is a method of construction which this Court eschews.” Instead, the court would “examine the language of the statute in the context in which it was adopted, and consider the general purpose, aim, or policy behind the statute.” In other words, the court would apply practical reasoning in looking beyond the text of a statute, especially with a view to understanding such text within the context of legislative intent and purpose, instead of finding that intent and purpose in the unclear text.

The court, upon rejecting the parties’ overemphasis on the statutory text, began addressing the issue by examining the nature of the crimes categorized as crimes of violence under Section 643B(a). One distinguishing factor between those crimes and automobile manslaughter, the court noted, is that, unlike the former which required proof of criminal intent, the latter required only proof of gross negligence. The latter, in fact, is an offense committed while the offender is doing a lawful thing in an unlawful manner, compared to the crimes listed in Section 643B(a), which are culpable acts in themselves. The only crime mentioned in this section that does not require criminal intent, the court continued, is involuntary manslaughter, which is expressly excluded from crimes of violence. The court found it anomalous, therefore, that the legislature would include a crime that does not require criminal intent in the same category as those requiring intent as all crimes of violence, and, at the same time, except another crime – involuntary manslaughter- that also does not require intent. This anomaly it found to negate “the prerogative and practice . . . to avoid interpretation of a statute that effects an unreasonable or illogical result or one that is inconsistent with common sense.”

The court next looked at the fact that Section 643B(a) also includes as a crime of violence an attempt at committing any of the listed offenses. According to the court, there is no such crime as attempted manslaughter.
by automobile, because an attempt requires a criminal intent, and involuntary manslaughter only requires that the offender be grossly negligent in operating an automobile.\textsuperscript{336} In the court’s view, therefore, inclusion of this crime in the violent category would amount to recognizing a non-offense as in attempted manslaughter by automobile.\textsuperscript{337} Such absurdity the court was not willing to support. To buttress its point, the court referred to the history of the statute.\textsuperscript{338} It noted that at the time the legislature enacted Section 643B, Section 388 (dealing with automobile manslaughter) was already in force.\textsuperscript{339} In fact, it was then a misdemeanor, which carried a three-year maximum sentence.\textsuperscript{340} At this same time, meanwhile, involuntary manslaughter carried a ten-year sentence.\textsuperscript{341} It would not, as such, make any sense that the legislature intended to treat automobile manslaughter more harshly than involuntary manslaughter.\textsuperscript{342} For the foregoing reasons, the court concluded that automobile manslaughter is not a crime of violence.\textsuperscript{343}

The beauty of the court’s approach in \textit{Blan} is its practical reasoning, far from the vacuous manipulation of an unclear text. The aim is at a sensible execution of a legislative intent, an intent that is better understood within the context of the statute’s enactment. While the court in \textit{Blan} did not need to rely on such legislative records as committee reports and floor statements, its extrication of the statute’s legislative intent revolved around the practical application of the provision in question. The court was not sheepish in its examination of the text. Even with such a whole-act approach, the primary focus was not necessarily on how the legislature used the unclear text in other parts of the statute, but on the consistency and uniformity of the legislature’s enacting goals. This approach is a middle ground between the hardened prisoner of texts and the untamed addict to legislative history. Where a textualist would necessarily end the inquiry with the phrase “manslaughter, except involuntary manslaughter,” and the legislative historian would readily find solace in committee reports, the contextual interpreter focuses mainly on avoiding that interpretation that leads to an unreasonable or absurd result. This, as indicated earlier, should be the foundation upon which the court’s activism must rest. To be sure, the mere examination of the overall nature of a statute is not enough to excuse a court from judicial passivity.\textsuperscript{344} The court must choose that interpretation that comports with common sense and justice. Unlike Justice Scalia’s textualist approach, and his result-oriented utilization of the whole-act rule, the Maryland high court would not hesitate to employ any means that would render an intelligible and a practicable result. This is contextual activism.

VI. CONCLUSION

Statutory construction is an art – a judicial art. It requires judges to interpret the words of others – the words of politicians, or at least of those who work for politicians. These words are sometimes not clear even to the most studious interpreter. Although statutes are deliberate legal documents, they are also political products, often with holes left by the enacting legislatures’ inability to address every related concern in the statutes. As such, they are bound to contain unclear language. In a system where statutes are primarily recitations of legislative responses to practical problems, and those responses are molded by logistical compromises by legislators, it is not surprising that courts would commonly encounter ambiguous statutory

\textsuperscript{336} See id. at 97, 724 A.2d at 671.

\textsuperscript{337} See id., 724 A.2d at 671-72.

\textsuperscript{338} See id.

\textsuperscript{339} See id., 724 A.2d at 672.

\textsuperscript{340} See id.

\textsuperscript{341} See id.

\textsuperscript{342} See id. at 97-98, 724 A.2d at 672.

\textsuperscript{343} See id. at 98, 724 A.2d at 673.

\textsuperscript{344} See generally Brogan, 118 S. Ct. 805 (1998)(examining the general nature of 18 U.S.C. § 1001, but reaching a passive and an absurd result). Note that while the approach to Section 643B(a) of the Maryland Code avoided the denial of a statutorily granted right, Brogan’s vacuous interpretation of § 1001 demeaned the constitutional right to due process.
provisions. In interpreting these provisions, the ultimate goal should indeed be the avoidance of a meaning that leads to absurdity. The objective is to abide by the constitutional doctrine of separating the judiciary from the legislature. This objective is hard to achieve without one branch understanding what, why and how the other carries out its functions.

The idea that statutory construction should be confined to a statute’s text is shortsighted and inadequate for what is required in a democratic system that draws a lot from the common law. Although statutes are supreme in today’s constitutional democracy, they do not exist in a vacuum. They are created within the political context of the problems they address; they express well-debated public policies. When the statutory interpreter goes outside this debate, there is an increased chance that she creates a different debate, which eventually results in tackling the wrong problem (or the right problem with the wrong approach). Justice Scalia’s textualist approach to statutory construction is faulty on many grounds. The main problem is that it marginalizes the importance of context, and ignores the fact that this context is crucial to justice. Even when it relies on context, it chooses the wrong one. Its criticism of purposivism and intentionalism as relying on legislative history and falling into the trap of “judicial freewheeling” is myopic. To the contrary, textualism presents a more serious danger of “judicial freewheeling,” because when a judge uses devices that are alien to a statute’s creation, there is a high likelihood that judicial opinions will become result-oriented. Justice Scalia’s own practices buttress this point, especially as they show that his textualism is a convenient tool for conserving and masking his political ideology.

The best approach to statutory construction is that employed by several state courts - what I have referred to as contextual activism. Because statutes tackle practical problems, they must be interpreted with a practical-reasoning approach. The issue is not whether the judge must consult legislative history, but whether this history can furnish sufficient context to the statutory text so that the judge’s interpretation would not lead to an absurd result. While legislative records are not authoritative sources of law, their cautious use presents a complete picture. This approach is necessary in light of the American common-law tradition, the skeletal nature of American codes, and the constitutional primacy of respecting the legislature’s authority. Moreover, law, in a democracy, must not maintain an independent existence, but must live or die by its purpose.

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The author wishes to thank Professor Charles Tiefer for introducing him to the subject of Legislation, especially with regards to the issues raised in this article. He also thanks Professor Eric B. Easton for the many lawyers he has equipped with the valuable arts of legal analysis, research, and writing.
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THE ADA REASONABLE ACCOMMODATIONS REQUIREMENT AND THE DEVELOPMENT OF UNIVERSITY SERVICES POLICIES: HELPING OR HINDERING STUDENTS WITH LEARNING DISABILITIES?

by Holly A. Currier

I. INTRODUCTION

Before the early 1970’s, children with disabilities were seldom educated, and if they were educated, it was almost always outside the regular classroom. Congress then passed the Education for All Handicapped Children Act (EHA), which was later modified and renamed the Individuals with Disabilities Education Act (IDEA) in 1975. Following IDEA, a free and appropriate public education was to be provided by the states for all children regardless of their disabilities.

As children with disabilities passed through the primary and secondary education systems, many of these children enjoyed accommodations and mainstreaming into general education programs. Interestingly, as these students came of age to apply and attend college, Congress passed the Americans with Disabilities Act (ADA) in 1990. With the broad applicability of the ADA, including institutes of higher education, students with disabilities were now substantially protected as they entered college. Furthermore, these students, who had enjoyed the benefits of accommodations throughout their earlier education, were more likely to apply for and demand accommodations at their colleges and universities.

From the standpoint of the university, the requests of students with disabilities has posed concerns, such as determining whether a student has met the requirements for obtaining an accommodation, assessing the costs involved, implementing the policies and application procedures, and preventing an unfair advantage. Furthermore, students with learning disabilities have presented present unique issues for universities, especially considering many of these disabilities involve the very skills being tested or evaluated through the learning process at the university level. Consequently, the accommodations being requested may challenge the traditional methods of the university education process. The ADA has been a relatively uncharted area for universities, having only been in effect since 1990. Thus, recent case law is providing interpretation of the ADA and the reasonable accommodation section as applied to institutes of higher learning.

Several colleges and universities have implemented disability services programs to assist faculty and staff in


5 Under the ADA, “place[s] of education” are covered entities, including undergraduate and graduate private educational facilities. See 28 C.F.R. § 36.104 (1990); see, e.g., 28 C.F.R. § 35.104 (1990) (defining public entit[ies], which would include public colleges and universities).

6 See Rothstein, Higher Education, supra note 4, at 119.
working with students with disabilities. The purpose of this Article is to explore the application of the ADA reasonable accommodation section to university students with learning disabilities, the university policies detailing the application for accommodations, the potential problems that may arise, and finally, proposed solutions in the model policy guidelines for university disability services policies. In reviewing the relevant case law history, recent court decisions, and current university policies, this Article seeks to present model policy guidelines for accommodating students with learning disabilities in a pro-active and effective manner that preserves the fundamental aspects of the education program.

II. STATUTORY LAW
A. The Rehabilitation Act of 1973

Prior to the enactment of the ADA, Congress passed the Rehabilitation Act of 1973 to protect the rights of the disabled. Specifically, under Section 504 of the Rehabilitation Act (Section 504) any program that receives federal funding is prohibited from discriminating against any qualified persons with disabilities. In general, colleges and universities are addressed in Section 504 and fall within the definition of “programs.” Consequently, since nearly all colleges and universities in the United States receive federal financial assistance, Section 504 covers a majority of the colleges and universities in the United States. Under section 104.44 of the Section 504 Regulations, these covered entities must accommodate those students with disabilities and modify their programs and services, if necessary.

B. The Americans with Disabilities Act

In 1990, Congress passed the landmark legislation known as the Americans with Disabilities Act. Title II and III of this Act, respectively, provide that public accommodations and private entities are prohibited from discriminating against a person due to disability in the enjoyment and participation of the covered entity’s programs and services. Additionally, these entities must provide reasonable accommodations, if necessary, for persons with disabilities to enjoy such program services. Nearly all public universities and colleges fall within Title II of the ADA as places of public accommodations,

*7 The University of Houston Law Center, the Hastings College of the Law, the University of Baltimore, Stanford University and James Madison University all have created policies and procedures for assisting students with disabilities. Some of these university policies explicitly state the procedures a student must follow to obtain reasonable accommodations, while others simply explain basic policies. The University of Baltimore has a brief policy detailing disabilities documentation; however, such a written policy leaves the freedom of deciding the appropriate plan of action to the administrators of the various schools within the university. See University of Houston Law Center, University of Houston, Handbook for Applicants and Students with Disabilities (1997); Hastings College of the Law, University of California, Policy and Procedures for the Provision of Services to Students with Disabilities, (1992); University of Baltimore, University of Baltimore Disabilities Documentation Policy, (1993); James Madison University, Statement of Policy & Definitions (visited Jun. 4, 2000) http://www.jmu.edu/disabilityser>; and Stanford University, Disability Resource Center Policy (last modified Jun. 22, 1999) <http://www.tanford.edu/group/DRC>.

*8 This Article will address the Rehabilitation Act in a minimal capacity to provide legal background in the disability rights area before the enactment of the ADA. The focus of this Article is the ADA reasonable accommodation section and its effect on students with learning disabilities at institutes of higher learning.
therefore, the ADA applies fully to these programs. However, for a student with a disability to benefit from the ADA, the student must be a qualified individual, as defined in the ADA.

C. Who is a “qualified” individual with disability?

While Congress incorporated many of the similar underlying concepts included in the Rehabilitation Act into the ADA, Congress further expanded the rights of those persons with disabilities, especially in regards to whom may “qualify” for a covered program, when it enacted the ADA. Under either the ADA or the Rehabilitation Act, a person must be “qualified” in order to receive the protection granted by law. Under the Rehabilitation Act, “otherwise qualified” persons are defined as “those who would be able to meet the requirements of a ... program in every respect except as to limitations imposed by their handicap.” In essence, despite a handicap or disability, the “otherwise qualified” person must be proficient in meeting the requirements of the program, which may be difficult depending on the specific disability. Extensive accommodations were not necessarily required under the Rehabilitation Act, however, a further interpretation of this Act in Alexander v. Choate dictated that programs must provide reasonable accommodations to enable participation in the program by “otherwise qualified” individuals.

On the other hand, the ADA defines a person with a disability as one who has:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; or
(B) a record of such an impairment; or
(C) being regarded as having such an impairment.

In addition, under the ADA, a qualified person with a disability is defined as a person who “with or without reasonable accommodations ... meets the essential eligibility requirements for the receipt of services or the

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17 See 42 U.S.C. § 12181(7); see, e.g., id. § 12132.

18 See id. § 12131. In addition, for many university disability services programs, the student must identify his or her disability, provide documentation of the disability, and list the requested accommodations. See, e.g., HASTINGS COLLEGE OF THE LAW POLICY, supra note 7, at 5.


20 See id.

21 See Southeastern Community College v. Davis, 442 U.S. 397 (1979). This leading case interpreted required and non-required modifications under Section 504 of the Rehabilitation Act in the realm of education programs accommodating students with disabilities. See id. Furthermore, it is one of the first cases defining an “otherwise qualified individual” under the Rehabilitation Act. See id. In Southeastern, the Supreme Court held that a school did not violate Section 504 when it decided a hearing impaired student was not qualified to be admitted to the nursing program. See id. at 413-14. Under Section 504, the Court ruled educational programs are not required to substantially alter or change their programs to accommodate those students with disabilities. See id. at 413. Although the Supreme Court decided this case nearly twenty years ago, educational facilities have been given great deference in protecting the fundamental aspects of their programs in both recent and past cases. Accord, Guckenberger v. Boston Univ., 974 F. Supp. 106, 148 (1997) (citing Carlin v. Trustees of Boston

22 See Southeastern, 442 U. at 398.

23 See id. at 410.

24 See Alexander v. Choate, 469 U.S. 287 (1985). In Alexander, the Supreme Court held that the state of Tennessee could reduce the number of inpatient hospital care days that its Medicaid program would cover and not be found in violation of Section 504 of the Rehabilitation Act. Id. at 309. The respondent complained that a reduction in the days covered would discriminate against those with disabilities, as these persons often require more specialized care. See id. at 290. The Court reiterated its position stated in Southeastern that covered persons under the Act must have “meaningful access to the benefit the grantee offers.” See id. at 301. Further, in order to provide such access, programs may have to make reasonable accommodations. See id. However, the Court reasoned that the reduction in days does not prevent access to the services, rather both the disabled and non-disabled will be affected and, thus, the state was not found to be in violation of Section 504. See id. at 302, 309.

Therefore, if the university does not wish to grant reasonable accommodations to enable the student with disabilities to enjoy the benefits of the education, this is considered discrimination. Clearly, reasonable accommodations in the programs or services offered by a place of public accommodation, such as a university, are required under the ADA. Therefore, unlike the Rehabilitation Act, a person under the ADA is considered “qualified” for the program even with the aid of reasonable accommodations.

III. ADA REASONABLE ACCOMMODATIONS: THE EDUCATIONAL SETTING

The ADA mandates that public accommodations programs provide reasonable accommodations, however, educational programs have struggled tremendously with several key issues in accommodating students with learning disabilities. Such issues include the determination of whether a student has a learning disability and the policies surrounding the accommodations of such disabilities. Universities generally require a student requesting accommodations to identify his or her disability to the institution, supply adequate documentation of the learning disability, and lastly, indicate the type of academic accommodations which are being sought. However, the policies involving learning disability documentation and evaluation of the requested accommodations have come under significant attention in recent years.

A. Relevant Case Law

In recent years, the amount of litigation has increased in the area of the ADA and higher education. According to statistics, 9.2% of entering freshmen college students had disabilities in 1994. These students identified themselves with a variety of disabilities including “23% with health impairments, 20% with hearing impairments, 18% with learning disabilities, 11% with sight impairments and 7% with speech impairments.” With growing numbers of students with disabilities, more students are requesting accommodations and exercising their rights under the ADA. An example of students clearly challenging their university’s policies was found in Guckenberger v. Boston Univ., a recent landmark decision involving a group of students with learning disabilities who sued Boston University (BU) regarding the policies of retesting for learning disabilities; test administrator credentials; course participation in programs ... provided by a public entity.”

