THE LAW FORUM
UNIVERSITY OF BALTIMORE SCHOOL OF LAW

DEPARTMENTS

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The Editorial Board and Staff of the University of Baltimore Law Forum have worked tirelessly to ensure Volume 33.2 continues in the journal’s long tradition of being interesting, insightful, and informative. This issue continues to highlight many recently decided cases in our traditional “Recent Development” (RD) format which succinctly summarizes the facts, procedure, holding, and analysis of a case. Also look for the addition of “Legislative Summaries,” highlighting some of the Maryland Legislature’s recently passed bills.

Kendra Johnson’s article, “Racially Bias SAT I/ACT Blocks Access to College: Is it Constitutional for College Officials to Condition Admission on a Racially Bias Assessment?” by Kendra Johnson, addresses concerns over colleges’ use of the SAT I/ACT as a determining admission factor. The article reviews the history of the SAT I/ACT, identifies racial bias in the tests, and discusses the use of standardized tests as criteria for college admission. The article also analyzes potential legal challenges to the use of these tests by colleges and argues that use of these tests, when there are viable alternatives, constitutes a violation of the Title VI Civil Rights Act of 1964. I am sure you will find the article informative whether you have children who will soon be taking such tests or are simply reminiscing back to that Saturday morning (or perhaps mornings) when you sat down, pencil in hand, ready to bubble that scantron sheet.

On the technology front, I continue to encourage readers to “surf” the University of Baltimore School of Law’s updated and improved website at law.ubalt.edu/lawforum/index.html. Follow the link from the main page to the publications section to find a link to our website. Our website will provide readers access to current issues, as well as past issues. My thanks go to J. Matthew Bodman whose guidance, direction, and assistance was instrumental in creating our website and training future staffers in how to maintain the site.

This will be the last issue of Volume 33. We leave the journal in the capable hands of next year’s Editorial Board, who have already begun their work on Volume 34. Best wishes to them as they continue the tradition of providing timely information to the Maryland legal community.

Finally, I would like to thank my Editorial Board for their significant contributions to this issue and the journal in general. Melissa Machen Shannahan, with the assistance of John MacClean, ensured the appropriate sampling and quality of RDs for this issue. Farrah Arnold’s many hours of solicitation and eventual editing of articles is reflected in the interesting and well-written article in this issue. Justin Flint’s organizational effectiveness kept our production schedule on time and running smoothly. Havalah Neborschick’s work as Manuscripts Editor was sincerely appreciated, especially considering she had to simultaneously wear the hat of President of the Student Bar Association. Last, but certainly not least, I would like to thank my fiancé, Rachel Zbyszinski, for her continued support and love throughout this challenging but rewarding publication process.

Ryan N. Hoback
Editor in Chief
Racially bias SAT I/ACT blocks college access: Is it constitutional for college officials to condition admission on a racially bias assessment?

By: Kendra Johnson

I. INTRODUCTION

University of California President Richard Atkinson advances verbal analogy questions: DRAPERY is to FABRIC as (pick one) fireplace is to wood; curtain is to stage; shutter is to light; sieve is to liquid; window is to glass. These questions come from the SAT I exam that 1.3 million college applicants take every year. SAT I questions are not that tough, but Atkinson believes they show the test is a capricious exercise that adds little information to what other tests and grades show about a student’s academic capabilities.

Pursuant to the Equal Protection Clause of the Fourteenth Amendment, legal challenges to the use of standardized assessment tests for decision-making in schools have focused on ability tracking, test disclosure, teacher competency, placement in special education classes, and assessment test scores as school admissions criteria. These legal challenges have been definitively addressed in all of the above-mentioned areas except for the use of standardized assessment test scores as school admissions criteria.

A wasteland of commentaries exists relating to the elitist fathers of standardized assessment tests, the rationale behind such assessment tests, and the discriminatory effect of using standardized tests as a condition for college admission. The constitutionality of the racially biased SAT I/ACT as a condition for college admission has not been legally challenged; therefore, the legal viability of these commentaries is uncertain.

This article argues that college officials are in violation of Title VI of the Civil Rights Act of 1964. The SAT I/ACT has a significant adverse impact on African American college applicants. Moreover, college officials knowingly and willingly use the SAT I/ACT when there are viable alternatives to determine admission to colleges and universities coupled with the precept of inferiority in our society, particularly within the educational system, establish the intent to discriminate against African American college applicants. This comment presents the issue of using standardized assessment tests as a condition for college admission. Part II discusses the history of the SAT I/ACT, types of bias in standard testing, racial bias inherent to the SAT I/ACT, and the use of standardized assessments as college admission criteria. Part III provides an overview of the possible legal challenges to the use of racially biased assessment tests as a condition for college admission, and part IV analyzes the present standing of a legal challenge regarding the use of standardized assessment tests as a condition for college admission. Part IV concludes that college officials are in violation of Title VI of the Civil Rights Act of 1964 because the SAT I/ACT has a significant adverse impact on African American college applicants. College officials use the SAT I/ACT even though there are viable alternatives for determining college and university admission.