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26 Id. § 12131.
27 See id. § 12132.
29 See id.
30 See Rothstein, Higher Education, supra note 4, at 120.
31 See Hastings College of the Law Policy, supra note 7, at 5; Accord, Rothstein, Higher Education, supra note 4, at 123 (citing Temple Univ., 8 Nat’l Disability L. Rep., at 125 (Off. Civ. Rts. 1995) (holding that late semester request for accommodations was not a violation of Section 504 or ADA)).
During the early 1990s, BU was considered one of the top universities for students with learning disabilities. In fact, BU established a program called the Learning Disabilities Support Services (LDSS) that began to recruit students with learning disabilities. The LDSS staff was responsible for authorizing student requested accommodations, including extended exam times and course substitutions. Consequently, without consulting faculty or any learning disability experts, Westling ordered the LDSS to stop permitting such actions. In late 1995, at the time students were nearing exams, Westling issued corrective actions to occur immediately, which subsequently became the basis for the lawsuit. Eventually, the deadline for complying with the changes was modified and the university hired a new disability expert to assist the disability services program.

In this complex case, the court ruled in favor of the plaintiffs on numerous counts, finding that the university had violated the ADA by changing the retesting procedures with little notice or time to respond for the affected students; requiring learning disability test administrators to be “physicians, clinical psychologists or licensed psychologists;” and refusing to modify university degree requirements of foreign language courses. Moreover, the court’s decision discussed the major barriers disability students face nearly eight years after the passage of the ADA.

Before Guckenberger, the First Circuit addressed the issue of whether a university should fundamentally alter its program by changing a test format to accommodate a medical student with a learning disability in Wynne v. Tufts Univ. School of Medicine. Steven Wynne brought a

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36 See Guckenberger, 974 F. Supp. at 114-15, 149; see generally, Jane Easter Bahls, Disability Dilemma, THE STUDENT LAWYER, May 1998, at 19-22. This article about the Guckenberger case provides a well-written description of how the case transpired, in addition to, how the case will affect universities providing accommodations under the ADA to those students with learning disabilities. The author notes that universities are challenged with protecting their academic programs amidst accommodating the learning disabled students and other students with disabilities.


38 See id.; This program was considered renown and clearly was an example of an effective accommodations program. Id. Further, the court noted that enrollment increased to over 450 students with this recruitment effort. Id.

39 Id. (explaining the goal of the program was to assist learning disabled students with extensive services and aids.)

40 See id. (noting that the LDSS staff approved course substitutions, even for required courses).

41 See id. at 117-19 (detailing his decision was based upon his own prejudices that learning disabled students were often faking the disability and further, that such disabilities were not supported by the scientific literature).

42 See id. at 119-20 (explaining that Westling’s staff determined that there was inadequate documentation to support the accommodations granted; shortly afterward Westling issued corrective actions including the need for current evaluations with tests performed by persons with doctorates, and that course substitutions in math or foreign language were not allowed).

43 See id. at 121.

44 See id. at 114-15 (finding that BU violated 42 U.S.C. § 12182(b)(2)(i) in regards to the requirement that the test administrator have a doctorate, except in cases of Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder).

45 See infra Section V of this Article for a detailed review of university policies and models for revised policies more aligned with the intent of the drafters of the ADA.
Section 504 claim against the university asserting that he was an “otherwise qualified” person with a disability. The factual history of the case revealed that Wynne began as a medical student in 1983 at the Tufts University School of Medicine (Tufts). Tufts granted him several accommodations, but Wynne was unsuccessful in completing the course work. Wynne claimed he had a learning disability and that the university had discriminated against him due to his disability. Specifically, Wynne felt he was unfairly disadvantaged because the university used a multiple-choice testing format.

The court in Wynne began its discussion by developing a test to assess whether the university had sufficiently considered the reasonable alternatives available. For the court to decide that the university had met its burden, the university had to prove it took into consideration the alternatives available, the associated costs, and most importantly, whether the alternative substantially altered the education program. In ruling for the university, the court held that Tufts had given sufficient consideration to the alternatives and had proven that providing the alternatives would lower academic standards. In conclusion, the court deferred to the academic institution, a decision well supported given the significant efforts of the university.

Another recent case involving a student with learning disabilities was Betts v. Rector and Visitors of the Univ. of Virginia. In this case, Robert Betts entered into a medical postbaccalaureate program at the University of Virginia (UVA) designed to assist minorities and economically disadvantaged students. In this program, the student had to maintain a certain grade point average (GPA) in order to qualify for admission into the UVA medical school. Betts did not maintain the required GPA; however, UVA decided to allow him to continue in the program contingent upon his participation in learning disability testing and tutoring. Although the tests revealed that Betts had no learning disabilities, UVA granted Betts an extension of the time allowed for taking exams. Betts received passing grades on the exams; however, he failed to earn the requisite GPA to remain in the program.

The court focused on the ADA and Rehabilitation Act violations and the provisions prohibiting discrimination due to a disability in the participation and enjoyment of the entity’s programs and services. Unquestionably, UVA, a state educational institution, fell within Title II of

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48 Wynne v. Tufts Univ. School of Medicine, 976 F.2d 791 (1992). See, e.g., Guckenberger, 974 F. Supp. at 147-48. The Guckenberger court reviewed the Wynne opinion discussing the format of a test at the medical school and the court’s final ruling that changing the format was a fundamental alteration of the university program, should the university change it to reasonably accommodate Wynne. See Guckenberger, 974 F. Supp. at 148. The Guckenberger court clearly stated that in comparison to a test format, “the degree requirements that are at issue in the instant litigation go to the heart of academic freedom.” Id.

49 See Wynne, 976 F.2d at 792.

50 See id.

51 See id.

52 See id.

53 See id.

54 See id. at 793.

55 See id.

56 See id. at 794-95.

57 See id. at 796.


59 See Betts, 967 F. Supp. at 882.

60 See id. at 884.

61 See id.

62 See id.

63 See id.

64 See id.

65 See id. at 885 (citing 42 U.S.C. § 12132). The court also discussed the Section 504 violations; however, in keeping with the focus of this article, that portion of the discussion has been omitted.
the ADA as a public entity. In its discussion, the court referred to Doe v. New York University, a similar case involving a medical student with mental disorders. Specifically, the language in Doe described once again the deference given by courts to the judgment rendered by administrators at the educational institution. The court addressed the facts of Betts’s performance after accommodations and UVA’s subsequent dismissal of him from the program. According to UVA, Betts was not performing at the level necessary to progress into the medical school. Betts argued that UVA’s decision should not be given the “usual deference because it was based solely on an ‘objective’ criterion.” Instead, Betts argued that the court should evaluate whether he was competent for medical school and that the GPA requirement only be applied to “individual semesters” and not the whole year. Ultimately, the court disagreed and ruled that the university’s decision was to stand.

B. Striking a Balance in Providing Reasonable Accommodations

For university administrators, carefully drafted policies for services provided to students with disabilities certainly will mitigate many potential problems in the future. Moreover, in providing accommodations, the educational institution has the undeniable right to protect the fundamental aspects of its programs. An accommodating university also has the responsibility not to create a financial burden or an unfair advantage for those students with disabilities. While universities may view accommodating learning disabled students as a challenge, evaluating accommodations with respect to these criteria will assess the reasonableness of the accommodation and the effect on the university’s programs.

1. The Creation of an Unfair Advantage for Students with Disabilities

Congress passed the ADA to ensure that persons with disabilities enjoyed, in a sense, “a level playing field” in the participation of such covered programs and services. At times, a fine line exists between providing reasonable accommodations, such as extended exam time for students with learning disabilities, and creating an unfair advantage that permits disabled students to excel far beyond their peers. Only those accommodations that are thoroughly documented and proven necessary should be allowed. Thus, in the instance of accommodating a student with disabilities, a university strives to reasonably accommodate while not placing the student at a greater advantage than non-disabled students.

Understanding the student’s learning disability is essential for the university in providing reasonable accommodations under the ADA. If a student has indicated she has dyslexia, a learning disability, then completing projects and exams in a timely manner may be difficult. A dyslexic student may need more time to read and understand the test/project material, since many of the letters she reads are transposed. To support the student’s request, records of past accommodations from

67 See Betts, 967 F. Supp. at 996 (citing Doe v. New York Univ., 666 F.2d 761 (2nd Cir. 1981)).
68 See id. (citing Doe, 666 F.2d at 775-76, explaining that this court denied the plaintiff’s requested relief to be reinstated at the medical school, instead deferring to the institution’s decision of no readmission).
69 See id. at 887.
70 See id.
71 See id.
72 See id.
73 See id. at 888 (stating this was a flawed argument that assumed “a clearly defined criteria [was] entitled to less deference than a vague goal statement would be”).
74 See James Madison University Policy, supra note 7 (describing how delineating the rights and responsibilities of both the student and the university will foster a greater understanding of each party’s role and promote effective team work).
75 Judging the extra amount of time to grant this type of student is an inexact science; simply beginning with time and a half can be a reasonable accommodation without creating an unfair advantage.
recent college exams/projects would be of great assistance to the university. In summary, the better the university understands what accommodations are necessary for the student to participate, the less likely it will create an unfair advantage. The university’s granting of the accommodations will likely enable the student to participate effectively in the program. Without the accommodations, the student could not participate sufficiently to continue in the university program.

2. The Creation of an Undue Financial Burden

The ADA requires a covered entity, such as a university, to provide reasonable accommodations to qualified students with disabilities. These students must follow the institution’s procedures for students with disabilities in order to qualify for such accommodations as auxiliary aids, tutoring, extended time to complete degrees, and sign-language interpreters. Many accommodations, such as extended time for exams or projects, or scheduling the class in a room with better lighting, cost little or no money to administer. Nevertheless, if the student’s request for accommodations creates an undue financial burden to the institution, the institution may be justified in denying the request. The institution, though, must clearly demonstrate that providing the accommodations creates such a burden. In light of the often large annual budgets of many universities, this burden may be difficult to prove.

3. Substantial Alteration of the Education Program

As previously discussed, courts have ruled that an educational facility did not have to substantially alter its program to accommodate a student requesting a different test format. Institutes of higher learning are often granted judicial deference where the court is satisfied that the available accommodations have been evaluated as to the effect on the fundamental aspects of the educational program. Courts are reluctant to make academic decisions, instead allowing universities “academic freedom” in educating their students. Changing test formats or degree requirements may amount to alterations of the fundamental aspects of an educational program. Universities have the burden to demonstrate that such alterations will occur — an often difficult burden to prove given the many methods currently available to test students or meet requirements.

IV. LEARNING DISABILITIES: POLICIES AND PROBLEMS WITH REASONABLE ACCOMMODATIONS

A. Learning Disabilities Defined

The court in Guckenberger, in describing the plaintiffs’ learning disabilities, began its review of the literature with a reference to volume four of the Diagnostic Statistical Manual of the American Psychiatric Association (DSM-IV). The court cited the DSM-IV and stated

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77 See University of Houston Law Center Policy, supra note 7; see, e.g., 28 C.F.R. § 35.104 (1990).

78 See, e.g., United States v. Board of Trustees for the Univ. of Alabama, 908 F.2d 740 (11th Cir. 1990). In this case, the court held that the school was not permitted to deny aids to students with disabilities based upon their financial abilities. See id. at 752. In addition, the court ruled that the school did not prove the transportation services necessary for the disabled students created an undue financial burden, considering the university’s annual budget for transportation was “$1.2 million.” See id. at 751. The court ruled that the school had failed to reasonably accommodate the disabled students in its transportation services. See id. at 751. See, e.g., Phyllis G. Coleman & Robert M. Jarvis, Tuition Adjustment for Law School Students: A Necessary Accommodation Under the ADA?, 24 J.C. & U.L. 45, 58 (1997) (citing Laura Rothstein, Disability Issues in Legal Education: A Symposium, 41 J. LEGAL EDUC. 301, 305 (1991)).

79 See Wynne, 976 F.2d 791; see, e.g., Southeastern Community College v. Davis, 442 U.S. 397 (1979).

80 See Wynne, 976 F.2d at 795.

81 See Haig A. Bosmajian, Introduction to Academic Freedom, at 6 (The 1st Amendment in the Classroom Series No.4, 1989).

82 See Southeastern Community College v. Davis, 442 U.S. 397 (1979); see, e.g., Wynne, 976 F.2d at 796.

83 See Guckenberger, 974 F. Supp. at 132.
that “‘learning disorders are diagnosed when the individual’s achievement on individually administered standardized tests in reading, mathematics, or written expression is substantially below that expected for age, schooling, and level of intelligence.’”84 The IDEA also provides a definition of learning disabilities that may be helpful in understanding students with such disabilities.85 Learning disabilities are often considered “hidden disabilities.” One cannot ascertain a student has a learning disability from seeing the student; therefore, universities are reluctant to grant accommodations for unapparent disabilities. In short, learning disabilities definitely affect the learning process that occurs at the university level.86

B. Policies and Procedures Regarding Reasonable Accommodations

As more students with disabilities enter colleges and universities, the need exists for these facilities to develop and administer policies for services provided to these students. While some policies address students with disabilities in the admissions process, this Article focuses on accommodating currently enrolled students.87 Generally, the policies will begin by stating the applicable law under which the institution will provide reasonable accommodations to those qualified students with disabilities.88 Further, the policies usually will state that all qualified students may participate in the university’s programs, if the students meet the requirements for such programs.89

In focusing on students with learning disabilities, university procedures generally address the steps the students must follow to apply for accommodations. The policy format below demonstrates how universities can determine student eligibility for special services:

1. The student identifies him/herself as a having a disability.
2. The student must provide documentation of the learning disability prepared by “a professional qualified to diagnose a learning disability, including but not limited to a licensed psychiatrist, learning disability specialist, or psychologist;90 [and shall] include the testing procedures followed, the instruments used to assess the disability, the test [score] results, [and] a written interpretation of the test results by the professional.91
3. The student must provide the accommodation request to the university.92

Although the steps appear to be clear-cut, points of contention for students may include the question of who is a “qualified professional” and how current the verification of the disability must be in order to qualify a student for

84 See id. (citing the DSM-IV section on learning disabilities).
85 See 20 U.S.C. § 1401(26)(1994). This IDEA section describes specific learning disabilities as “a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written which disorder may manifest itself in imperfect ability to listen think, speak, read, write, spell, or do mathematical calculations.”’ Id.
86 Adding to the difficulty in obtaining accommodations is the fact that some students may not realize they have a learning disability until they enter college.
87 See Hastings College of the Law Policy, supra note 7, at 1 (explaining that the policy was developed mainly for enrolled students).
88 See id.
C. Significant Problems in Developing and Administering Policies for Learning Disabled Students: A Discussion

Often universities are presented, with requests for accommodations by students with learning disabilities that require significant consideration before a decision is rendered. An example is a request for oral exams by a law student with a learning disability that hinders his ability to answer exams in a written fashion. Is it fair to the other students in the class to allow such an accommodation? The school must apply certain criteria to determine the reasonableness of accommodations. More specifically in this case, is an unfair advantage being created for the student with the learning disability? If the affected student has essentially met the criteria and it is apparent to the school that the accommodation is necessary, then the student should be permitted to respond orally. By following established procedures, the university can protect against creating an unfair advantage and greatly mitigate the chance of inequities between students.

Furthermore, the burden is on the student to prove adequately that the disability affects his ability to learn or participate in a particular class, service, or program. For instance, if a student requests an accommodation, such as extended time for completing a project, the university has the right to require appropriate disability documentation and information regarding past accommodations. Providing an accommodation, if not proven necessary, creates an unfair disadvantage to those non-disabled students who must perform in the mode and time required by the professor. Universities, while desiring to accommodate those qualified students under the ADA, nonetheless must maintain their high academic standards. Without appropriate documentation, the university does not have the information necessary to assess reasonableness under the ADA.

Accommodation requests for course substitutions and degree requirement modifications are perhaps the most troubling requests for a university. Not only is the risk of creating an unfair advantage present, but these requests encroach upon the university’s responsibilities in educating its students. The university is concerned with substantially altering its programs by granting these types of requests. In essence, the university will argue that granting many of these requests will result in a student obtaining an insufficient knowledge base to warrant awarding a college degree. Solutions for universities navigating through such difficult issues lie in well-defined disability policies, which hopefully provide guidance as to how a university can protect its academic programs and still provide reasonable accommodations.

Cost is yet another defense that universities raise to providing reasonable accommodations to students with learning disabilities. Several accommodations, such as note-takers and books on tape, when provided for a number of learning disabled students, may present a substantial financial burden for a university. Further, budget cuts at the state level may significantly effect the university’s budget, making providing accommodations more difficult. Conversely, the burden is quite high for universities under the ADA, specifically if the university claims the accommodation creates an undue financial burden. However, given the relatively large budgets of state universities, it will be difficult for a university to successfully argue this defense. In addition, having a court scrutinize accommodations.

93 See Guckenberger, 974 F. Supp. at 114-15. The university required that evaluations must be performed by “physicians, clinical psychologists or licensed psychologists [or] they were unacceptable.” Id. The court ruled such criteria “‘screen[ed] out or tended to screen out’ the learning disabled students and furthermore, were not considered pertinent to the rendering of reasonable accommodations. Id.