II. BACKGROUND

A. History of SAT I/ACT

At its inception, SAT was an acronym for the Scholastic Aptitude Test and then the Scholastic Assessment Test. The test is now officially named the SAT I because of uneasiness at the Educational Testing Service (“ETS”) and the College Board about defining just what the test measures. The SAT is the nation’s oldest, most widely used and misused college entrance assessment test. The SAT is composed of two sections: verbal and math. Each section is scored on a 200-800 point scale. Approximately 138 questions are exclusively multiple choice. Ten math questions require students to “grid in.” By design, the SAT is “speeded” which means that many assessment takers will be unable to complete the assessment test.

Carl Brigham, a professor of psychology at Princeton
University, created the SAT. Brigham also developed IQ tests for army recruits before World War I, which he began to use for college use; he administrated the SAT for the first time in 1926. At the beginning of World War II, previous college admission tests were replaced by the SAT, which all college applicants were required to take. The ETS was founded in 1947 when the American Council on Education, the Carnegie Foundation for the Advancement of Teaching, and the College Entrance Examination Board turned over their testing programs, a portion of their assets, and a percentage of their employees. The ETS is the single largest national organization devoted exclusively to educational testing and research. The ETS, under contract with the College Board, produces and administers all SAT assessment tests.

In response to the revised SAT administered by the ETS, the ACT, formerly American College Testing Program Assessment, was created in 1959. The ACT, created by E.F. Lindquist and Ted McCarrel, was initially designed to more closely relate to high school curriculums than the SAT. The ACT was supposed to combine achievement and aptitude, while the SAT was solely aptitude. However, ACT and SAT scores correlate very highly. In fact, most universities now treat the ACT and SAT interchangeably and allow college applicants the option of submitting either assessment score. The ACT is required predominantly in the Midwest, Southwest, and Deep South, while the SAT I is required mainly on the East and West Coasts.

B. Types of Bias in Standardized Testing

Are all cognitive tests racially or culturally biased? A considerable number of Americans answer this question in the affirmative. When analyzing racial bias in testing, scholars characterize bias in testing as labeling bias, content bias, or methodological bias.

Labeling bias occurs when a test claims to measure one thing, but actually measures something else. Labeling bias appears most often in tests that measure either "intelligence" or "aptitude." Most citizens, including federal judges hearing challenges to college admissions assessment tests, perceive both intelligence and aptitude as innate traits. Almost all psychologists conclude that an individual's score on an intelligence or aptitude test depends partly on genetic makeup, but also reflects a myriad of environmental factors. In addition, many psychologists, as well as lay persons, agree that environmental influences play some role in the black-white test score gap.

Content bias is similar to labeling bias. Content bias occurs when a test claims to measure something that could in principle be measured in an unbiased way, but fails to do so because it contains questions that favor one group over another. For example, suppose French and English speaking Canadians take a vocabulary test. If the test is in English, it will underestimate the vocabulary of French-speaking children. The tester can eliminate this disparity by re-labeling the test to measure English vocabulary or by including equal numbers of French and English words.

Methodological bias occurs when a test assesses mastery of some skill or body of information using a technique or method that underestimates the competence of one group relative to another. Using multiple-choice questions, instead of essays or tests where students are under severe time pressure, illustrates methodological bias. Although it is not clear how much methodological bias distorts black-white comparisons, no one has produced a testing methodology that sharply reduces the black-white gap.

Prediction bias occurs whenever a test is used to predict an individual’s future performance. For example, colleges use SAT I to predict applicants' college grades. If African American undergraduates typically earned higher grades than whites with the same SAT I scores, many individuals would probably conclude that the SAT I was biased against African Americans. However, whites with the same SAT I scores as African Americans tend to have higher grades than their African American counter-parts.

1. Racial Bias on the SAT I/ACT

In 1988, approximately 7,000 African American high school seniors scored 1000 or above on the combined SAT I. Therefore, African Americans rank in the 80th percentile on these tests. The national average score was about 900. An estimated 21,000 African American high school seniors scored 700 or below on the SAT (approximately the 15th percentile).

In addition, Georgia eliminated the SAT I as a requirement for students pursuing career programs in its community college system because it was of little value.
and intimidated many students. As a result of Georgia’s initiatives, other community colleges eliminated the SAT I as an admission requirement.

A study regarding the SAT I by James Crouse and Dale Tresheim analyzes the SAT I scores’ poor utility in forecasting both short- and long-term success. The study compared two admissions strategies, one using just the high school record of the student and the other using the high school record and SAT I score. More than 90 percent of the admissions decisions were the same under both strategies. However, the SAT I-based strategy led to far greater rejections of otherwise academically qualified minority and low-income applicants. Also, data demonstrated that using the high school record alone to predict who would complete a bachelor’s degree resulted in “correct” admissions decisions 73.4 percent of the time, while using the SAT I and high school grade point average forecast resulted in “correct” admissions decisions in 72.2 percent of the cases.

The four-year study of some 878,000 students enrolled in the University of California system looked at the relationship between high school GPA, SAT I score, SAT II score, and first-year undergraduate grades. The weakest predictor of college performance proved to be SAT I scores, which explained just 12 percent of the difference (or variation) in freshman grades. SAT II scores and GPA each separately explained approximately 15 percent of the variance; each of these factors did a better job of forecasting college performance than the SAT I. Adding the SAT I to this equation improved the predictive ability by less than one percent, which demonstrated that the SAT I adds little information to the assessment of a student’s application. In addition, researchers discovered that the predictive power of the SAT I was further compromised when socioeconomic status was taken into account. The research concluded that SAT I scores are more closely associated with family income and parents’ education than SAT II scores or high school GPA.

One study at Chicago State University confirmed that the ACT score does a poor job of predicting academic performance in college. For the vast majority of the university’s graduates who scored in the middle range of the test as high school students, the ACT explained only 3.6 percent of the differences in cumulative college grade point average. In fact, the exam over-predicted the performance of the class graduating in 1992, which had the highest average ACT score among the classes in the research study, yet the poorest academic performance over four years at the university.

Moreover, a report from Bates College, which made SAT I score submittal optional in 1985, concludes that “the optional SAT I policy has had no negative, and quite possibly a positive, impact on the quality of students admitted.” Student quality increased since Bates adopted the policy; academic performance of SAT submitters and nonsubmitters is nearly the same; nonsubmitters’ GPAs are higher than their SAT’s would predict; “none of the standardized tests (currently in use at Bates) predict students’ performance very well.” The authors conclude, “there is much in the data that would call into question the policy of requiring any standardized test scores, given how poorly they predict academic performance at Bates.”

However, some scholars hesitate to argue that the SAT I underestimates the academic potential of African American applicants. These scholars are skeptical of the following argument:

1. Other things being equal, innate ability probably has some effect on both SAT I scores and college grades;
2. African Americans have the same innate ability as whites;
3. But, African Americans score lower on the SAT I than whites.

Therefore, the average African American with a total SAT I score of 1000 began life with more innate ability than the average white with the same score. In addition, African Americans should earn higher college grades than whites with the same SAT I scores because African Americans have a greater innate ability than whites with same SAT I score.

Critics assert that this argument is flawed. Statistics indicated that African Americans earn lower grades than whites with the same SAT I scores. Also, this is correct for cumulative grade point averages over all four years of college. Moreover, racial disparity in grades is wider among students with the highest SAT I scores attending selective colleges and universities.

In addition, supporters of the SAT I concede that it is a flawed assessment test; however, they question whether there is a viable alternative. Supporters of the SAT I believe it is the best assessment as this time. They
point out that “scores on the SAT I are positively corre-
related with performance in college and that higher SAT I
scores are indicative of higher scores in college.” More-
over, “the SAT I is a standardized assessment adminis-
tered to thousands” of students annually at a minimum cost
to universities and colleges, which get much of the benefit
from the test.70 The SAT I allows larger state universities
to rank applicants by mathematical formula, and at smaller
universities, it allows for admissions personnel to glance
inside the mind of the applicant. Also, supporters of the
SAT I further suggested “the test is objective because it is
the same for every student from every public and private
school system in the country.”71 Furthermore, SAT I sup-
porters argue that a variety of factors explains why Cau-
sasian males continue to perform better on the SAT I than
other groups. For example, better schools and higher
parental income have an impact on test scores and women
still do not take as many advanced math and science
courses as men.72

A. College Admission Procedures

All colleges and universities, with the exception of
approximately 400 (see Appendix C), require the SAT I
or ACT.74 Although colleges and universities do not de-
finitively state that applicants must meet a minimum SAT I
or ACT score, college officials advance minimum SAT I
and ACT scores by including the range of SAT scores in
the freshman class profile.75 The significance of including
SAT I/ACT scores in college brochures and college hand-
books is paramount. Students are likely to be discour-
aged from applying to schools where their SAT I/ACT
scores fall below the SAT I/ACT range cited in college
literature. This collective thought is based on colleges and
universities conscious and direct advancement of their
school’s freshman profile, which clearly advertises the
range of SAT I/ACT scores earned by incoming fresh-
man. College officials do not, however, indicate the so-
cioeconomic range, high school GPA, and geographical
diversity of incoming freshman, and many officials do not
advance the racial diversity of the freshman class. Stu-
dents seeking admission into the school’s freshman class
can characterize the conscious efforts of college officials
as an intentional attempt to advance minimum SAT I/ACT
scores needed for admission.