94 This disorder is referred to as ADHD.

95 This disorder is referred to as ADD.

96 See Guckenberger, 974 F. Supp. at 115.

In summary, a university is likely to encounter many of the previously mentioned issues in administering a disability services policy. How a university administers its disability services program unquestionably will affect whether the university will be seen as having reasonably accommodated students with learning disabilities. As seen in Guckenberger, when the university made substantially burdensome changes in the program requirements for learning disability documentation, the university violated the ADA.\footnote{See Guckenberger, 974 F. Supp. at 114-15 (stating that the new criteria for eligibility in the disability services program, such as having to be evaluated every three years by persons with doctorates, was found to have screened out or tended to screen out the learning disabled students).} It is understandable that universities may want to ensure that only those students with “qualified” disabilities are accommodated and, consequently, will require high standards in proving eligibility. However, such practices border on violating the ADA. Moreover, when a university undertakes rapid changes in the program requirements without adequate notice to students, the net effect is a violation of the ADA by denying or delaying accommodations.\footnote{See id. at 116.}

V. SOLUTIONS: DISCUSSION OF MODEL DISABILITY SERVICES POLICY GUIDELINES

A. Main Factors of Well Developed Policies

In developing a model disability services policy, special attention must be given to the landmark decisions in the area of the ADA and universities.\footnote{See John W. Parry, Executive Summary and Analysis, Section I. ADA and Other Federal Disability Civil Rights, 21 MENTAL AND PHYSICAL DISABILITY L. REP. 557 (1997)(explaining that the ruling in Guckenberger will have a significant impact on the disabled population at the nation’s college and universities, in addition to, revealing the “tension between students with learning disabilities and university and college officials over academic accommodations”).} The mistakes of BU in Guckenberger should serve as a learning tool to prevent the repeat of such problems.\footnote{See Guckenberger, 974 F. Supp. 106.} In addition to a well-developed policy, providing disability services training to the university staff will assist all parties involved to serve better the students with disabilities. Lastly, key factors that should be considered in the development of a disability services policy include the authority granting the right to request reasonable accommodations (a brief statement of the applicable ADA sections); the application process; the university procedures for review of accommodation requests; the policy regarding confidentiality of student’s disability records; the dispute resolution process; and disability services program network information.\footnote{For a comprehensive description of these key factors in the development of a model disability services policy, see Appendix A.}

B. Why Develop a Comprehensive Disability Services Policy?

A comprehensive disability policy including the previously mentioned factors serves a number of purposes for universities in working with students with learning disabilities. Further, while the policy may not cover every situation, a majority of situations will be covered and explained to assist in the effective implementation of a disability services program. Though not the obvious reason for developing a comprehensive policy, universities should not overlook the fact that well written policies indicate the organization desires to operate within the law concerning the ADA and reasonable accommodations. Lastly, the public relations effect will clearly be beneficial to the university in demonstrating its desire to have a diverse
student body inclusive of students with all types of disabilities.

C. Discussion of the Model Policy Guidelines

These model policy guidelines were developed from the standpoint that students with learning disabilities often face tremendous barriers in obtaining reasonable accommodations, their right granted under the ADA. When the focus is the learning disabled student requesting accommodations in the educational setting, the process can perhaps be more difficult for several reasons. Problems arise because students have disabilities that affect how the student performs at the university, namely the student’s ability to learn, comprehend, and retain the material. In reviewing the different disability policies for this article, the author highlighted a few current topics that have been or continue to be areas of much debate in the education arena. Topics concerning modifications of degree requirements, course substitutions, and course modifications are key issues for university programs. Simply put, these issues target the very heart of the American higher education system.

The solution to preventing problems with these current topics of debate lies in well-developed disability services policies. Providing a quality education, in light of reasonable accommodations, requires a team effort on behalf of the student and the university. Aside from the initial identification and documentation of a disability, effective communication between the student and the university regarding the accommodation request is imperative for a successful educational experience. Moreover, once the student and the university understand the rights and responsibilities that each possess, the process of accommodating students with learning disabilities will occur more readily. Discussed below are recommendations for addressing potential problem areas in disability policies designed for learning disabled students.

1. Modification of Degree Requirements and Substitution of Course Work

Areas of disability policies that have ignited a tremendous debate in the university setting include the request for modifications of the degree requirements and substitution of course work. Setting the degree requirements necessary to earn an undergraduate or graduate degree is an undeniable right of a university. A challenge to this right naturally threatens, from the university’s standpoint, the quality and basis of a student’s education. However, the debate from those students with learning disabilities is that in some instances, the student is unable to complete all degree requirements due to a learning disability. Conversely, the university can argue that if it modifies the degree programs challenged by students with learning disabilities, than it will lose its “right” to decide how its students will be educated and how degrees will be earned. Students requesting an accommodation will perhaps argue discrimination under the ADA if the university claims it cannot change its policies.

103 See James Madison University Policy, supra note 7. This disability services policy was one of the few policies that approached the process from two perspectives—the student and the university. See id. The student plainly has responsibilities to uphold as a participant in the education system, such “an obligation as any other student to meet and maintain the institution’s academic and technical standards.” Id. Whereas the university has the right to “identify and establish the abilities, skills, and knowledge necessary for success in its programs and to evaluate students on this basis.” Id. Developing a policy such as the one at James Madison University, is a step towards enacting a positive and pro-active program for students with learning disabilities.

104 Due to the similarities in these issues, the author addresses the topics together noting the differences when applicable. Mainly, these issues overlap in the effect on the university’s program requiring similar policies and procedures to accommodate students while maintaining program integrity.

105 For example, a chemistry major may require a four-hour calculus course; however, a four hour advanced mathematics class may suffice to provide the mathematical background necessary in this field. By permitting such a modification, the student is reasonably accommodated and the university’s learning objectives may be satisfied for the earning of a chemistry degree.

106 For the author’s suggestions in how best to address a student’s request for degree requirement modification, see infra section V, C, 1(a) of this article describing model policy guidelines for such an accommodation.
Another related issue faced by universities is the request for course substitution. Students with learning disabilities may request to substitute another course in place of a required course in the curriculum. In this instance, the student has entered onto what perhaps educators would call “sacred ground.” For the very basis of university degree programs is the required course work selected by the curriculum committees of universities that, if successfully completed, earns the student the college degree. Given the fact that universities possess substantial academic freedom to educate their students as they deem appropriate, course substitutions will undoubtedly be highly scrutinized to preclude fundamental alterations of their programs — a non-acceptable accommodation for a university to provide. Concerning specific courses, faculty should not have to “sacrifice course expectations or quality of student work.” Therefore, it is necessary that a policy clearly detail the process for requesting a modification in degree requirements, the review of the alternatives including course substitution, and the final procedure for rendering a decision.

A well defined policy detailing the procedures to follow with the request for course substitution or degree requirement modification unquestionably will assist the university in effectively administering a disability services program. The policy should establish the steps students should follow to request accommodations such as:

1. The Disability Services Coordinator will review the request certifying that the student’s disability documentation is appropriate to enable the assessment of the request.

2. The Coordinator will then forward the request to the student’s department head who will contact the department’s disability services representative (a faculty member sitting on a special designated committee established to develop and implement the university’s policy). If necessary, this team will send the request to the University Disability Services Committee for a final decision.

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107 See Southeastern, 442 U.S. 397 (holding that educational facilities are not required under Section 504 to substantially alter their education programs to accommodate students with disabilities); see, e.g., Guckenberger, 974 F. Supp. at 146 (citing Alexander v. Choate, 469 U.S. 287 (1985) and Southeastern, 442 U.S. 397 to support the concept that schools are required to make reasonable accommodations under the ADA and Section 504, but again not accommodations that fundamentally alter the education programs).

108 See JAMES MADISON UNIVERSITY POLICY, supra note 7. It should be noted that students with learning disabilities may argue that degree requirements are unreasonable and discriminate, such as with a four credit lab course for a student who cannot learn in a visual manner, but instead learns best by hearing the material. It may be difficult to modify certain lab activities, when an essential part of the class work is performing experiments; however, an alternative may be for the student to use computer-aided learning activities that could suffice for the covered material.

109 The author is assuming that when a student makes a request for a modification of degree requirements, that the committee or department team will select an appropriate substitution. Simply excusing the student from the required course, and dictating no substitute, neither promotes equal treatment of all students nor does it ensure the university is adequately educating its students. Furthermore, students without disabilities will view such actions as unfair and indicative that the university has two standards by which degrees are awarded.

110 See STANFORD UNIVERSITY POLICY, supra note 7. The author strongly believes that fielding student requests through the disability services coordinator is absolutely necessary. This procedure ensures an adequately trained individual reviews the request initially for sufficient documentation and information—a safeguard to preventing untrained administrators from making decisions without complete records.

111 Faculty are present on the committee to give their input as to “what equally effective courses can be substituted,” since as educators they are better equipped to assess the course work necessary to educate students appropriately. See JAMES MADISON UNIVERSITY POLICY, supra note 7. Further, with the varied representation on the committee, a decision will have been developed in a fair and reasonable manner as to whether a request by a student with a learning disability fundamentally alters the education program.
3. Whether the department team or special committee makes the decision, several factors shall be considered:
   · The nature of the student’s disability and its nexus to the requested modifications.112
   · Whether an equal course may be substituted without compromising the student’s education.113 (All available alternatives MUST be considered; including courses outside of the student’s designated department to provide significant latitude for accommodation.)
   · Lastly, whether the accommodation will result in a fundamental alteration of the education program.114

   These policies include several levels of review to prevent one person from having the sole responsibility for deciding whether to grant a student’s request for accommodations.115

   An important factor that warrants further discussion is whether an adequate replacement course is available. The university may indicate this factor cannot be met, however, an open-minded and pro-disability approach is imperative to providing accommodations under the ADA. In the beginning of implementing this new policy, the committee will be challenged in numerous ways; however, by working with the different colleges throughout the university system, alternatives will often be available. As students with disabilities continue to push for changes in the traditional education system, universities will have to become more flexible in their requirements while maintaining educational standards.

   Finding innovative teaching methods will assist universities in maintaining academic standards, while providing alternative learning opportunities. Professors who are active in their professional organizations could learn such alternative techniques to teach students in new ways. New techniques include integrating computer assisted learning programs into the classroom, in addition to implementing interactive learning between the students to provide a different learning environment from the traditional lecture model.116 Most importantly, should students feel this factor was not adequately considered, a dispute resolution process would be available as a component of a well-developed program. It is likely that universities will thoroughly investigate the requests at the committee or dual team member level to prevent students from having to use stronger means to obtain reasonable accommodations.117

   If this approach is developed and followed by the student and the university, both parties will benefit. The university will provide a more progressive and congenial environment for students who often have faced substantial impediments to receiving their education. This result is not only desirable, but is required in light of the ADA as applied to institutions of higher learning. Such a systematic approach will benefit the university in that each request will go through a review process to ensure: (1) that all possibilities are explored, (2) that only those changes considered necessary are made, and (3) that should modifications be required, a comparable alternative is selected, thus protecting the fundamental aspects of the educational program.

   112 See Stanford University Policy, supra note 7.

   113 Id.; see, e.g., James Madison University Policy, supra note 7.

   114 See James Madison University Policy, supra note 7.

   115 Further, persons educated in working with learning disabled students will be present in each department. Even if the faculty representative does not hold a special education degree, with proper training, this person can understand the basic requirements under the ADA and what common modifications are given to learning disabled students. In addition, it should be noted, that a coordinator in the disability services program likely will hold a special education degree, as would the program supervisor. These safeguards ensure fair and proficient handling of student requests.

   116 The author acknowledges that while some professors use multiple teaching methods, many professors still use the traditional lecture method.

   117 Other recommendations include written guidelines detailing the process a student must follow to request an accommodation, the process of review by the committee, and lastly the process of appeal. As mentioned previously, well written guidelines not only assist the committee in their duties, but also provide documentation to follow when any request is made, thereby ensuring fair handling of all students’ request. Stronger means may result in students approaching high level administrators or in the worst case, filing suit against the university.
2. “Modifications in Specific Courses”\textsuperscript{118}

Similar to the debate initiated when a student makes a request to modify degree requirements or substitute courses, is the potential for debate when a student approaches a faculty member regarding a modification to a specific course. Faculty members are given significant latitude in teaching, therefore having a student request to change the manner in which a course is taught may create a contentious situation. A model approach to this portion of the policy includes a system in which the student acts as an advocate while requesting accommodations from the teacher. This approach has many advantages including developing advocacy skills for students with disabilities;\textsuperscript{119} allowing the student and faculty member to develop a workable solution together; and promoting free discussion of such an important issue between those parties most affected. In this case, a committee may simply take too long to consider the request, thus, serving neither the university nor the student’s best interest.\textsuperscript{120}

A teacher is required under the ADA to make reasonable accommodations; however, a teacher does not have to grant requests that substantially alter the fundamental aspects of the course work.\textsuperscript{121} On the contrary, a student may request an accommodation that does not fundamentally alter the course such as completing a paper in a larger font or submitting the assignment electronically.\textsuperscript{122} If this process does not result in an agreeable solution, the student may contact the disability services coordinator to resolve the issue.\textsuperscript{123}

This article has only addressed a few of the essential issues regarding disability policies and the recommendations necessary to develop pro-disability policies. With the developments in the disability rights area, universities would be advised to review its policies on at least an annual basis to ensure continued compliance with the ADA and the surrounding case law. Additionally, universities should establish an independent university committee compromised of students with disabilities, faculty members, a disability services coordinator, and outside members tasked with regularly following the issues affecting the university’s students with disabilities. Ideally, with an independent committee following the different issues, the university can identify problem areas and act preventively, maintaining a productive and effective relationship between the students and the administration.

VI. CONCLUSION

While many issues exist regarding the application of the ADA to universities, a few present unique problems that require universities to be pro-active and implement policies for students with disabilities. The goal in working with learning disabled students is to strike a balance between providing reasonable accommodations while not creating an unfair advantage, an undue financial burden, or fundamental alterations of the educational program. Applying the ADA reasonable accommodation section to students with learning disabilities presents challenging situations for the universities for several reasons, including the fact that the disability may have a tremendous effect on the student’s ability to learn and succeed at the university.

Further, the accommodations requested by students with learning disabilities may substantially alter the educational program. In this case, universities are given significant deference by the courts in deciding what is a fundamental alteration. Courts are reluctant to decide

\textsuperscript{118}See James Madison University Policy, supra note 7.

\textsuperscript{119}Such a skill will be instrumental for any student with a disability in discussing an accommodation request with the both university and in future endeavors.

\textsuperscript{120}See Appendix B for a detailed description of the steps for a student to follow in requesting a modification of a course.

\textsuperscript{121}See generally, Southeastern Community College. 442 U.S. 397.

\textsuperscript{122}See Stanford University Policy, supra note 7 (detailing “alternate media” using “an optical character recognition scanner” which translates books into other media for the visually impaired).

\textsuperscript{123}A further step would be a review under the university dispute resolution policy for students who have made requests for reasonable accommodations and are not satisfied with the results.
academic issues, instead traditionally leaving such decisions to the university staff and administrators, unless there is evidence of unfair handling of requests or discrimination.\textsuperscript{124}

Administering a successful disability services program should be a goal of every university. The previously mentioned recommendations for a comprehensive policy are solutions to reasonably accommodating students with learning disabilities, which allows enjoyment of the programs without a fundamental alteration of the educational criteria. Clearly, as more disabled students challenge university policies, courts will continue to eliminate discriminatory actions by universities — the very actions Congress sought to prevent with the passage of the ADA. It is unlikely that Congress will significantly modify the ADA as it applies to public universities in the near future. On the contrary, faculty senates will address these issues in a greater capacity as more students with learning disabilities enter the classrooms. Until such policies are in effect at all United States public colleges and universities, students with learning disabilities will continue to face barriers in receiving a college degree.

**APPENDIX A**

Factors to be included in Model Disability Policy Guidelines

Listed below are relevant factors and categories to be included in a model comprehensive policy.\textsuperscript{125} The author has expanded the topics typically covered by such a policy to provide more guidance in implementing an effective disability services policy at a public university.\textsuperscript{126}

**Authority/General Introduction**

1. An introduction citing to the applicable sections of federal law, including the IDEA and ADA.
2. Different brochures or sections for enrolled students versus those students applying for admission.\textsuperscript{127}
3. Definition of a person with a disability under the ADA and Rehabilitation Act.
4. Statements providing students will not be discriminated against by the university in any program due to their disability.\textsuperscript{128}

**How to Apply for Reasonable Accommodations**

5. Verification of a Temporary Impairment.
6. Verification of a Sensory, Physical, Mental or other Health Impairment.\textsuperscript{129}
7. Verification of a Learning Disability with specific criteria dictating how, when, and by whom the documentation should be performed.
8. Statements regarding whom shall bear the cost of the required testing.

\textsuperscript{126}Cf. JAMES MADISON UNIVERSITY POLICY, supra note 7, STANFORD UNIVERSITY POLICY, supra note 7, and HASTINGS COLLEGE OF THE LAW POLICY, supra note 7.

\textsuperscript{127}See HASTINGS COLLEGE OF THE LAW POLICY, supra note 7, at 1. This pamphlet stated that it is the policy of the college to reasonably accommodate enrolled students. See id. The school assumed that upon being accepted, the student was “deemed qualified to undertake the academic program.” Id.

\textsuperscript{128}This factor requires complete understanding by the policy developers of all programs currently part of the university programs. Reviewing the programs before developing the policy will surely mitigate future problems, as guidelines can be carefully drafted to provide accommodations to “qualified” individuals while not opening the university up to litigation. Examples of accommodations would also be invaluable to assisting students and faculty. Challenging areas include study abroad programs, exchange programs with other United States public universities, university sponsored trips, and activities part of college life such as social and service organizations (including university approved fraternities and sororities).

\textsuperscript{129}See UNIVERSITY OF BALTIMORE POLICY, supra note 7, at 1.
University Procedures for Reasonable Accommodations

9. A list of procedures explaining how the university determines reasonable accommodations.
10. Material describing common accommodations in the areas of academic modifications, exams, auxiliary aids and services, and building facilities.
11. Specific statements addressing students with learning disabilities and the special documentation and process detailing accommodations for students with such disabilities.