III. ANALYSIS

A. Equal Protection Clause

Section I of the Fourteenth Amendment of the United
States Constitution provides that “[a]ll persons born or
naturalized in the United States, and subject to the juris-
diction thereof, are citizens of the United States and of the
state wherein they reside,” and it further provides that “[n]o
State shall . . . deny to any person within its jurisdiction
the equal protections of the laws.”76 The command of the
Equal Protection Clause that no State shall deny to any
person within its jurisdiction equal protection of the law is
essentially a direction that all persons situated alike should
be treated alike.77 The Equal Protection Clause is vio-
lated only by purposeful78 and intentional discrimination.79
Mere governmental negligence is insufficient to sustain an
equal protection claim,80 since such a claim also requires
the presence of an unlawful intent to discriminate against a
plaintiff for an invalid reason. The plaintiff need not prove
that another fundamental right was trampled, as the right
to equal protection of the law is itself fundamental. The
plaintiff does not have to prove that he or she was victim-
ized by a “suspect classification” such as race, but the
discrimination must be intentional, and the government’s
motive must fail to comport with the requirements of equal
protections.81

Since our country’s inception, courts have ad-
dressed allegations of discrimination. Moreover, courts
determined many forms of discrimination within an edu-
cational setting were in contravention of the United States
Constitution. In Larry P. v. Riles,82 the United States
District Court for the Northern District of California up-
held the lower court’s holding that IQ tests used by the
California school system violated federal statutes.83 The
court determined the school system could not demonstrate
that IQ tests, which resulted in disproportionate place-
ment of African American children, were required by edu-
cational necessity.84 However, the appellate court reversed
the lower court’s finding that the school system was guilty
of intentional discrimination under the Fourteenth Amend-
ment of the Constitution because the pervasiveness of the
discriminatory effect could not be equated with the nec-
essary discriminatory intent.85 The court’s conclusion was
consistent with the Supreme Court’s interpretation of the
appropriate standard of review for equal protection vio-
In *Washington v. Davis*, the United States Supreme Court made it much more difficult to eliminate racial inequities by stating the standard for review of an equal protection violation claim is purposeful or intentional discrimination, thus excluding the various forms of “racial discrimination that is done accidentally or unconsciously but is, nevertheless harmful.”

In order to advance the argument that college officials are within the scope of the Fourteenth Amendment, we must first determine whether there has been “state action.” Although education is not specifically mentioned in the federal Constitution, the federal government has a historic involvement in education. In fact, educational programs under various federal laws pertaining to education in recent years have made up approximately six percent of the total amount of money expended for public elementary and secondary education. Perhaps of greater importance has been the pervasive and significant force of the federal judiciary in influencing educational policy. Controversial educational issues such as racial segregation in schools, financing of schools, due process for both students and teachers, the role of religion in the schools, the extent to which students and teachers may engage in freedom of expression, and standardized testing have all been addressed by the federal judiciary.

The United States Supreme Court in *The Civil Rights Cases* first discussed the concept of state action. In *The Civil Rights Cases*, the Court determined that only state action is within the scope of the Fourteenth Amendment. Courts have determined state colleges and universities and college and universities receiving federal funding are actors of the state, thus falling within the scope of the Fourteenth Amendment. Generally, colleges and universities that receive any federal funding are likely within the reach of the United States Constitution.

The equal protection guarantee is intended to secure equality of protection not only for all but against all similarly situated. African American students have a viable claim against college officials for conditioning admission upon a racially biased SAT I/ACT. One purpose of the Equal Protection Clause is to ensure that citizens are not subject to arbitrary and discriminatory state action. Therefore, African American students can claim a violation of the Equal Protection Clause of the Fourteenth Amendment by arguing they are subject to discriminatory state action when college officials condition admission upon the racially biased SAT I/ACT. Beginning with the Warren Court, the United States Supreme Court intensified equal protection scrutiny of legislation. The Warren Court created suspect classes and mandated a special level of scrutiny. A classification based on race is inherently suspect.

Studies indicate the SAT I/ACT is racially and culturally biased, therefore college officials must advance a compelling state interest that is narrowly tailored to satisfy a governmental interest. The state interest advanced here is the need to “predict” college applicants’ success in college, thus maximizing our country’s economy by producing educated, productive citizens and consumers. Contrary to the state’s interest, studies reveal the SAT I/ACT scores are least effective when predicting a college applicant’s likelihood of success in college. Normally, if the state is unable to meet the compelling interest standard, the plaintiff would prevail. However, recent case law reveals the state action must also be intentional or purposeful discrimination.

At bar, it is unlikely that African American students would prove intentional or purposeful discrimination. Although African American students can articulate reasons why college officials would discriminate against African Americans, it is improbable that a court would determine there is a clear nexus between requiring racially biased SAT I/ACT scores as a condition for college admission and the purposeful intent by college officials to deny African American students college access.

**B. Title VI of the Civil Rights Act of 1964**

Title VI of the Civil Rights Act of 1964 provides that “no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.” In addition, the act provides that a program or activity includes that operations of an instrumentality of a state or local government, an entity of a state that distributes federal financial assistance, and those entities that receive such funding: all levels of public education; and specified corporations, partnerships, or private organizations. If any part of an entity is listed in...
the definition of “program or activity” and receives federal funds, Title VI covers the entire entity. Moreover, any person aggrieved by a federal agency decision to terminate federal funding has standing to seek judicial review, including any state or political subdivision or a political subdivision of either, as well as individuals and organizations.

To state a claim under Title VI, a plaintiff must establish the defendant funding recipient’s purposeful discrimination, and the receipt of federal funds. To establish the elements of a prima facie discrimination case against a program or activity receiving federal financial assistance under Title VI, the complaining party must demonstrate that race, color, or national origin was the motive for the purposeful discrimination. When the decision maker is motivated by a factor other than the excluded party’s race, there is no intentional discrimination. In an action challenging a facially neutral practice, the plaintiff must show disparate-impact on a group protected by Title VI, which is a result of purposeful discrimination. Once a prima facie case is made, the defendant must provide a narrowly tailored, compelling interest that justifies the challenged practice. Merely providing circumstances that raise an inference of purposeful discrimination is insufficient. If no such purposeful discrimination is shown, no compensatory relief is awarded.

African American plaintiffs can argue that college officials’ behavior is in contravention of Title VII of The Civil Rights Act of 1964. In order to adequately analyze likely results of this first impression issue, an evaluation of how courts have historically applied, as well as the current application, a disparate-impact Title VI argument to mandated educational assessments is appropriate. In Gi Forum, Image De Tejas v. Texas Educational Agency, a United States District court determined that the Texas Assessment of Academic Skills (TAAS) examination as a requirement for high school graduation did not have an impermissible disparate impact on Texas’ minority students in violation of Title VI. Although the disparate-impact argument did not prevail, the court clearly indicated that there are facts where assessments can have an impermissible disparate impact on minority students, which would be a violation of Title VI. Moreover, the United States Court of Appeals for the Fifth Circuit found a state could overstep its bounds in implementing standardized tests as graduation requirements. Specifically, the court concluded a test did not measure what students actually learned could be fundamentally unfair. Also, the court stated a test that perpetuated the effects of prior discrimination was unconstitutional.

Furthermore, in Cureton v. NCCA, the court determined that the NCCA was within the scope of Title VI. Here, the NCAA member colleges divided into divisions. The suit dealt with an NCAA bylaw called Proposition 16, which affected initial eligibility only in Division I.

Proposition 16, codified as NCAA bylaw 14.3 had two components that operated on a sliding scale: a minimum high school grade point average in thirteen required core courses and a minimum SAT I/ACT score. Initially, the court determined that Proposition 16 had a disparate impact on African Americans. However, the appellate court reversed and remanded the judgment entered against NCCA because it determined the NCCA was not a federally funded agency, thus a Title VI analysis was not appropriate. In dicta, however, the court asserts that only intentional or purposeful discrimination was within the reach of Title VI. This recent court of appeals ruling suggests that the intentional and purposeful discrimination must be alleged and proved in a disparate impact Title VI claim.

1. Alexander v. Sandoval: A current Snapshot of the United States Supreme Court Disparate Impact Analysis

In Alexander, the Supreme Court carved out an important exception to the right of private action and determined intentional discrimination is the standard for a disparate impact analysis. Here, the Alabama Department of Public Safety, a recipient of federal financial assistance, was subject to Title VI of the Civil Rights Act of 1964. Sandoval brought this class action to enjoin the Alabama Department of Public Safety’s decision to administer the state driver license test only in English. Sandoval argued the Alabama Department of Public Safety’s regulation subjected non-English speaking persons to discrimination based on their national origin. Both the district court and the Eleventh Circuit agreed with Sandoval’s argument that the Alabama Department of Public Safety was in violation of Title VI of The Civil Rights
Act of 1964. However, the United States Supreme Court reversed.

Unfortunately, the correct application of precedent was demonstrated in the district court and the eleventh circuit decisions. The United States Supreme Court’s majority opinion in Alexander is unfounded in precedent and is “hostile to decades of settled expectations.” Three aspects of the decision illustrate the flawed analysis of the United States Supreme Court. First, the Court determined that there is no private right to enforce disparate impact regulations promulgated under Title VI. Second, the Court stated that section 601 prohibits only intentional discrimination. Third, the Court determined that regulations promulgated under section 602 may validly proscribe activities that have a disparate impact on racial groups, even though such activities are impermissible under section 601.