Confidentiality
12. Statements regarding the confidentiality of disability services records and use of confidential information.

Dispute Resolution/Grievance Process
13. Statements regarding the appeal process when the university denies a student’s accommodation request(s).
14. Statements describing “academic dismissals and readmission” into the university.

Disabilities Services Program Network
15. Information regarding a mentor program which matches new students with disabilities with currently enrolled students with disabilities.
16. Information on working with a counselor in the disability services center.

Special Topics
17. Financial Aid and requests for an accommodation in taking a part-time course load.
18. Graduate schools, including the Law School, the Medical School and the Business School all have policies in addition to this general policy. Students are encouraged to meet first with the Disability Services Program for the university and then meet with the appropriate representative from their school.

Appendices
19. Forms necessary to apply for accommodations.
20. List of important persons to contact in the administration who are available to assist students throughout the application process.

APPENDIX B

The steps to an effective application system for a course modification include:
1. The student communicating directly with the teacher;
2. The student providing a disability services request form for course modification, complete with the reasons for the request, as well as, the specific modification requested;
3. The teacher and student setting a meeting to discuss the request;
4. The teacher providing a written response indicating whether the request is granted. The student should approach the teacher within the first week of the semester to begin the process. Additionally, the disability coordinator can provide suggestions for modifications that have been previously successful.

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130 See UNIVERSITY OF HOUSTON LAW CENTER POLICY, supra note 7, at 6.

131 Although not all universities have graduate programs, this paragraph serves as a reminder for universities with such programs to mention special guidelines each graduate program may have for accommodating students with disabilities.

132 Students shall bring with them appropriate documentation of their learning disabilities, in addition to a written correspondence from the disability services coordinator on behalf of the student to the teacher.

133 See JAMES MADISON UNIVERSITY POLICY, supra note 7.

134 See id.
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**Brown v. Dermer**

Lead Paint Plaintiffs Need Only Show Landlord Had Reason to Know of Chipping Paint

By Todd R. Chason

The Court of Appeals of Maryland held that a plaintiff in a lead paint action survives summary judgment by merely alleging that a landlord has knowledge of flaking, chipping, or otherwise loose paint. *Brown v. Dermer*, 357 Md. 344, 744 A.2d 47 (2000). It is not necessary to allege that the landlord knew the paint was lead based; here, mere evidence that the landlord had knowledge of deteriorating paint created an issue of material fact.

The Browns, and their twins born in January of 1984, lived in a home rented from the Dermers. One month prior to becoming pregnant with the twins, Ms. Brown allegedly gave notice to the landlords that there was chipping paint in the home. The landlord denied receiving this notification, and the condition went uncorrected. In 1985, both children were diagnosed with increased levels of lead in their bloodstream. Upon investigation of the residence, the Baltimore City Health Department found thirty violations related to lead paint, which the landlords were given one week to correct; however, they failed to comply for almost three months. The Browns subsequently filed suit for negligence.

The Circuit Court for Baltimore City granted the Dermer’s motion for summary judgment, which was affirmed by the court of special appeals. The Court of Appeals of Maryland granted certiorari. The issue before the court of appeals was what must a plaintiff allege in a lead paint case to survive summary judgment. Specifically, whether evidence must be offered that the landlord knew or had reason to know a danger existed due to lead-based, chipping paint, or whether mere allegations of knowledge of chipping paint were sufficient.

The court of appeals noted that pursuant to Maryland Rule 2-501(e), the plaintiffs must allege sufficient facts from which a jury could conclude that the defendants acted negligently. *Brown*, 357 Md. at 354, 744 A.2d at 53. The court stated that “summary judgment is generally not appropriate for issues concerning knowledge, motive, or intent because the facts concerning the defendant’s knowledge and conduct, and the circumstances in which they existed . . . are best left for resolution by the trier of fact at trial.” *Id.* at 355, 744 A.2d at 53 (quoting *Federal Sav. & Loan Ins. Corp. v. Williams*, 599 F.Supp. 1184 (D. Md. 1984)).

The court turned its analysis to Maryland law regarding negligence, noting that a plaintiff must prove (1) a duty upon the defendant to protect the plaintiff from injury, (2) breach of that duty, (3) resulting injury, and (4) proximate cause between the injury and defendant’s breach. *Id.* at 356, 744 A.2d at 54. The court recognized that the requisite duty may be established by statute; thus, the violation of a statute may provide evidence of a breach of duty. *Id.* at 358, 744 A.2d at 55. Finally, a prima facie case of negligence is made by showing a nexus between violation of the statute and the resulting injury. *Id.* at 359, 744 A.2d at 55.

The court of appeals examined the Baltimore City Housing Code, which provides that in order to properly maintain property, “interior walls, ceilings, woodwork, doors and windows shall be kept clean and free from any flaking, loose or peeling paint and paper.” *Id.* (quoting *Baltimore City Code (1983 Repl. Vol.), Art. 13 § 703(2)(c)). The court found a statutory obligation existed to eradicate deteriorating paint conditions about which the landlord knows, regardless of lead content. *See id.* at 359-60, 744 A.2d at 55-56. Otherwise stated, a violation is established merely by showing “that there was flaking, loose or peeling paint . . .” *Id.* The court held that this statutory violation constituted evidence of negligence by the landlord. *Id.* at 359, 744 A.2d at 55.

The court, however, was quick to point out that the plaintiff must still establish that the landlord was
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provided notice of the violation. Id. at 361, 744 A.2d at 57. The court stated this “reason to know” test was the first prong that the plaintiff must satisfy to survive summary judgment. Id. at 362, 744 A.2d at 57. The court noted that it must be shown that “the defendant has knowledge sufficient to support an inference of knowledge of the condition is required.” Id. It is unnecessary that the plaintiff show that the deteriorating paint contained lead. Id. The second prong of the test is foreseeability. Id. The plaintiff must show that a reasonable person would realize that an injury due to lead paint is possible. Id. The Defendant’s actual knowledge is not an issue. Id.

The court then compared this standard with its prior jurisprudence in the area of lead paint litigation. The court analyzed its holding in Richwind Joint Venture 4 v. Brunson, 335 Md. 661, 645 A.2d 1147 (1994), where evidence was presented that the apartment in question, built prior to 1957, was in a state of ill repair, including chipping and flaking paint. Id. at 363, 744 A.2d at 57. In Richwind, it was further established that the landlord had been a property owner in Baltimore for sixteen years and knew that property constructed before 1957 often contained lead paint. Id.

The Richwind court found that sufficient evidence existed to defeat the defendant’s motion for summary judgment. Id. at 364, 744 A.2d at 58. The court in the instant case, however, suggested that the showing in Richwind actually exceeded the proof necessary to survive summary judgment. Id. at 365, 744 A.2d at 59. The court noted that the jury could have “found that the defendant’s breach of statutory duty prescribed by the housing code was proximately related to the injury alleged, without specifically finding that the defendant had actual knowledge or reason to know of the presence or hazards of lead-based paint.” Id.

The court then analyzed the cases that the landlords offered to support their contention that summary judgment was appropriate. The decisions in both Winston Properties v. Sanders, 565 N.E.2d 1280, (Ohio App. 1989) and Garcia v. Jiminez, 539 N.E.2d 1356, (Ill. App. 1989) held that mere notice of deteriorating paint “was insufficient to establish liability.” Id. However, the court distinguished both cases from the case at bar. The Court of Appeals of Maryland noted that in Winston, no statute existed prohibiting peeling paint without reference to lead content, and in Garcia, there was no applicable statute at all, and the court relied entirely on common law principles. Id. at 370, 744 A.2d at 61. Thus, neither case instructed against holding the landlords liable.

In the instant case, the court of appeals found that the reason to know element was satisfied because the plaintiff testified she gave notice to the Dermers regarding the eroding paint. Id. at 367, 744 A.2d at 60. Thus, accepting plaintiff’s testimony to be true, the first-prong was met. Id. Additionally, the foreseeability element was likewise met. Id. The court noted that the Housing Code serves to put landlords on notice that lead paint poses a significant danger to children. Id. The court stated that even assuming arguendo, that the code was insufficient, during depositions, defendants acknowledged awareness of lead paint laws and regulations prohibiting loose paint. Id. at 368, 744 at 60. The court therefore found that it is clear that the lead paint injuries suffered by the plaintiffs were foreseeable, and the second-prong is thus satisfied. Id.

The court of appeals’s holding in Brown represents a significant change in Maryland law regarding summary judgment in lead paint cases. Although the court suggested that “Richwind does not establish a factual threshold for all lead poisoning cases,” that is precisely how it was viewed by the legal community, including the Court of Special Appeals of Maryland in this case. Id. at 365, 744 A.2d at 59. There was no suggestion in Richwind or any subsequent case that Richwind “satisfied a higher burden” than was required. Id. Thus, this ruling greatly lowers the bar that the plaintiff must clear to defeat a defendant’s motion for summary judgment. The court’s holding practically guarantees that summary judgment will almost never succeed, and plaintiffs will almost always be granted the opportunity to present their case to a jury.

This ruling represents a reasonable bright-line test—if notice is given of defective paint, it must be corrected. The burden is placed on the landlord to investigate claims of deteriorating paint made by tenants. As a result of this ruling, to minimize liability landlords will likely be more responsive to tenants’ complaints.
recent developments regarding paint. If they fail to respond to allegations of deteriorating paint, it is at their own peril.

In sum, requiring knowledge merely of defects in paint rather than knowledge of the presence of lead paint is a common sense approach dictated by the language of the statute. Moreover, it strikes an appropriate balance between the needs of tenants and landlords.
The Court of Appeals of Maryland held that under Maryland’s slayer’s rule, the relatives of a murderer could take in the proceeds of the murderer’s insurance policy as contingent beneficiaries. Diep v. Rivas, 357 Md. 668, 745 A.2d 1098 (2000). The court supported its conclusion by pointing out that the relatives were blameless in the crime committed by the murderer and were not attempting to obtain the insurance proceeds by claiming “through and under” the murderer. As such, Maryland’s slayer’s rule could not prevent them from receiving the insurance proceeds under the policy.

On April 2, 1996, Xuang Ky Tran (“Tran”) murdered his wife, Maria Rivas (“Maria”), then committed suicide. Tran held an accidental death and dismemberment insurance policy, issued by Continental Casualty Company (“CNA”) through his employer, ITT Research Institute. Shortly after the murder/suicide, the relatives of Maria (“Rivas”) and Tran (“Dieps”) both filed claims with CNA as the beneficiaries of Tran’s policy.

Faced with the prospect of conflicting claims, CNA interpled both parties in the Circuit Court for Montgomery County. The circuit court held for the Rivas family and noted that Maryland’s slayer’s rule was inapplicable. A timely appeal was filed, and the court of special appeals, while noting the insurance policy provided benefits to the Dieps, held that Maryland’s slayer’s rule precluded the Dieps from taking under Tran’s policy. The Court of Appeals of Maryland granted certiorari.

The court of appeals began its analysis by reviewing the language of Tran’s insurance policy. Id. at 671-72, 745 A.2d at 1100. Under the policy, Tran was an “insured” and Maria an “insured family member.” Id. Under the “Payment of Claims Clause” of the policy, benefits “for loss of life of any insured family member will [be] payable to the Insured, if living, otherwise in the same manner as above.” Id. at 673, 745 A.2d at 1100. Following the policy language analysis, the court surmised that if both Tran and Maria were dead, the benefits would be payable to certain other surviving beneficiaries. Id. As Maria did not survive Tran, and Tran had no surviving parents or children, the court of appeals arrived at the same conclusion as had the court of special appeals, namely that if the terms of the policy were in effect, and the slayer’s rule was inapplicable, the Dieps comprised the first class of eligible beneficiaries and should be allowed to take under the policy. Id. at 673, 745 A.2d at 1101.

The court then examined the second issue, whether Maryland’s slayer’s rule prevented the Dieps from taking under the policy. Id. The court noted that Maryland’s slayer’s rule “exists as a matter of public policy embodied in the common law.” Id. at 675, 745 A.2d at 1101 (noting that the rule was first applied in Price v. Hitaffer, 164 Md. 505, 165 A. 470 (1933)). Essentially, the rule stands for the proposition that no one should be allowed to benefit either through inheritance or insurance proceeds from a wrong that they have committed. Id. at 675, 745 A.2d at 1102 citing Estate of Jeffers, 134 Cal.App.3d 729, 182 Cal. Rptr. 300 (Cal. Ct. App. 1982). There are exceptions to this rule, however. Generally, the rule only applies to willful and felonious killings, and “it [the rule] has no application where even though the acts of a beneficiary cause death, they are without the intent to do so . . . .” Id. at 676, 745 A.2d at 1102 (quoting Schifanelli v. Wallace, 271 Md. 177, 188, 315 A.2d 513, 519 (1974)). See Ford v. Ford, 307 Md. 105, 512 A.2d 389 (1986). Id.

The court next applied these exceptions to the court of special appeals’ decision, and rejected that court’s holding on two grounds. Id. at 677, 745 A.2d at 1102. First, the court of appeals noted that the Dieps were completely blameless in Maria’s
murder. Moreover, as the slayer’s rule is inapplicable to those who cause death without intent or are found not criminally responsible, so too is the rule inapplicable to the blameless Dieps who committed no crime in the instant matter.  *Id.* at 677, 745 A.2d at 1103.

Second, the slayer’s rule is inapplicable to the Dieps because they are not claiming “through or under” Tran.  *Id.* at 678, 745 A.2d at 1103. Regarding the position of the Dieps’ claim under the policy, the court noted that under Maryland law, the slayer’s rule “appl[ies] not only to the killer but to those claiming through or under him.” *Id.* (quoting *Ford v. Ford*, 307 Md. 105, 112, 512 A.2d 389, 392 (1986)). The court pointed out, however, that in the instant matter this principle was inapplicable because the Dieps were claiming in their own right as contingent beneficiaries.  *Id.* at 679, 745 A.2d at 1104. As such, the Dieps were favored by the general rule in Maryland case law that even if beneficiaries are disqualified under the slayer’s rule, the benefits can still be awarded to innocent contingent beneficiaries.  *Id.* at 680, 745 A.2d at 1104. As Tran failed to specify designated beneficiaries, the benefits were to be paid according to the insurance policy.  *Id.* at 682, 745 A.2d at 1105. This meant that under the terms of the policy, the benefits were to be paid to the first class of eligible beneficiaries that survived Tran.  *Id.* As Maria did not survive Tran, and the blameless Dieps were the next to take under the policy, the slayer’s rule could not prevent them from taking thereunder.  *Id.* at 683, 745 A.2d at 1106.

In *Diep*, the Court of Appeals of Maryland rendered a decision that clearly delineates who is precluded by Maryland’s slayer’s rule from taking under an insurance policy. In highlighting the public policy underpinnings of the rule, the court chose to follow the majority rule that innocent third parties should not be prevented from taking under an insurance policy by Maryland’s slayer’s rule. Rather, as long as the beneficiaries are asserting their own rights as contingent beneficiaries they should not be prevented from receiving insurance proceeds. In so holding, the court partially repudiated the rule set forth in *Estate of Jeffers*, that an insured who kills should not have the right in any form to specify the recipient of insurance proceeds. Thus, the court’s decision must surely be regarded as beneficial to family members trying to take under the estate of one who has committed an act of violence, but troubling for victim’s rights groups seeking to prevent any semblance of profiting by the relatives of a murderer.
Recent Developments

Handy v. State
Pepper Spray May be Classified as a Deadly or Dangerous Weapon Under Robbery with Deadly Weapon Statute

By Michelle Owens

In a case of first impression, the Court of Appeals of Maryland held that, as a matter of law, pepper spray or mace may be considered a deadly or dangerous weapon under the robbery with deadly weapon statute. *Handy v. State*, 357 Md. 685, 745 A.2d 1107 (2000). Furthermore, the court determined that there was sufficient evidence for a jury to find, as a matter of fact, that a defendant’s spraying of pepper spray into a person’s eyes, causing substantial pain and injury during the course of a robbery, constituted robbery with a deadly weapon. In so holding, the intent of the legislature to prevent criminals, including robbers, from using pepper spray or mace in an open manner with an intent to injure victims is illustrated in this case.

Harry Sparks (“Sparks”), an employee of the United States Postal Service, was approached by the petitioner, Mark Handy (“Handy”), while delivering mail on his usual route. Handy inquired into whether or not Sparks had any change of address cards. After Sparks responded in the negative and proceeded along his route, Handy suddenly sprayed Sparks in the eyes with pepper spray and wrestled Sparks to the ground. Handy then fled with Sparks’s mailbag.

Handy was convicted by a jury in the Circuit Court for Baltimore City of robbery with a dangerous or deadly weapon, robbery, and wearing and carrying a weapon openly with intent to injure. Handy appealed to the Court of Special Appeals of Maryland, which affirmed the circuit court’s judgment. The Court of Appeals of Maryland granted certiorari and affirmed, but upon a slightly different analysis.

The court began its analysis by considering whether pepper spray or mace may constitute a dangerous or deadly weapon for purposes of proving the crime of robbery with a dangerous or deadly weapon. The court firmly rejected the court of special appeals’s conclusion that such issue was to be resolved by the trier of fact. *Id.* at 690, 745 A.2d at 1109. The court explained that the issue of whether an object can be considered a dangerous or deadly weapon under the appropriate test is a matter of law for the court to decide. Subsequently, whether the criminal use of a deadly or dangerous weapon actually occurred becomes a factual matter to be determined by a trier of fact. *Id.* at 690-91, 745 A.2d at 1109-10.

The court of appeals addressed the questions of law properly before it by looking to the statute that Handy allegedly violated, Art. 27, Section 488 of Maryland Code (1957, 1996 Repl. Vol.). *Id.* at 691, 745 A.2d at 1110. The robbery with deadly weapon statute provides, in pertinent part, that one “is guilty of a felony when convicted of robbery or attempted robbery with a dangerous or deadly weapon.” *Id.* Because the statute is worded in the disjunctive, the court held, the State need not prove that the weapon is dangerous *and* deadly, but instead, need only prove that a weapon is dangerous or deadly. *Id.*

The court next examined the issue of what constitutes a dangerous or deadly weapon under section 488. In *Brooks v. State*, 314 Md. 585, 552 A.2d 872 (1989), the court adopted the “objective test,” in which to be deadly or dangerous a weapon must be inherently of that character or must be used or useable in a manner that gives it that character. *Id.* at 691-92, 745 A.2d at 1110 (quoting *Brooks v. State*, 314 Md. 585, 552 A.2d 872 (1989)). Previous cases have determined that the term “dangerous or deadly weapon” encompasses those objects which are inherently dangerous or deadly, or that may be used in a dangerous or deadly manner; for example, an unloaded pistol and a starter’s pistol. *Handy*, 357 Md. at 692-93, 745 A.2d at 1111 (citing *Wallace v. Warden*, 226 Md. 670, 174 A.2d 435 (1961)); *Jackson v. State*, 231 Md. 591, 191 A.2d 432.
In light of such cases, the court recognized the development of a three-part objective test, only one part of which needs to be met, in deciding whether a weapon used to commit a robbery is dangerous or deadly. *Id.* at 693, 745 A.2d at 1111. This three-part objective test dictates that an instrument is “deadly or dangerous” under section 488 when: (1) the instrument is designed or used in the course of destroying, defeating, or injuring an enemy; (2) the instrument is immediately useable to inflict serious or deadly injury; or (3) the instrument is actually used in way to inflict serious or deadly injury. *Id.*

Maryland courts have never been presented with the question of whether pepper spray could fall under the first category of weapons. Therefore, the court of appeals summarized case law from other jurisdictions holding that pepper spray, as a matter of law, may be a dangerous or deadly weapon. *Id.* at 696, 745 A.2d at 1113. For example, the Michigan Court of Appeals in *People v. Norris*, held that pepper spray was a dangerous weapon under Michigan’s statute due to the seriousness of the injuries that resulted from the weapon, such as extreme eye pain and irritation, burning sensations, and breathing difficulties. *Id.* at 696-97, 745 A.2d at 1113 (citing *People v. Norris*, 236 Mich. App. 411, 600 N.W.2d 658 (1999)). Consequently, the Court of Appeals of Maryland found pepper spray to be an instrument designed to injure an enemy, and thus it fits within the first category of the *Brooks* test. *Id.* at 699, 745 A.2d at 1114. In addition to finding that pepper spray fits within the first category, the court of appeals opined that instead of measuring the extent of actual injury, the mere potential for bodily harm suffices in order for the spray to be characterized as a deadly or dangerous weapon. *Id.*

The court went on to examine pepper spray as a dangerous or deadly weapon under the second and third categories of the applicable test, namely, whether pepper spray was immediately useable to inflict serious or deadly injury, and whether the spray was in fact actually used to inflict such harm. *Id.* In the instant case, the use of pepper spray on Sparks caused him to suffer a temporary blinding and a painful burning sensation to his eyes for several hours. *Id.* at 700, 745 A.2d at 1115. As such, the second and third parts of the *Brooks* test were satisfied as well.

The court concluded that, after applying the objective test as set forth in *Brooks*, the issue of whether an object may constitute a dangerous or deadly weapon is a question of law for a court to decide. The court held, as a matter of law, that the use of the pepper spray constituted use of a dangerous or deadly weapon while in the course of committing a robbery. Additionally, the court held that the jury had sufficient evidence to determine that Handy, as a matter of fact, used pepper spray in a dangerous or deadly manner. The evidence presented at trial supported the State’s contention that Handy sprayed Sparks in the face with the pepper spray causing substantial injury to the victim while committing a robbery.

With this holding, the Court of Appeals of Maryland has established a clear standard for trial courts to use when examining objects under the robbery with deadly weapon statute. In determining whether an object may be characterized as a deadly or dangerous weapon, trial courts must perform a comprehensive scrutiny, which includes separating those issues of law from those of fact. Whether or not an object may constitute a dangerous or deadly weapon will depend upon the nature of the object itself as well as how the object is actually used. For example, the legislature did intend to prevent criminals from using pepper spray or mace in a manner that combined an intent to injure while in the course of committing a robbery; however, the legislature did not intend to prevent citizens from protecting themselves by wearing pepper spray or mace in a concealed fashion.
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The Court of Appeals of Maryland held that even in the absence of evidence suggesting potential bias, the trial court must ask specific voir dire questions regarding racial bias when requested to do so by counsel. *Hernandez v. State*, 357 Md. 204, 742 A.2d 952 (1999). The court opined that a trial court’s refusal to racially particularize a voir dire question at the request of counsel constituted reversible error. In so holding, the court of appeals unequivocally stated that a showing of “special circumstances” of the likelihood of racial bias among the jurors is not a prerequisite to receive racially specific voir dire questions.

Petitioner, Jorge Hernandez (“Hernandez”), a Hispanic, was convicted in the Circuit Court for Montgomery County of child abuse and second-degree rape. At trial, Hernandez testified in Spanish through an interpreter. The state proved that Hernandez had vaginal intercourse with the nine year old Hispanic daughter of the woman with whom he lived.

During the voir dire process, the defense counsel requested a racially specific voir dire question. Instead of Hernandez’s proposed voir dire question, the court stated to prospective jurors that “they should be as free as humanly possible from prejudice, sympathy, and preconceived ideas for or against either party.” The court refused to racially particularize the question, even after the prosecution urged it to do so.

After his conviction, Hernandez’s motion for a new trial was denied. Hernandez appealed to the Court of Special Appeals of Maryland. The court of special appeals affirmed the lower court’s ruling. Hernandez sought a writ of certiorari, which was granted by the Court of Appeals of Maryland.

The court of appeals began its analysis by considering the development of federal law on voir dire pertaining to racial prejudices. *Hernandez v. State*, 357 Md. 204, 742 A.2d 952 (1999). The court found that in the early stages of addressing this issue, the United States Supreme Court regarded racially specific voir dire questions as being essential to the adherence of our criminal justice system’s notions of fairness and justice. *Hernandez*, 357 Md. at 211, 742 A.2d at 955 (citing *Aldridge v. United States*, 283 U.S. 308, 310 (1931)). In its holding, the United States Supreme Court noted that the “essential demands of fairness required the trial court to propound the requested questions in light of the non-remote possibility of disqualifying prejudice in the individual members of the jury.” *Id.* at 211, 742 A.2d at 955 (quoting *Aldridge*, 283 U.S. at 310).

In examining later decisions of the Supreme Court, the Court of Appeals of Maryland found that the Court abandoned its earlier liberal application of racially specific voir dire questions. *Id.* at 211, 742 A.2d at 955. In *Ristaino v. Ross*, 424 U.S. 589 (1976), the Supreme Court upheld the conviction of an African-American defendant for assault and battery and armed robbery of a Caucasian security guard, even after the trial court’s refusal of defendant’s voir dire request. In its holding, the *Ristaino* Court concluded that racially specific voir dire questions are only appropriate in circumstances in which there is a “constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be as indifferent as they stand unsworne.” *Id.* at 219, 742 A.2d at 956 (quoting *Ristaino*, 424 U.S. at 598). In analyzing the Supreme Court’s reasoning for requiring the “special circumstances” standard, the Court of Appeals of Maryland concluded that the Court...
must view racial prejudice as a “latent attitude that becomes effective only under particular, racially charged circumstances.” *Id.* at 213, 742 A.2d at 956.

The court of appeals further examined *Rosales-Lopez v. United States*, where a plurality of the Court added another dimension to the “special circumstances” standard. *Id.* at 213, 742 A.2d at 957 (citing *Rosales-Lopez v. United States*, 451 U.S. 182 (1981)). In that case, the Court noted that only in cases that dealt with violent interracial crime would there exist circumstances that would warrant racially specific voir dire questioning. *Id.* at 214, 742 A.2d at 957. The *Rosales-Lopez* court reasoned that in the absence of this standard, there would be an impression that “justice in a court of law may turn upon the pigmentation of skin (or) the accident of birth.” *Id.* (quoting *Rosales*, 451 U.S. at 190, (quoting *Ristaino*, 424 U.S. at 596)). Therefore, under current federal law, a trial court’s refusal to propound racially specific voir dire questions in the absence of racially charged circumstances does not constitute reversible error.

In examining Maryland law on this issue, the Court of Appeals of Maryland found that in its most recent decision, they rejected the narrow federal position. *Id.* at 214, 742 A.2d at 957 (citing to *Hill v. State*, 339 Md. 275, 661 A.2d 1164 (1995)). The court of appeals rejected prior federal precedent based upon the U.S. Supreme Court’s reasoning in *Ristaino*: “the States are free to allow or require voir dire questions not demanded by the U.S. Constitution.” *Id.* at 218, 742 A.2d at 959 (quoting *Ristaino*, 424 U.S. at 594).

In *Hill*, the court of appeals embraced the *Aldridge* decision, thus characterizing a trial court’s failure to propound requested voir dire questions as reversible error, even in the absence of a showing of potential juror bias. *Id.* at 219, 742 A.2d at 960. The court further reasoned that allowing per se racial voir dire questions would strengthen the criminal justice system by: (a) acknowledging that racial prejudice is a reality; (b) creating an impression that racial prejudice will not be tolerated; and (c) alleviating the need for trial judges to search the record for facts amounting to “special circumstances.” *Id.* at 221, 742 A.2d at 960-61.

In finding *Hill* controlling, the court of appeals ruled that Hernandez was entitled to a racially specific voir dire question. *Id.* at 223, 742 A.2d at 962. In so holding, the court explained that its decision applies to any defendant who requests race specific voir dire questions, regardless of their own race. *Id.* at 225, 742 A.2d at 963. The court further noted that when a trial court is faced with a defendant who has improperly requested voir dire questions, it is incumbent upon the court to submit a question related to race on its own motion. *Id.* at 224, 742 A.2d at 962. In light of the trial court’s refusal to propound racially specific voir dire questions, as specifically requested by the defendant, the Court of Appeals of Maryland ordered a new trial. *Id.* at 231, 742 A.2d at 967.
Recent Developments

Huffman v. State

Home Improvement Contractors Operating without a License Are Subject to Prosecution for Each Individual Transaction

By Christopher Mason

In a case of first impression, the Court of Appeals of Maryland held that a home improvement contractor could be charged criminally for each individual transaction that the contractor enters into without a license. *Huffman v. State*, 356 Md. 622, 741 A.2d 1088 (1999). In so holding, the court determined that the intent of the legislature in drafting Section 8-601 of the Business Regulation Article of the Annotated Code of Maryland, was to charge multiple violations of that statute individually. The court concluded that the plain language of the statute supported this determination.

Between September 11, 1995, and December 18, 1996, petitioner James Ralph Huffman (“Huffman”) entered into home improvement contracts with eight different homeowners. During this time period, Huffman accepted deposits and began work under each of the eight contracts. He failed, however, to complete any of the jobs and did not return any of the deposits. Moreover, Huffman was not licensed by the Maryland Home Improvement Commission to perform these home improvements as required.

As a result of Huffman’s failure to complete any of the jobs or return any of the deposits, he was charged with eight separate counts of violating § 8-601 (“acting as [a] contractor or subcontractor or selling a home improvement without [a] license”). Huffman was convicted in the Circuit Court for Harford County on seven of the eight counts, with the State entering a *nol prosequi* on count eight.

In an unreported opinion, the Court of Special Appeals of Maryland affirmed his convictions based on the plain language of § 8-601. The Court of Appeals of Maryland granted certiorari to determine whether Huffman’s actions constituted one continuing violation of § 8-601, or seven separate violations.

The court of appeals began its analysis by asserting that the legislative intent of the statute is pivotal to a determination of whether specific continuing behavior constitutes multiple violations of a single statutory offense. *Huffman v. State*, 356 Md. 622, 627-28, 741 A.2d 1088, 1091 (citing *Richmond v. State*, 326 Md. 257, 261, 604 A.2d 483, 485 (1992)). The court was determined to use a common sense approach by giving the language of the statute its ordinary meaning. *Id.* at 628, 741 A.2d at 1091.

With these principles of statutory construction laid out before it, the court examined § 8-601(a), which states in pertinent part: “[e]xcept as otherwise provided in this title, a person may not act or offer to act as a contractor in the State unless the person has a contractor license.” *Id.* The court, in construing the statute according to its plain language, concluded that a violation of § 8-601 requires two elements: 1) an individual must act as a contractor and 2) that act must be completed without a license. *Id.* The court then looked to the Maryland Home Improvement Law for the definition of “contractor.” *Id.* at 629, 741 A.2d at 1092. Section 8-101(c) defines a “contractor” as “a person who performs or offers or agrees to perform a home improvement for an owner.” *Id.* The court concluded that the intent of the legislature was to classify each transaction with a separate owner as an independent act of the contractor. *Id.* It relied on the use of the singular articles “a” and “an” before “home improvement” and “owner,” respectively, as a basis for its conclusion. *Id.* To suggest otherwise, the court reasoned, “ignores the plain language of § 8-101 (c) and the fundamental rules of grammar.” *Id.*

The court of appeals next examined the statute “in the context within which it was adopted.” *Id.* at 630, 741 A.2d at 1092 (quoting *Motor Vehicle Admin. v. Mohler*, 318 Md. 219, 225, 567 A.2d 929, 934 (1990)). The title of the original statute, enacted in 1962, indicates
that the legislature fashioned the Maryland Home Improvement Law with the intention of, “providing generally for the regulation of the home improvement business of all persons in this State, establishing a system of licensing certain contractors and salesman under a new administrative agency to be known as the Maryland Home Improvement Commission; . . . [and] providing criminal penalties regarding home improvement transactions.” Id. (citing 1962 Md. Laws Chap. 133). Based on this language the court of appeals opined that the purpose of the Maryland Home Improvement Law was to provide criminal penalties for each home improvement transaction entered into without a license. Id.

Huffman relied on Reddick v. State, 219 Md. 95, 148 A.2d 384 (1959), and People v. Hays, 234 Cal. App.3d Supp. 22, 286 Cal. Rptr. 462 (1991), to support the claim that his conduct constituted only one violation of § 8-601. Id. at 630-31, 741 A.2d at 1093. In Reddick, it was determined that the State did not need to plead or prove that the defendant intended to defraud a particular person in order to satisfy the intent to defraud element of forgery. Id. at 631, 741 A.2d at 1092-93. Instead, a simple showing of an intent to defraud the general public satisfied the applicable pleading requirements. Id. at 631, 741 A.2d at 1093. In Hays, the court held that the determination of whether a victim is necessary for one to commit the crime of acting as a contractor is a question of fact to be determined on a case by case basis. Id. (citing Hays, 234 Cal.App.3d Supp. 22, 286 Cal. Rptr. 462, 464 (1991)).

Based on these cases, Huffman argued that he could be prosecuted for only one violation under § 8-601 for making an offer to the general public; and therefore, a singular victim cannot be used as the unit of prosecution. Id. at 631-32, 741 A.2d at 1093. The court of appeals determined Huffman’s argument was inapplicable because it did not address the issue in the present case. Id. at 632, 741 A.2d at 1093. Moreover, the court concluded that since the case at bar was not concerned with offers to the general public, the cases relied on by Huffman were irrelevant. Id.

Huffman also relied on State v. Carlisle, 28 S.D. 169, 132 N.W. 686 (1911), and Wilson v. Commonwealth, 119 Ky. 769, 82 S.W. 427 (1904), in which it was held that certain criminal statutes created continuing offenses. Id. The court of appeals rejected this argument because the statutes at issue in Carlisle and Wilson addressed completely unrelated subject matter and were not similarly worded. Id. at 633, 741 A.2d at 1093-94. Moreover, the court reasoned that the decisions in Carlisle and Wilson did not take into account the Maryland legislature’s intent in enacting the Maryland Home Improvement Law, and, therefore, were unpersuasive to the instant case. Id. at 633, 741 A.2d at 1093.

Through its holding, the court of appeals was true to the legislature’s intent when it enacted § 8-601 and the Maryland Home Improvement Law in 1962. The court concluded that the Maryland legislature, through the specific language selected by it for each statute, clearly intended home improvement contractors to be charged criminally for each separate transaction they enter into without a license.

The holding in Huffman v. State will affect both prosecutors and private attorneys. Prosecutors will now be able to charge multiple violations for each separate transaction a contractor enters into without a license. This will, in turn, give them more leverage in obtaining a guilty plea. Similarly, attorneys who represent companies or individuals who perform home improvements must, now more than ever, remind their clients to keep their licenses current.