Although the United States Supreme Court is correct, this Court has never expressly recognized a private right of action to enforce the disparate impact regulations promulgated under section 602, the Court addressed this issue twenty-eight years ago, and was unanimous in determining that private parties could bring a lawsuit under Title VI and its implementing regulations to enjoin the provision of governmental services that discriminated against non-English speaking persons. While five justices saw no need to go beyond the command of section 601, Chief Justice Burger, Justice Stewart, and Justice Blackman relied specifically on the regulations to support their conclusion that a private action existed. Five years later in Cannon v. University of Chicago, the Court more explicitly stated, “[w]e have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination.” Although the majority acknowledges that Cannon is binding, the majority carved out an unprecedented exception, which is that a private right of action only exists in cases of intentional discrimination. This exception is “wholly foreign to Cannon’s text and reasoning.”

Then the Court stated that section 601 prohibits only intentional discrimination. Again, the majority relied on Cannon. Cannon is a disparate impact case where a female plaintiff brought a suit against two private universities challenging medical school admission policies that set age limits for applicants. In Cannon, there is no language referring to intentional discrimination. The phrase the Alexander majority relied on, “because she is a woman,” encompasses both intentional and disparate impact claims. Yet, the majority in Alexander reasoned that Cannon stood for the proposition that intentional discrimination is needed for a disparate-impact claim. This reasoning by the Court in Alexander is not supported by the decision in Cannon. For example, expressly applying the holding in Cannon to a disparate impact claim without intentional discrimination is permissible, which is described in detail in footnote one of the opinion. Although it was not forthright, the holding in Cannon was reinforced in Guardians Assn. v. Civil Serv. Comm’n of New York City. Furthermore, the Alexander majority relied on Regents of the University of California v. Bakke. In Bakke, five members of the Court concluded that section 601 only prohibits race-based affirmative action programs in situations where the Equal Protection Clause would impose a similar ban. However, the Court did not engage in an independent analysis of the reach of section 601. The only writing regarding Title VI came from two of the five justices in the majority, who wrote separately to reject the majority’s blanket characterization that the standard of review for Title VI claims is intentional discrimination.

Third, the Court determined that regulations promulgated under section 602 may validly proscribe activities that have a disparate impact on racial groups, even though such activities are impermissible under section 601. This conclusion is in contravention of the well-settled expectations derived from judicial decisions and legislative intent. Congress’ actions over the last two decades reflect a clear understanding of the existence of a private right action to enforce Title VI and its implementing regulations. Moreover, Congress has twice adopted legislation expanding the reach of Title VI of The Civil Rights Act of 1964.
C. Precept of Inferiority

“At the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted… Blacks had no rights which the white man was bound to respect.” In *Dred Scott v. Sanford*, a freed African American brought an action asserting his right to freedom under state and federal law. The Court determined that African Americans were not citizens and, therefore, were not afforded protection of the state and federal laws. Furthermore, when the Court first analyzed the Fourteenth Amendment to ascertain its scope, the Court determined that individuals and individual companies, without any discussion relating to the individuals’ or companies’ governmental affiliations, could discriminate against African Americans because their actions were not “action[s] of the state.” Although camouflaged as a non-race issue, the Court’s decision was just another illustration of the presumption that African Americans were inherently inferior to all other ethnic groups, especially European Americans.

In *Crandall v. State*, African Americans could not be educated in the States unless the school obtained a license, which could be denied if the city advanced a reasonable explanation for the denial. Moreover, the United States Supreme Court declared that it was within the State’s power to engage in race regulation. In *Roberts v. City of Boston*, the Court determined that it was constitutional when a school district decided to close an African American high school, yet decided to keep a white European high school open. In addition, the United States Supreme Court handed down *Plessy v. Ferguson*, one of the two most venal decisions in American history. *Plessy*, which held that separate but equal facilities were constitutional, was an official government endorsement of “Jim Crow segregation.” The significance of *Plessy* cannot be overestimated because it was the “final and most devastating judicial step in the legitimization of racism under state law.”

Also, the presumption of inferiority was used in the housing area for the exclusion and substantial segregation of African Americans. In the brief for the City of Louisville, Kentucky, filed in United States Supreme Court in *Buchanan v. Warley*, it was stated “it is shown by philosophy, experience, and legal decisions, to say nothing of Divine Writ, that… the races of the earth shall pre-

serve their racial integrity by living socially by themselves.” Although the United States Supreme Court held the Louisville segregation statute unconstitutional, segregation in housing remained because restrictive covenants and other private devices precluded African Americans from living in certain areas.

In addition, segregation in education continued to demonstrate our country’s perception of African Americans and other minorities as inferior. In *Gong Lum v. Rice*, the United States Supreme Court declared that Chinese Americans have no equal protection claim because States can separate and educate children by race, and that such regulation was within the State’s police power. Although the United States Supreme Court in *Brown v. Board of Education of Topeka (Brown I)* held that separate educational facilities can never be equal because of its effect on African Americans, the American schools did not integrate immediately. In actuality, various schools used the courts to prolong the integration process, thus minimizing the impact of *Brown I*. Therefore, *Brown II* was handed down. In *Brown II*, the United States Supreme Court placed local school boards in charge of integration, which was supervised by the federal court system. The necessity of the United States Supreme Court’s intervention illustrates the perception of inferiority embraced by Americans.