Additionally, this holding strikes a blow for future home improvement customers in Maryland. As the phenomenon of Home Depot, Lowe’s, and the entire home improvement industry continues to grow, the precedent set by this court should reduce the number of inexperienced, unlicensed contractors performing home improvements. Consequently, this should abate the number of lawsuits brought by disgruntled homeowners hoping to save a few dollars by hiring a friend of a friend.
Recent Developments

Illinois v. Wardlow
An Individual’s Presence in a High Crime Area Combined with Unprovoked Flight after Seeing a Police Officer Is Sufficient Basis for Reasonable Suspicion

By Lee A. Dix

The Supreme Court of the United States, in a five to four decision, held that there is sufficient basis for a Terry stop when an individual in a high crime area flees, without provocation, after noticing a police presence. Illinois v. Wardlow, 120 S.Ct. 673 (2000). The Court explained that for purposes of a Terry stop, a “totality of the circumstances” approach is applied to determine if reasonable suspicion exists under the circumstances. In so holding, the Court stated that a determination of reasonable suspicion requires commonsense judgments and inferences concerning human behavior.

On September 9, 1995, four police cars carrying a total of eight Chicago Police Department officers were converging on an area of the city known for drug trafficking. Officers Nolan and Harvey, in uniform, were in the last car. Officer Nolan observed the defendant (“Wardlow”) holding an opaque bag. Wardlow looked in the direction of the officers and, without provocation, immediately began to run. Officers Nolan and Harvey pursued Wardlow and eventually overtook him. Upon apprehension, Officer Nolan immediately conducted a Terry frisk, as it was common knowledge and procedure to locate weapons in close proximity to drug transactions. Upon squeezing the bag Wardlow was carrying, Officer Nolan felt a hard object in the shape of a gun and further inspection revealed Wardlow was carrying a loaded .38 caliber handgun.

The trial court denied Wardlow’s motion to suppress. Subsequently, Wardlow was convicted of unlawful possession of a handgun by a felon. The appellate court reversed, stating that reasonable suspicion did not exist for Officer Nolan to detain Wardlow. In affirming the decision, the Illinois Supreme Court held that sudden flight in a high crime area did not create reasonable suspicion justifying a Terry stop because flight is not determinative of wrongdoing. The Supreme Court granted certiorari solely to review the question of whether the initial stop was supported by reasonable suspicion.

The Court began its analysis by stating that an individual’s mere presence in a high crime area, without more, does not rise to the level of reasonable suspicion that criminal activity is afoot. Wardlow, 120 S.Ct. at 676. However, location is a factor in determining if reasonable suspicion exists. Id. Furthermore, the Court stated that officers should consider the relevance of location along with other factors to determine if further police action is warranted. Id. In addition to location, the Court explained that a high crime area is a relevant consideration in the Terry analysis. Id. (citing Adams v. Williams, 407 U.S. 143, 144 (1972)).

The Court next addressed Wardlow’s actual behavior after he noticed the police. Id. The Court stated that nervous and evasive behavior of an individual is another pertinent factor in determining reasonable suspicion. Id. Noting that flight is the ultimate act of evasion, the Court held that it is suggestive of wrongdoing, but not indicative. Id. The Court opined that “the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.” Id. Applying this totality of the circumstances approach, the Court concluded that Wardlow’s detention was based on reasonable suspicion that he was involved in illegal activities. Id.

Aware of the potential conflict with prior decisions, the Court reconciled its holding in Wardlow with the Bostick v. Florida holding that “refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for detention or seizure.” Id. (quoting Florida v. Bostick, 501 U.S. 429, 437 (1991)). The Court opined that a Terry stop is a minimal intrusion on an individual’s Fourth Amendment rights, and that police officers may stop innocent people. However, if
probable cause does not arise during a Terry stop, the individual is free to go. Id. at 677. The Court also addressed its holding in Royer v. Florida, that an individual has a right to go about his business if approached by an officer lacking the requisite reasonable suspicion or probable cause. Id. at 676 (citing Florida v. Royer, 460 U.S. 491 (1983)). The Court, however, reasoned that unprovoked flight is more than a refusal to cooperate and is not merely going about one’s business. Id.

Four justices concurred in part and dissented in part. The justices concurred with the majority in adopting a totality of the circumstances approach to determining reasonable suspicion. However, they rejected a “bright-line-rule,” allowing the detention of an individual who flees after seeing a police officer. Id. Furthermore, the concurring justices stated that some minorities, particularly those in high crime areas, believe contact with police officers can be dangerous, which provides a completely innocent explanation for fleeing. Id. at 680.

The dissent rejected the majority holding that flight occurring in a high crime area is sufficient justification for reasonable suspicion. Id. 683-84. They emphasized that many factors providing innocent reasons for unprovoked flight are concentrated in high crime areas. Id. at 684. Flight and the high crime area factor, the dissent stated, are both too susceptible to innocent interpretation to form the basis for reasonable suspicion. Id. at 678-80.

With this decision, the Supreme Court gives police officers broad discretion to stop individuals, specifically minorities and the poor, in high crime areas for behavior that may be overlooked in a different community. This decision creates a two-tier system of Fourth Amendment rights and may contribute to increased harassment of minorities and the less fortunate by police officers. The likelihood that evidence seized during a Terry stop will be suppressed is significantly decreased by this decision. Defense attorneys face a substantial hurdle to defeat the validity of the Terry stop if their client is stopped after running in a high crime area. As a result of this holding, prosecutors are merely required to argue that the individual attempted to flee instead of the individual’s intent to engage in criminal activity.
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Recent Developments

**Imbesi v. Carpenter Realty Corp.**  
Maryland’s Non-Claim Statute Does Not Permit a Creditor Setoff once All Creditor Claims Are Barred by Statute

By Brian Kelly

The Court of Appeals of Maryland held that section 8-103 of the Wills and Trusts Article of the Annotated Code of Maryland, which limits the time a creditor has to present a claim, does not permit a setoff based upon a creditor’s claim against the Estate once presentment of creditor’s claims are barred by statutory limitations. *Imbesi v. Carpenter Realty Corp.*, 357 Md. 375, 744 A.2d 549 (2000). The court found that permitting a creditor to setoff a claim, which was not presented in the allotted six month time period pursuant to section 8-103(c), from monies owed to the Estate, would directly conflict with the purpose of the statute. The court refused to view the defensive use of setoff as an exception from the Maryland nonclaim statute of section 8-103, thereby prohibiting any assertion of creditor’s claim on an estate after the applicable six-month period expired.

On June 1, 1982, Mr. Imbesi entered into a stock redemption agreement between 7-UP of Baltimore, 7-UP of Philadelphia, and the Carpenter Realty Corporation (“CRC”), whereby he would sell all the stock he owned in the companies to the issuing corporations for $500,000 payable in 120 monthly installments. In 1979, Mr. Imbesi issued an $80,000 promissory note to 7-UP of Philadelphia, due October 23, 1989. The promissory note was never repaid. Upon the death of Mr. Imbesi in 1992, the personal representative of the Estate, filed Letters of Administration with the Baltimore County Register of Wills. In addition to these Letters, notice, pursuant to section 8-103(a)(1), was sent to creditors informing them of Mr. Imbesi’s death.

Following the notice to creditors, the Estate sued CRC and 7-UP of Baltimore in the Circuit Court for Baltimore County for the respective overdue balances of the stock redemption agreement owed to Mr. Imbesi. CRC counterclaimed, contending that the claims on the stock redemption agreement may be offset by the amount on the $80,000.00 note originally possessed by 7-UP of Philadelphia, but negotiated for value to CRC. The circuit court disagreed, and found in favor of the Estate for $57,447.67. The Court of Special Appeals of Maryland, questioning the authenticity of the 1979 note, reversed and remanded the case. On remand, the circuit court found that the 1979 note could be used by CRC as a setoff against the Estate’s claims, and held that a defensive use of setoff does not violate the legislative intent of section 8-103. The court of special appeals affirmed the trial court’s interpretation of section 8-103(a), which denied the creditors from presenting the note, but permitted CRC to offset the value of the note from the debts owed to the Estate. Following the ruling, the court of appeals granted certiorari.

In determining whether the right to setoff a claim is a type of claim barred by section 8-103, the court of appeals began its analysis by comparing the impact setoff would have as compared to a counterclaim and recoupment. *Imbesi*, 357 Md. at 380, 744 A.2d at 552. Setoff, by definition, is “a diminution or a complete counterbalancing of the adversary’s claim based upon circumstances arising out of a transaction other than that on which the adversary’s claim is based.” *Id.* at 380, 744 A.2d at 552 (citing *Billman v. State of Maryland Deposit Ins. Fund Corp.*, 88 Md. App. 79, 92-93, 593 A.2d 684 (1991)). In the instant case, CRC argued that the only feasible remedy available to creditors is the right to setoff. Due to the presentment of the claim after the statutory period of section 8-103(c), the creditor argued that since the transaction failed to occur in the same transaction or occurrence as the prior business dealing, all claims of recoupment would be barred. *Id.* CRC contended, and the court of special appeals agreed, that use of the note to setoff the amount owed to the...
Estate is a purely defensive tactic, and should be permitted in order to offset the monies owed to the estate via the stock redemption agreement. Id. at 382, 744 A.2d at 552.

The court of appeals squarely rejected the court of special appeals’s argument, as well as CRC’s, that setoff does not affect the timely and efficient process that section 8-103 was drafted to protect. Id. at 382, 744 A.2d at 553. The general purpose of section 8-103, the court held, is to provide notice to all creditors of the Estate so they may file their claims in the applicable time period, thereby allowing probate to progress in an expedient manner. Id. Following this interpretation, the court found that a setoff defense would require consideration of the facts and circumstances of a separate transaction. Id.

The court further noted that the legislative history of the statute illustrated a policy of increasing the scope of protection by the non-claim statute. Id. at 383, 744 A.2d at 553. The authority given to the non-claim statute was reinforced by the judicial history of the statute, which illustrated the increase, not diminution, of power the judiciary has interpreted in the statute over the years. Id. at 382-86, 744 A.2d at 553-55. Furthermore, the intent of the language and history of the statute was to “forever bar” claims that were not brought within the applicable time period set forth in the statute. Id. at 386, 744 A.2d at 554.

The court, however, was careful to state that the non-claim statute does not bar all claims in all circumstances. In Chandlee v. Stockley, the court, “held that the personal representative was estopped to assert the bar of the statute because of representations made on behalf of the estate that the injured plaintiff’s claim would be paid.” Id. at 385, 744 A.2d at 554 (quoting Chandlee v. Stockley, 219 Md. 493, 150 A.2d 438 (1959)). However, upon comparison to Imbesi, CRC was never informed of the possibility of payment on their claim, but instead was consistently refused recognition of a valid claim due to CRC’s failure to present the note to the Estate within the statutory period. Id. at 386, 744 A.2d at 555.

Finally, the court of appeals analyzed the practices of other jurisdictions regarding the parameters of the non-claim statute. Id. at 389, 744 A.2d at 557. In Berrigan v. Pearsall, the Connecticut court found that the non-claim statute was no more than a statute of limitations which did not prohibit the defensive use of a claim of setoff. Id. at 389, 744 A.2d at 557 (citing Berrigan v. Pearsall, 46 Conn. 274 (1878)). The Court of Appeals of Maryland, however, opposed this view, stating, “we construe § 8-103(a) to bar a claim that has not been presented and that arises out of a transaction separate from the one which the estate claims.” Id. at 391, 744 A.2d at 558.

Based on the foregoing legal analysis, the court concluded that the creditor in question could not assert a claim that was barred by limitations against a note owed to the Estate, due to section 8-103(c). Id. at 392, 744 A.2d at 558. The court found the non-claim statute not to be a statute of limitations, but instead “a condition precedent to a legal recovery against a solvent estate.” Id. at 391, 744 A.2d at 557.

The court’s holding leaves open the question of asserting a right of recoupment in instances where the same transaction is in question. In this instance, however, the court decided to create a clear limitations period. This bright line rule not only broadens the scope of the non-claim statute, but also ensures that probate will move along as expeditiously as possible, thereby underscoring the overall purpose of section 8-103.
In re Adoption/Guardianship, No. T97036005

Children Have a Statutory Right to a Hearing on the Merits for a Petition to Terminate Parental Rights

By Meredith Stein

The Court of Appeals of Maryland held that a child who is the subject of a termination of parental rights petition, and makes a timely objection thereto, is entitled to a hearing on the petition’s merits. In re Adoption/Guardianship, No. T97036005, 358 Md. 1, 746 A.2d 379 (2000). In a consolidated case, four Children In Need of Assistance (CINA) who through counsel filed timely appeals against the decision to terminate their natural parents’ rights, were deemed by the court to be parties to the termination petitions. As such, the children were entitled to representation at the petition hearings, as well as an opportunity to be heard on the petition’s merits.

Jamal L., Dimitri D., Iesha E., and Christopher C. were all foster children who had been committed to the care of the Baltimore City Department of Social Services (BCDSS). Each had been previously adjudicated a CINA, pursuant to section 3-812 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland (1973, 1998 Repl. Vol. 1999 Supp.). A petition for “guardianship with the right to consent to adoption or long-term care short of adoption” was filed by BCDSS on the children’s behalf. BCDSS’s requests were granted by the trial court, thereby terminating parental rights to the children either by operation of law or consent. The trial court had denied each child’s request for hearings on the merits of the petition.

The first child, Jamal L., requested a hearing on the merits because he believed his permanency plan through BCDSS was to be returned to his natural mother. Jamal requested, in the alternative, the case be held sub curta pending a decision of the Court of Special Appeals of Maryland on In re Adoption/Guardianship No. T97036005, No. 783, Sept. Term, 1998 (Md. Ct. Spec. App. Feb. 10, 1999). The second child, Dimitri D. requested a postponement and a trial on the merits based on evidence that there was a connection between him and his father and his desire to be reunited with his mother. The postponement was denied. After which, Iesha E. requested a trial on the merits to show a family bond that had formed between herself and her parents and siblings through frequent contact. The circuit court denied Iesha’s request for a hearing on the merits for two reasons: 1) her parents consented to termination by operation of law and; 2) Iesha lacked standing for a trial on the merits. Finally, Christopher C. requested a postponement to attempt to give notice and obtain consent from his absentee father and for the opportunity to have Christopher’s views on the petition heard. The circuit court denied the request and granted BCDSS’s petition to waive notice to Christopher’s father and guardianship. Upon timely appeal to the court of special appeals, an unpublished opinion was issued affirming the circuit court’s decision holding that the denial of postponement was not an abuse of discretion. In each child’s case, a timely objection to the circuit court’s decision was filed, and a writ of certiorari was granted by the Court of Appeals of Maryland to decide the rights of the children in Termination of Parental Rights Proceedings.

The court began its analysis by determining whether a child is considered a party to the petition for termination. In re Adoption/Guardianship, No. T97036005, 358 Md. 1, 12, 746 A.2d 379, 385. A “party” to the petition, as defined by section 3-801(r) of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland, “includes a child who is the subject of a petition, [and] the child’s parent, guardian, or custodian.” Id. at 13-14, 746 A.2d at 385-86. To substantiate this definition, the court read section 3-804(a)’s plain language defining “party” to include a child, previously adjudicated a CINA, who is the subject of a termination of parental rights.
proceeding and deemed to be under the jurisdiction of the Juvenile Court. \textit{Id.}, 746 A.2d at 385-86. The court opined that it would be illogical to allow the child to be a party in CINA proceedings, which commits them to BCDSS's custody, but not allow him to be a party in guardianship proceedings. \textit{Id.} at 15, 746 A.2d at 386-87.

The court also noted that under Maryland common law, a party to an action, whose rights are to be affected, has the right to be heard. \textit{Id.} at 16-17, 746 A.2d at 387. The court determined that Maryland law affords this privilege statutorily in termination of parental rights hearings. \textit{Id.} The court interpreted these laws to extend to children by looking to the child’s right to counsel, notice of the hearing, and the opportunity to object. \textit{Id.} Section 3-821(a) of the Courts and Judicial Proceedings Article provides that “a party is entitled to the assistance of counsel at every stage of any proceeding under Subtitle 8, Juvenile Causes.” Moreover, if read in conjunction with section 3-804(a)(2), this privilege also applies to termination of parental rights hearings. \textit{Id.} The court, therefore, concluded that the right to representation by counsel implies the right to be heard. \textit{Id.} at 17-18, 746 A.2d at 388. Section 5-323(a)(1)(iv) of the Family Law Article of the Annotated Code of Maryland requires separate counsel to be supplied for the child in an involuntary termination of parental rights proceeding. \textit{Id.} The court equated this right of the child to the parental right to representation by counsel and the right to be heard. Therefore, the child should also have the right to an evidentiary hearing and the right to be heard. \textit{Id.} Without this interpretation, the court held, the role of counsel to the child would serve little or no purpose. \textit{Id.} at 18, 746 A.2d at 388.

The court recognized the fact that notice to the attorney representing a child in CINA hearings must be given pursuant to section 5-322(a)(1)(ii)(2) of the Family Law Article. \textit{Id.} Further, this requirement includes that a copy of the petition and cause for an action for guardianship to be given to the same attorney, pursuant to Rule 9-105(f). \textit{Id.} These provisions provide an opportunity for objection on behalf of the child. Without objection, the attorney for the child is considered to have consented to the guardianship. \textit{Id.} at 19, 746 A.2d at 388. Moreover, Rule 9-107(a), as noted by the court, provides that “any person having a right to participate in a proceeding for adoption or guardianship may file a notice of objection to the adoption or guardianship.” \textit{Id.} The purpose of the party’s right to notice and right to object, as seen in Rule 9-109(a), is to enable that party an opportunity to be heard on the merits. \textit{Id.} at 19, 746 A.2d at 388-89. Based on this statutory interpretation, the court of appeals concluded that because the child is considered a party to a guardianship action, he or she has a right to counsel, a right to notice of the petition, and finally, a right to be heard, as indicated by the Family Law Article and the Maryland Rules. \textit{Id.} at 19-20, 746 A.2d at 389.

Finally, the court noted that the standards to comply with when ruling on a guardianship petition are “the best interests of a child,” as codified in Rule 9-109(b) and section 5-313 of the Family Law Article. \textit{Id.} at 22, 746 A.2d at 390. Rule 9-109(b) points to Section 5-313, which sets out a detailed list of factors which must be established by clear and convincing evidence. \textit{Id.} As such, the court concluded that in a guardianship hearing, Rule 9-109 mandates that the factors in Section 5-313 must always be considered by the court. \textit{Id.} at 22-23, 746 A.2d at 390-91. Furthermore, the hearing record must reflect the consideration of all the statutorily required factors. \textit{Id.} at 23, 746 A.2d at 391.

The Court of Appeals of Maryland concluded that the burden imposed by requiring the additional safeguard of an evidentiary hearing is minimal to ensure that the best interests of the child are protected. \textit{Id.} at 25, 746 A.2d at 392. A child has a statutory right as a party to a guardianship hearing to be heard, and therefore, with timely objection on the child’s behalf, the child is entitled to an evidentiary hearing on the merits of his or her case.

The decision from the Court of Appeals of Maryland on this compilation of cases opens many doors and opportunities for children in need of assistance in Maryland juvenile law, as it reshapes the way children are viewed in guardianship and adoption proceedings. Specifically, children who are threatened with being permanently separated from their natural parents
Recent Developments

now have an opportunity to voice concerns about how their guardianships are to be handled. The practitioner should be aware that this important decision affects his or her duty to represent children in these proceedings. A more active role for both child and practitioner in guardianship and adoption proceedings has resulted. The goal is to help ensure what is in the best interests of the child by investigating thoroughly, including considering the concerns of the child. Finally, since this may affect the speed at which children are filtered through the social service system, due to the possibility of an extra step in the process, the social service system must scrutinize their petition process more closely.
Recent Developments

Koch v. Strathmeyer
Implied Easement Over Subdivided Lots Extended from Public Road to the Water’s Edge, Entitling Interior Lot Owners to Waterfront Access

By David Schmitz

The Court of Appeals of Maryland recently held that access to a public navigable creek was within the scope of an easement granted under the general rule of implied easements over roads bordering conveyed property. Koch v. Strathmeyer, 357 Md. 193, 742 A.2d 946 (1999). The court reasoned that the general rule, limiting the reach of the easement to the next street or public way, was naturally extended to include navigable waterways when such was the original intent of the grantor of the land.

In 1940, George Hazard (“Hazard”) began selling lots from his seven parcel waterfront subdivision. Through the subdivision, and bordering each lot, was a 16-foot gravel road that connected the county road to the shoreline of Lerch’s Creek. Through subsequent years, the original seven parcel subdivision was consolidated into four lots; two waterfront lots, owned by Mr. and Mrs. Koch and Mr. Brewer, and two interior lots, owned by Mr. and Mrs. Strathmeyer and Mr. and Mrs. Hantske. The four lots were still partially bisected by the gravel road; however, the gravel road no longer extended to the water’s edge but rather stopped some 85 feet therefrom. The two waterfront parcels covered the original gravel road with grass and placed obstructions within its path. This had the deleterious effect of denying the two interior lot owners the full use and enjoyment of access to the waterfront.

In a two-count complaint, the two interior lot owners petitioned the Circuit Court for Anne Arundel County, asking it to take various actions. First, Plaintiffs asked the court to recognize an implied easement over the path of the original gravel road to the waters edge; second, to enjoin the waterfront lots from interfering with their right-of-way to the waterfront; and third, to have the waterfront lots pay damages resulting from the denied access to the waterfront. The circuit court ruled in favor of the interior lot owners, however, it denied their damages claim.

In a timely appeal, the court of special appeals affirmed the lower court’s decision. The court noted that although all the parties stipulated to the existence of the easement, the issue in question centered on whether or not the easement extended to the waterfront. Id. at 198, 742 A.2d at 949. The court held that under well-settled Maryland law, “when Hazard conveyed the property by a metes and bounds description naming the 16 foot road as a boundary, each lot owner acquired fee simple title up to the center of the road contiguous to his or her property.” Id. at 198, 742 A.2d at 949 (citing Md. Ann. Code art. 21 § 114 (1939)). The court noted that although all the parties stipulated to the existence of the easement, the issue in question centered on whether or not the easement extended to the waterfront. Id. at 199, 742 A.2d at 949.

After recognizing that an easement did exist in favor of all the lot owners, the court next turned to the scope of the easement. The court of appeals found that case law defined the general rule of implied easements over roads bordering conveyed property as extending “until it reaches some other street or public way.” Id. (citing Hawley v. Baltimore, 33 Md. 270 (1870)). When a common grantor conveyed land bordering streets, there existed
a rebuttable presumption that the common grantor intended “to offer to dedicate the streets [or] public use,” or “...grant the purchasers an implied right-of-way over the streets contiguous to their lots to the next closest street or public way.” Id. at 200, 742 A.2d at 949 (citing Hackerman v. Baltimore 212 Md. 624, 625, 130 A.2d 735, 736 (1957)). The court, by analogy, reasoned that if the waterfront were considered a street or public way, under Hawley, the easement would extend to both the waterfront and the opposite county road. Id. at 200, 742 A.2d at 950. 

The court of appeals rejected the waterfront lot owners’ assertion that the existence of the navigable waterway cut off the interior lots’ implied easement at the border of the waterfront lots. Id. at 201, 742 A.2d at 950. The argument that the closest street or public way was the county road was soundly rejected by the court. Rather the court opined that this case squarely fit within the general rule of implied easements over roads bordering conveyed property. Id. Not only was the waterfront owned and maintained by the state, but it was a “public way” as well. Id. The court concluded that the original gravel road was bounded on one side by a public county road and on the other side by a public waterway. Id. Therefore, the interior lot owners enjoyed an implied easement that extended not only to the county road, but also to the water’s edge. Id.

In the last portion of its opinion, the court distinguished the cases proffered by the interior lot owners. The court rejected the notion that under the facts of the instant case, the waterway was a special exception to the general rule. Id. Rather, the court reasoned that the general rule of implied easements was clearly applicable to a waterway. Id. When the lots were conveyed, the court concluded the original grantor bisected the development so that each lot was contiguous to the gravel road. Id. at 203, 742 A.2d at 951. It was only logical for the easement to extend to the waterfront so that each lot could have full use and enjoyment of the waterfront. Id.

The Court of Appeals of Maryland rejected the notion that a public way does not include a public waterway. This case clarifies and extends the common law notion of “public way” regarding implied easements to include waterways. Although this common law clarification might seem somewhat nugatory, in a state where most of its inhabitants live near the coast, this case is an important clarification for waterfront property law.
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Recent Developments

Laznovsky v. Laznovsky
The Psychiatrist-Patient Privilege Clearly Applies in Child Custody Cases, Barring Disclosure of Parent’s Mental Health Records

By Scott H. Amey

The Court of Appeals of Maryland held that under the Maryland psychiatrist-patient privilege statute, a parent seeking sole custody of his or her minor children does not place his or her mental health at issue requiring disclosure of the parent’s privileged mental health records. *Laznovsky v. Laznovsky*, 357 Md. 586, 745 A.2d 1054 (2000). In so holding, the court rejected the claim that a parent who asserts parental fitness has placed his or her mental health at issue, and therefore waived the psychiatrist-patient privilege. The court’s holding recognized the reinstated psychiatrist-patient privilege regarding child custody cases in Maryland, and did not compel the discovery of privileged information.

In 1995, Mrs. Laznovsky filed for divorce and sought sole custody of the couple’s two children. In response to Mrs. Laznovsky’s complaint, Mr. Laznovsky also sought sole custody of the children. In 1994, the couple saw a psychiatrist. In addition, Mrs. Laznovsky had a long history of psychiatric treatment during the course of her marriage.

The Circuit Court for Talbot County awarded sole custody of the children to Mrs. Laznovsky and held that she did not waive the psychiatrist-patient privilege by attempting to obtain custody of the children. Mr. Laznovsky appealed the decision, asserting that Mrs. Laznovsky did waive the psychiatrist-patient privilege by claiming to be a fit and proper person. The Court of Special Appeals of Maryland vacated the trial court’s order and held that Mrs. Laznovsky waived the psychiatrist-patient privilege. The Court of Appeals of Maryland granted Mrs. Laznovsky’s petition for a writ of certiorari.

The court began its analysis by examining whether a statutory psychiatrist-patient privilege is waivable in a child custody case. In its consideration, the court gave great weight to the legislative history surrounding the adoption of the privilege in Maryland. *Id.* at 594, 745 A.2d at 10584 (citing Md. CODE ANN., CTS. & JUD. PROC., § 9-109(b) (1974, 1998 Repl. Vol.)). In so doing, the court found that in 1977 the Maryland General Assembly intentionally repealed the exception permitting trial judges to compel discovery relating to a patient’s mental or emotional disorder as related to a psychiatrist or psychologist in a child custody dispute. *Id.* at 595, 745 A.2d at 1059 (citing 1977 Md. Laws, 685, repealing Md. CODE ANN., CTS. & JUD. PROC., § 9-109(c) (1974, 1998 Repl. Vol.)).

The court’s examination of the legislative history found that the Maryland Legislature was fully aware of the ramifications of repealing the child custody exception and determined that the privilege outweighed the best interests of the child in custody cases. *Id.* at 599-600, 745 A.2d at 1061. The court concluded that the Legislature’s repeal of the exception was clear and unambiguous. *Id.* at 603, 745 A.2d at 1063.

The court then considered the intent of the Legislature when it repealed the exception that permitted a court to compel privileged psychiatrist-patient information in child custody cases. *Id.* at 603-04, 745 A.2d at 1063-64. The court observed that the Legislature created exceptions that dealt with the accountant/client privilege, privileges regarding patients of mental health providers who exhibit a propensity for violence, and spousal privileges in criminal cases involving abuse to minor children. *Id.* at 604-05, 745 A.2d at 1064. With these privileges, the court noted, the Legislature expressly created, and never repealed, their exceptions. *Id.* The court further stated that the subsequent repeal of the child custody exception, and failure to include child custody exceptions in similar statutes, was a clear indication that no express psychiatrist-patient privilege exception now applies in any
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child custody case. Id. at 606, 745 A.2d at 1065.

The court then analyzed the laws of other states to determine whether there is a required disclosure of the privileged material when mental health is put at issue. Id. at 608-09, 745 A.2d at 1066. Although many states have adopted statutes similar to Maryland’s repealed legislation, the court did find a few cases in which other courts recognized the psychiatrist-patient privilege in child custody cases. Id. When deciding whether a parent waived the psychiatrist-patient privilege in child custody cases, the court found two different approaches from Alabama and Florida. Id.

The Alabama rule states that a party waives their psychiatrist-patient privilege in a child custody case where the mental state of the party “is clearly in controversy, and a proper resolution of the custody issue requires disclosure of privileged medical records . . . .” Id. at 609, 745 A.2d at 1066. In Thompson v. Thompson, a woman alleged to be an alcoholic was required to reveal her privileged medical records in a child custody case. Id. (citing Thompson v. Thompson, 624 So.2d 619, 620 (Ala. Civ. App. 1993)). The Thompson court held that the privilege must yield in custody cases because the parent’s mental state is at issue. Id. (citing Thompson, 624 So.2d at 620).

The Indiana Supreme Court advanced the Alabama approach when it held “that the mere filing of a custody action places the parent’s mental health at issue, thus waiving the privilege.” Id. at 609-10, 745 A.2d at 1066-67 (citing Owen v. Owen, 563 N.E.2d 605, 608 (Ind. 1990)).

In contrast, Florida courts have held that parties do not waive their psychiatrist-patient privilege when they claim parental fitness. Id. at 613-14, 745 A.2d at 1069. (citing Peisach v. Antuna, 539 So.2d 544, 546 (Fla. Dist. Ct. App. 1989)). The court distinguished Peisach from other cases in which the party asserted a claim concerning their mental health by stating that the party made a specific assertion of a mental condition in support of a claim. Id. at 615, 745 A.2d at 1069-70 (citing Davidge v. Davidge, 451 So.2d 1051, 1051-52 (Fla. Dist. Ct. App. 1984).

The court concluded its analysis by relying on the 1977 legislative policy decision to repeal the psychiatrist-patient privilege exception for child custody cases. Id. at 618-19, 745 A.2d at 1071-72. The court determined that the Legislature made a policy decision that the importance of confidential mental health treatment communications outweighed any exception for child custody matters. Id. at 619-20, 745 A.2d at 1072. The court declared that it was unwilling to ignore the Legislature’s commitment to the psychiatrist-patient privilege. Id. at 620, 745 A.2d at 1072.

In lieu of waiving the mental health privilege in child custody cases, the court, in dicta, described that a waiver of the psychiatrist-patient privilege is not the only way for the court to access a patient’s medical health records. Id. at 619, 745 A.2d at 1072. The court determined that the party can voluntarily furnish the information, or a court may order current mental health evaluations to decide fitness to parent. Id.
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**Lettley v. State**

Trial Court’s Denial of Defense Counsel’s Motion to Withdraw Based on Conflict of Interest Violated Defendant’s Sixth Amendment Right to Effective Assistance of Counsel

By Amy E. Askew

The Court of Appeals of Maryland held that a trial court’s denial of defense counsel’s motion to withdraw, due to a conflict of interest violated the defendant’s Sixth Amendment right to effective assistance of counsel. *Lettley v. State*, 358 Md. 26, 746 A.2d 392 (2000). The court further held that an attorney’s applicable conflict of interest was not limited to multiple representation in the same case, but could also be created by the attorney’s dual representation of the client and a third person, where the third person is not a party to the client’s case.

Timothy Smith (“Smith”) was shot three times at a parking lot in Baltimore City on December 10, 1997. After recovering from his injuries, Smith identified Donald Lettley (“Lettley”) from a photo array as the shooter. Lettley was indicted by a Grand Jury in Baltimore City for attempted first degree murder and related offenses. Lettley privately retained an attorney on February 11, 1998.

On August 17, 1998, Lettley’s attorney informed the court that she had a conflict of interest and requested that the court grant her motion to withdraw her appearance. The attorney told the court that an existing client, who was not the defendant in the instant case, had come to her in confidence implicating himself in the Smith shooting. The attorney informed the court that her ability to effectively represent Lettley had thus been compromised, as it would force her to reveal confidential information that could harm another client, not a party to the instant case. After the court questioned the attorney regarding the alleged conflict, the judge permitted Lettley to consult with an independent counsel, who agreed there was a conflict of interest. Nevertheless, the judge denied Lettley’s request for a postponement and advised Lettley that he had two options: to proceed with his present counsel or discharge her and proceed pro se. Lettley proceeded with his present counsel and was subsequently convicted for attempted murder and possession of a handgun.

Lettley filed a timely appeal to the Court of Special Appeals of Maryland, claiming that the trial judge denied him effective assistance of counsel as guaranteed to him under the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights. The Court of Appeals of Maryland granted a writ of certiorari on its own motion *sua sponte*.

The court addressed the fundamental protection of the Sixth Amendment and Article 21 guarantees of a criminal defendant’s right to effective assistance of counsel. Id. at 34, 746 A.2d at 396. According to the court, effective assistance of counsel includes the right to have representation absent conflicting interests. Id. at 34, 746 A.2d at 396. The court explained that while a typical conflict of interest issue arises in multiple representation settings, a defendant’s right to “conflict free” representation continues in any situation in which the defense counsel has a conflicting obligation to both the defendant and some other party. Id. at 34, 746 A.2d at 397.

Generally, the standard that a defendant must meet in order to prove ineffective assistance of counsel is relatively high, as set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Id. The defendant must prove that his counsel’s representation fell below an objective standard of reasonableness and that the defendant was prejudiced. Id. However, the court of appeals pointed out that where the claim stems from a conflict of interest,
the strict standard in *Strickland* does not apply. *Id.* The court pointed to two United States Supreme Court approaches to the conflict of interest based claims of ineffective assistance of counsel, and explained that the determining factor used by that court was whether the conflict was noted on the record. *Id.* at 35, 746 A.2d at 397. If the defense counsel makes a timely objection as to the conflict, and a conflict is said to actually exist, then deference should be given to the defense attorney and the court should take adequate measures to ensure that the defendant’s rights are not violated. *Id.* at 35-37, 746 A.2d at 397-98. (citing *Glasser v. U.S.*, 315 U.S. 60, 69 (1942); *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978)). The existence of the conflict itself is said to be inherently prejudicial, as the evil is what the defense attorney is compelled to refrain from doing. *Id.* However, if the defense counsel fails to make a timely objection, thus denying the court the ability to correct the situation, the defendant must prove that the actual conflict adversely affected his counsel’s performance (citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980)). *Id.* at 37, 746 A.2d at 398. Once the conflict and the adverse effect are illustrated, prejudice is presumed. *Id.*

The court reviewed the last case seen in Maryland regarding ineffective assistance of counsel. *Id.* at 41, 746 A.2d at 401. In *Austin v. State*, 327 Md. 375, 609 A.2d 728 (1992), two lawyers from the same law firm represented co-defendants in a criminal case. *Id.* Once again, the court reiterated the language of the United States Supreme Court and said that once a conflict is determined to exist, prejudice is presumed and the court should take steps to eliminate the conflict. *Id.* at 42, 746 A.2d at 401.