VI. CONCLUSION

Many would hail *Gi Forum, Image De Tejas* as a pivotal decision that helps analyze a possible constitutional challenge to the use of the racially biased SAT I/ACT as a condition for college admission. After *Gi Forum, Image De Tejas*, there is hope that courts may determine that assessment tests, failing to measure what students actually learn, are fundamentally unfair and in contravention of federal law. Unfortunately, the hope created by *Gi Forum, Image De Tejas* is diminished by *Cureton v. NCCA* and appears to be eliminated by *Alexander*.

Although *Alexander* does not involve an educational assessment issue, the United States Supreme Court stated a clear, yet flawed, standard of review for a disparate treatment analysis under Title VI. The decision was split 5-4, which indicates a division among the Court regarding the
determination that intentional discrimination is the appropriate standard of review in a disparate impact analysis and that there is no private right of action to enforce disparate impact regulations promulgated under Title VI. I argue that *Alexander* should not be controlling here.

First, *Alexander* did not involve an educational assessment issue. Second, the majority incorrectly applied jurisprudence when articulating its opinion. Third, the precept of inferiority in our country demands a sensitive race conscious evaluation in all Title VI analyses. Here, our issue involves the use of standardized assessment tests within an educational setting. Previous jurisprudence clearly suggested the necessity of judicial intervention to ensure equality and equity within the educational process. Moreover, research is unavering regarding the racial bias of the SAT I/ACT. The creators acknowledge the inherent racial bias of the assessment, yet *Alexander* would have us believe that it was the legislative intent of the Civil Rights Act of 1964 that allowed governmental discrimination unless the governmental agencies openly admit to the discrimination.

In addition, the analysis section in this article presents the obvious and inherent flaws of the United States Supreme Court majority opinion in *Alexander*. Without being redundant, it is worth reiterating that no court, other than the majority in *Alexander*, has unambiguously declared that all disparate impact analysis under Title VI requires proof of intentional or purposeful discrimination. Yet, the majority in *Alexander* incorrectly relied on case law that it proclaimed supported its proposition, which it clearly did not. I advance the argument that the United States Supreme Court improperly relied on inapplicable case law to support its conclusion.

Finally, the precept of inferiority requires a more thoughtful and complete analysis. A little over a century and a half ago, our country’s legal system stated that African Americans were not citizens. Shortly thereafter, the American legal system declared that African Americans were subject to separate but equal accommodations. As we began the twentieth century, the precept of inferiority continued. Therefore, the necessity of the Civil Rights Act of 1964 was evident. American college officials are aware of this precept of inferiority or should be; yet these officials consciously require a racially biased assessment test as a condition for college admission. I proclaim that such action is in contravention of applicable case law and the legislative intent of Title VI of The Civil Rights Act of 1964.

Frederick Douglass posed the following question over a century ago:

> Can American justice, American liberty, American civilization, American law, and American Christianity...be made to include and protect alike and forever all American citizens in the rights which have been guaranteed to them by the organic and fundamental laws of the law?

If college and university officials are able to condition admission upon a known and undisputed racially biased assessment test when there are other viable alternatives, the answer to Frederick Douglass’ question must, unfortunately, be answered in the negative.

**APPENDIX A**

<table>
<thead>
<tr>
<th>Point</th>
<th>Number</th>
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</thead>
<tbody>
<tr>
<td>SAT Total = 900</td>
<td>20,518</td>
</tr>
<tr>
<td>SAT Total = 1000</td>
<td>10,665</td>
</tr>
<tr>
<td>SAT Total = 1100</td>
<td>5,014</td>
</tr>
<tr>
<td>SAT Total = 1200</td>
<td>2,031</td>
</tr>
</tbody>
</table>

**APPENDIX B**

### 2001 COLLEGE BOUND SENIORS AVERAGE TEST SCORES: ACT

- Total Test-takers: 1,069,772
- ALL TEST-TAKERS 21.0
- **ETHNICITY**
  - African-American/Black 16.9
  - American Indian/Alaskan Native 18.8
  - Caucasian American/White 21.8
<table>
<thead>
<tr>
<th>Race or Ethnicity</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mexican American/Chicano</td>
<td>18.5</td>
</tr>
<tr>
<td>Asian American/Pacific Islander</td>
<td>21.7</td>
</tr>
<tr>
<td>Puerto Rican/Hispanic</td>
<td>19.4</td>
</tr>
<tr>
<td>Other</td>
<td>19.5</td>
</tr>
<tr>
<td>Multiracial</td>
<td>21.2</td>
</tr>
</tbody>
</table>