In the present case, Lettley’s defense counsel had confidential information from one client that was crucial to the case of another client. *Id.* at 43, 746 A.2d at 402. Because of ethical obligations to the previous client, counsel was prohibited from using it to fulfill yet another ethical duty to her current client; the duty to represent a client zealously. *Id.* at 44, 746 A.2d at 402. The Court of Appeals of Maryland found the constraint obvious. *Id.* As counsel made a timely objection, the trial court abused its discretion by not allowing her to withdraw her representation and therefore violated Lettley’s Sixth Amendment rights. *Id.* at 45, 746 A.2d at 403.

The fundamental right for a defendant to receive a fair trial resonates throughout this opinion. However, the possibility that this decision could be used to cause delay within the system could become a reality. Applying this decision to the heavy case-load of the Public Defender’s Office, it appears that there will be times when finding a “conflict-free” representation will be extremely difficult. A public defender’s client list is often vast, with many overlaps. Yet the Court of Appeals of Maryland seems to reason that any obstacle presented in finding representation is not as paramount as a defendant’s right to effective assistance of counsel.
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**Patterson v. State**  
**Trial Judge Not Obligated to Deliver a Missing Evidence Instruction to the Jury**  

By D’Arcy Byrnes

In a case of first impression, the Court of Appeals of Maryland held that a criminal defendant is entitled to a missing evidence jury instruction in a case where the state failed to produce evidence relied upon by the defendant. *Patterson v. State*, 356 Md. 677, 741 A.2d 1119 (1999). The court’s holding demonstrated that a missing evidence instruction is generally not needed, and a failure by the trial court to issue such an instruction is neither error nor an abuse of discretion. The court also held that a failure by the police to preserve evidence is not a denial of due process of law unless the defendant can prove that the police acted in bad faith.

The petitioner (“Patterson”), was detained after running a stop sign in Montgomery County. Officers Stone and Perry of the Montgomery County Police Department performed a records check, which revealed that Patterson’s Maryland driver’s license had been revoked. Patterson was arrested and placed in the passenger seat of the police cruiser with Officer Stone, while Officer Perry conducted an inventory search of the car. The search produced a jacket in the trunk of the car that contained what was suspected and later determined to be crack cocaine.

At trial in the Circuit Court for Montgomery County, Patterson intended to prove his defense that the jacket did not belong to him, by trying the jacket on and showing the court that it did not fit. However, at trial, rather than presenting the jacket into evidence, the prosecution offered a photograph of the jacket while in the trunk of the car. Cross examination of the police officers revealed that the jacket was not the type of evidence typically retained for trial. Throughout the remainder of trial, no evidence was produced establishing any connection between the jacket and Patterson. At the close of trial, Patterson requested that the court issue a missing evidence jury instruction which would allow the jury to infer that because the State chose not to produce the jacket, the potential admission of the evidence would have been unfavorable to the State. The trial court refused to issue such an instruction. Patterson was convicted of possession of cocaine with the intent to distribute, along with various driving offenses. The Court of Special Appeals of Maryland affirmed the trial court’s decision, and the Court of Appeals of Maryland granted certiorari to consider whether the trial court erred in refusing to give a missing evidence instruction.

The court of appeals began its analysis by addressing the general failure by the State to produce evidence. *Patterson*, 356 Md. at 682, 741 A.2d at 1121. In a case where the State has failed to produce reasonably available evidence, or fails to justify the absence of such evidence, the defense is allowed to comment on the missing evidence during closing arguments made to the jury. *Id.* at 682, 741 A.2d at 1122 (citing *Eley v. State*, 288 Md. 548, 419 A.2d 384 (1980)). *Eley* made it clear that when relevant prosecutorial evidence is not produced, nor its absence explained, such failure to furnish can be used against the State, by creating a reasonable inference. *Id.* at 683, 741 A.2d at 1122 (citing *Henderson v. State*, 1 Md. App. 152, 441 A.2d 1114 (1982)).

In addressing the issue of whether the trial judge erred in denying the jury instruction, the court looked to Maryland Rule 4-325(c), which requires that jury instructions be given only in connection with the applicable law in the case. *Id.* at 684, 741 A.2d at 1122. Pursuant to this rule, the court is only required to give the requested instruction when: “(1) it is a correct statement of the law; (2) it is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given.” *Id.* (quoting *Ware v. State*, 348 Md. 19, 702 A.2d 699 (1997)). The court of appeals made a clear distinction...
between statements of the law and the facts of a case. *Id.* Instructions as to facts or inferences are not required. *Id.* While questions of law, including elements of a crime and affirmative defenses, are based on legal standards and therefore warrant an instruction, evidentiary issues are questions of fact that are based on individual facts. *Id.* at 685, 741 A.2d at 1122-23. While an inference can be made against a party who fails to introduce evidence during trial, such an inference does not mandate a jury instruction. *Id.* Moreover, the court noted, there is concern that a judicial instruction regarding a permissible inference may give undue emphasis to one particular inference over other permissible inferences. *Id.*

Because the nature of missing evidence instructions was an issue of first impression for the court of appeals, the court reviewed decisions from other jurisdictions, as well as the court of special appeals. The review revealed that while some jurisdictions leave the determination of the issuance of a missing evidence instruction to the discretion of the trial judge, the result is typically the same as the case at bar. *Id.* Many courts, while holding that the instruction is not mandatory, have tended to base their decisions on an abuse of discretion standard. *Id.* at 688, 741 A.2d at 1127.

Based on a thorough examination of both Maryland case law and law from other jurisdictions, the court refined the rule set forth by the court of special appeals, that while an instruction regarding applicable law may be mandated, generally, the trial court is not obligated to give instructions on the presence or absence of evidentiary inferences. *Id.* at 694, 741 A.2d at 1127. When there is missing evidence due to an omission by a party, an inference that the missing evidence would have been unfavorable to the party is permissible, with nothing more being required. *Id.* at 688, 741 A.2d at 1124.

The court next addressed Patterson’s claim that the rejection of a missing evidence instruction denied him due process of law. *Id.* at 694, 741 A.2d at 1128. To substantiate such a claim, the court held, a defendant must prove that the government acted in bad faith. *Id.* (citing Arizona v. Youngblood, 488 U.S. 51 (1988)). In order then, for a criminal defendant to prove a denial of due process, a showing of bad faith on the part of police is required. *Id.* at 695, 741 A.2d at 1128. The court added that a showing of negligence is not enough to meet the bad faith standard. *Id.* at 695, 741 A.2d at 1129.

In this case, despite the defendant’s belief that the jacket was exculpatory evidence, the court relied on the fact that the police never considered the jacket to be pertinent in the case. *Id.* at 698, 741 A.2d at 1129. Because there was no evidence pointing to malicious destruction on the part of the police, there was no due process violation. *Id.* at 699, 741 A.2d at 1129.

The court has now made it clear that a trial judge in Maryland is required to give a jury instruction only when dealing with the applicable law in the case, and that the court is under no obligation to deliver instructions on factual issues and inferences. Instructions to a jury regarding inferences may cause confusion, and, more importantly, may tend to overly influence a jury to consider just one out of many inferences that can be drawn based on the facts presented during trial. This holding helps to eliminate potentially damaging and prejudicial influences from the judge upon the jury.

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**Sessoms v. State**

Test for Admitting Other Crimes into Evidence in Criminal Proceedings Does Not Apply to Crimes, Wrongs, or Acts Committed by Witness who Testifies at Trial

By Kristin E. Blumer

In a four to three decision, the Court of Appeals of Maryland held that the test for admitting evidence of other crimes into criminal proceedings does not apply to crimes, wrongs, or acts committed by anyone other than the defendant. *Sessoms v. State*, 357 Md. 274, 744 A.2d 9 (2000). The court found that the other crimes evidence rule, a court-created standard, is intended to protect a defendant from being convicted based on a reputation or propensity to commit crimes. Although the rule protects the defendant from undue prejudice, the court held that it does not exclude acts committed by other people.

On December 24, 1996, Tracy Dillon (“Tracy”) was walking through an alley when a man who was later identified as James Sessoms (“Sessoms”) attacked and raped her twice at knife point. When her attacker released her, Tracy ran towards home. En route, she saw her brother, Kelly Dillon (“Kelly”), and his friend, Antonio Shields (“Shields”), on a street corner. Kelly later testified that when he saw his sister, she was crying and dirty, with leaves in her hair and blood on her hands. The three of them found Sessoms on a street corner and confronted him. Once Kelly determined that Sessoms had attacked Tracy, he and Shields then beat Sessoms nearly unconscious.

When Officer Edward Marshall (“Officer Marshall”) arrived at the scene, he found Tracy, hysterical, standing about fifteen feet from Sessoms, who was lying unconscious in the street. Kelly and Shields had fled the scene. Tracy told Officer Marshall that Sessoms had raped her and that he had been assaulted by two unknown men. A nurse at Mercy Hospital found injuries consistent with non-consensual sex; however, no semen was found. Tracy admitted to the nurse that she knew who had attacked Sessoms, but refused to reveal their names.

Officer Francis Shipp (“Officer Shipp”) drove Tracy home from the hospital early in the morning hours of December 25, 1996. At that time, Tracy identified Kelly as her brother to the officer. Minutes later, Tyrone Pitman (“Pitman”) ran up to the police car and told Officer Shipp that he had just been robbed by “that man,” and referred to Kelly. Upon hearing this statement, Tracy said, “I ain’t saying it is my brother or isn’t my brother.”

Sessoms was tried in the Circuit Court for Baltimore City on a seven-count indictment alleging rape, assault, assault with intent to rape, and sexual offenses. *Sessoms*, 357 Md. at 276, 744 A.2d at 10. The State filed a motion in limine to exclude the testimony of Officer Shipp alleging that Kelly had robbed Pitman. *Id.* at 279, 744 A.2d at 12. Defense counsel argued that the testimony was relevant when considered in light of Tracy’s inconsistent statements concerning her brother’s identity and Sessoms’ claim of a robbery. *Id.* at 279-80, 744 A.2d at 12. The trial judge granted the State’s motion, holding that the “highly prejudicial” evidence should be excluded. *Id.*

At trial, Sessoms testified on his own behalf, stating that he did not touch Tracy. *Id.* at 278, 744 A.2d at 12. He said that while he was walking down Baltimore Street to purchase lottery tickets, he was approached by two men, one of whom accused him of robbing his sister. *Id.* Sessoms denied the robbery, and was beaten unconscious by the two men. *Id.* Afterwards, he noticed that money and two lottery tickets, which had been in his possession prior to the attack, were missing from his pants pockets. *Id.*

The jury convicted Sessoms of third-degree sexual offense and acquitted him of the remaining charges; the court imposed a ten-year sentence. *Id.* at 281, 744 A.2d at 11. Sessoms appealed to the Court of Special Appeals of Maryland, which affirmed his conviction in an unreported opinion. *Id.* The Court of Appeals of Maryland granted a writ of certiorari to determine whether the test for admitting other crimes
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evidence should apply to evidence offered not against the defendant, but against a witness to establish a defense. Id. at 277, 744 A.2d at 11.

The court began its analysis by noting that the rule prohibiting introduction of evidence of other crimes was established to protect defendants from undue prejudice at trial. Id. at 282, 744 A.2d at 13 (citing Boyd v. United States, 142 U.S. 450 (1892)). The court cited three policy reasons for the rule:

(1) the strong tendency to find the accused guilty of the charge merely because of his or her history of committing such acts; (2) the tendency to condemn the accused not because of guilt, but because he or she escaped punishment from previous offenses; and (3) the injustice of unfair surprise.

Id. at 283, 744 A.2d at 14 (citing 1A John Henry Wigmore, Evidence § 58.2, at 1215). The court emphasized that none of these policy considerations applied to anyone other than the defendant. Id. The standard was adopted by Maryland in State v. Faulkner, 314 Md. 630, 718 A.2d 588 (1998). Id. at 277, 744 A.2d at 11. Accordingly, the rule was later codified as Maryland Rule 5-404(b), using language derived from Fed. R. Evid. 404(b). Id. at 285, 744 A.2d at 15.

The court observed that it had been afforded many opportunities to evaluate the other crimes evidence rule and had consistently held that use of the test in criminal proceedings was limited to acts committed by the defendant. Id. at 283, 744 A.2d at 14. The court stated that an extension of the rule to parties other than the defendant would “broaden[] it beyond the type of prejudice that this rule was designed to prevent.” Id. at 285, 744 A.2d at 15. This interpretation of the rule was supported by a majority of federal court interpretations of Fed. R. Evid. 404(b). Id. at 287, 744 A.2d at 16. The court of appeals adopted the majority rule that “when evidence of other crimes, wrongs, or acts committed by a third party is proffered by the defendant, the risks of prejudice against the defendant normally are not present.” Id. at 291, 744 A.2d at 18.

On appeal, the State argued that since Maryland Rule 5-404(a) distinguished the “use of character evidence based on whether the character at issue is of the accused, the victim, or a witness,” Rule 5-404(b), which uses the general word “person,” indicated that the rule was intended to apply to persons other than the defendant. Id. at 286, 744 A.2d at 16. The court rejected this argument, noting that in Wynn v. State, 351 Md. 307, 718 A.2d 588 (1998), the court interpreted Rule 5-404(b) along with Maryland case law, and held that Rule 5-404(b) only excluded evidence of wrongs committed by the defendant. Id. at 286-87, 744 A.2d at 16. The court found that to expand the scope of the rule to persons “other than the defendant would turn the purpose of this rule on its head.” Id. at 287, 744 A.2d at 16. The court reasoned that evidence of wrongs committed by a witness does not impute to the defendant a propensity to commit a crime. Id.

The court determined that the excluded evidence regarding Pitman’s alleged robbery by Kelly might have been relevant to Sessoms’ defense, especially when considered in light of Tracy’s inconsistent statements. Id. at 291, 744 A.2d at 18-19. The court stated that the evidence related to Sessoms’ defense that he was robbed by Kelly, that Tracy had concocted the rape to cover for her brother, and that the suppression of this evidence denied Sessoms an opportunity to fully present the basis of his defense. Id. at 292, 744 A.2d at 19. The court of appeals held that exclusion of this evidence on other crimes evidence grounds was erroneous. Id. The court further stated that exclusion of this evidence denied Sessoms an opportunity to impeach Tracy’s credibility by introducing her inconsistent statements, and to show that Tracy and Kelly “had bias, prejudice, interest, or other motive to testify falsely.” Id. at 294, 744 A.2d at 20.

The dissent, authored by Judge Wilner, criticized the majority for reaching out to decide an issue that was not present in the case. Id. at 295, 744 A.2d at 21. He found that Pitman’s accusation that Kelly had robbed him was properly excluded because it was hearsay, and highly prejudicial. Id. at 296, 744 A.2d at 21. He agreed with the majority that the rule against admitting evidence of other crimes should be limited to evidence admitted against the defendant in a criminal case, but
stressed that such evidence should not “be freely admissible in all other circumstances.” *Id.* at 301-02, 744 A.2d at 24.

The Court of Appeals of Maryland’s conclusion that the bar against admission of evidence of other crimes applies only to defendants is troublesome from a practical standpoint. The limitation of this rule opens the door to allowing such evidence to be introduced at trial against witnesses in criminal proceedings, thereby putting those individuals on trial. Admission of such evidence presents a fact-finder with evidence that is irrelevant to the issues in the case. As noted by the dissent in the instant case, other evidence was properly admissible to impeach the State’s witnesses. Use of evidence that someone other than a defendant has committed crimes or bad acts should be introduced in a criminal trial only in very limited circumstances.
The Honorable Peter B. Krauser, the newest member of the Court of Special Appeals of Maryland, graduated from the University of Pennsylvania Law School in 1972. Prior to his appointment to the Court of Special Appeals, Judge Krauser was the President of Krauser & Taub, P.C., a general practice law firm with particular emphasis on general trial and appellate litigation in the areas of employment, commercial, fair housing, criminal, land use, and personal injury law. Judge Krauser also served as the Chair of the Maryland Democratic Party.

Judge Krauser began his legal career as a law clerk to the Honorable John P. Fullam in the United States District Court for the Eastern District of Pennsylvania. Judge Krauser worked in the United States Department of Justice in the Criminal Division as an appellate attorney and the Defender Association of Philadelphia before entering private practice with Margolius, Davis, Finkelstein & Rider, a general practice law firm based in Washington, D.C. Judge Krauser also served as General Counsel to the Prince George Center, Inc., a land development and real estate management company doing business throughout the Washington, D.C. metropolitan area. Judge Krauser was the managing partner of the Maryland office of Thompson, Hine & Flory, a national law firm based in Cleveland, prior to the creation of Krauser & Taub, P.C., in Landover, Maryland.

Judge Krauser was a longtime community activist before joining the Court of Special Appeals. He was the President of the Jewish Community Council of Greater Washington from 1994-1996, and also served as the Chair and Founder of the Black-Jewish Seder of Prince George’s County. Judge Krauser was on the Board for the American Jewish Committee and also served as the Maryland State Chair of the National Jewish Democratic Council. Judge Krauser was a member of the Prince George’s Chamber of Commerce and was named Prince Georgian of the Year in 1993 for his leadership in the community.

Judge Krauser is a member of the American Bar Association, the Maryland State Bar Association, and the Prince George’s County Bar Association. Judge Krauser was also an Adjunct Professor at George Mason University Law School and was an Instructor in the University of Maryland Paralegal Studies Program. Judge Krauser has given numerous lectures to the Maryland legal community on the subjects of property management, employment law, and real estate law.

Judge Krauser and his wife, Circuit Court of Prince George’s County Judge Sherri L. Krauser, have two children and reside in Adelphi, Maryland.
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