**HOUSEHOLD INCOME**

<table>
<thead>
<tr>
<th>Income Range</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than $18,000/year</td>
<td>18.1</td>
</tr>
<tr>
<td>$18,000 - $24,000/year</td>
<td>18.9</td>
</tr>
<tr>
<td>$24,000 - $30,000/year</td>
<td>19.6</td>
</tr>
<tr>
<td>$30,000 - $36,000/year</td>
<td>20.2</td>
</tr>
<tr>
<td>$36,000 - $42,000/year</td>
<td>20.6</td>
</tr>
<tr>
<td>$42,000 - $50,000/year</td>
<td>21.0</td>
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<td>$50,000 - $60,000/year</td>
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</tr>
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<td>$60,000 - $80,000/year</td>
<td>22.0</td>
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<tr>
<td>$80,000 - $100,000/year</td>
<td>22.5</td>
</tr>
<tr>
<td>More than $100,000/year</td>
<td>23.4</td>
</tr>
</tbody>
</table>

**APPENDIX C**

391 Schools That Do Not Use SAT I or ACT Scores for Admitting Substantial Numbers of Students Into BachelorDegreePrograms as of August 28, 2001

This list includes colleges and universities that do not use the SAT I or ACT to make admissions decisions about substantial numbers of freshman applicants who recently graduated from U.S. high schools. As the footnotes indicate, some schools exempt students who meet grade-point average or class rank criteria while others require SAT or ACT scores but use them only for placement purposes or to conduct research studies. Please check with the school’s admissions office to learn more about specific admissions requirements, particularly for international or non-traditional students.

Key:
- 1 = SAT/ACT used only for placement and/or academic advising
- 2 = SAT/ACT required only from out-of-state applicants
- 3 = SAT/ACT used only when minimum GPA or class rank is not met
- 4 = SAT/ACT required for some programs
- 5 = SAT/ACT not required if submit SAT II series
- 6 = University of Maryland University College is a separate institution from University of Maryland at College Park
- 7 = must submit COMPASS, CPAT, TABE, Stanford Achievement Test, or ASSET if do not submit SAT/ACT

A
- Academy of Art College, San Francisco, CA
- Alabama State University, Montgomery, AL

1
- Alcorn State University, Alcorn State, MS 1, 3
- Allen University, Columbia, SC
- American Academy of Art, Chicago, IL
- American Conservatory of Music, Chicago, IL
- Angelo State University, Angelo, TX 3
- Antioch Coll. of Antioch Univ., Yellow Springs, OH
- Arizona State University, Tempe, AZ 3
- Arkansas Baptist College, Little Rock, AR
- Arkansas State University, State University, AR 7
- Arlington Baptist College, Arlington, TX 1
- Armstrong University, Berkeley, CA
- Art Institute of Atlanta, Atlanta, GA 7
- Art Institute of Colorado, Denver, CO
- Art Institute of Ft. Lauderdale, Ft. Lauderdale
Articles

- Art Institute of Phoenix, Phoenix, AZ
- Art Institute of Portland, Portland, OR
- Art Institute of Southern California, Laguna Beach, CA
- Art Institutes Int’l San Francisco, San Francisco, CA
- Atlantic College, Guaynabo, PR
- Audrey Cohen College, New York, NY 7

B
- Baker College of Cadillac, Cadillac, MI
- Baker College of Flint, Flint, MI
- Baker Coll. of Mt. Clemens, Clinton Township, MI
- Baker College of Muskegon, Muskegon, MI
- Baker College of Owosso, Owosso, MI
- Baker College of Port Huron, Port Huron, MI
- Baltimore Hebrew University, Baltimore, MD
- Baptist Bible College, Springfield, MO
- Bard College, Annandale-on-Hudson, NY
- Bartlesville Wesleyan College, Bartlesville, OK 3
- Bates College, Lewiston, ME
- Bemidji State University, Bemidji, MN 1,3
- Benedict College, Columbia, SC
- Berkeley College, White Plains, NY
- Berkeley College of New York City, New York, NY
- Black Hills State University, Spearfish, SD 3
- Boricua College, New York, NY
- Boston Architectural Center, Boston, MA
- Boston Conservatory, Boston, MA
- Bowdoin College, Brunswick, ME
- Brewton-Parker College, Mount Vernon, GA 1
- Burlington College, Burlington, VT

C
- Calif. College for Health Sciences, Nat’l City, CA 4
- Calif. College of Arts and Crafts, San Francisco, CA
- Calif. Institute of Integral Studies, San Francisco, CA
- Calif. Institute of the Arts, Valencia, CA

- Calif. Maritime Academy, Vallejo, CA 3
- Calumet College of St. Joseph, Hammond, IN
- Cambridge College, Cambridge, MA
- Cazenovia College, Cazenovia, NY
- Chaparral College, Tucson, AZ
- Charter Oak State College, Newington, CT
- City College, Ft. Lauderdale, FL
- City University, Bellevue, WA
- Clear Creek Baptist Bible College, Pineville, KY

- Cleary College, Ypsilanti, MI
- Cleveland State University, Cleveland, OH
- Coleman College, La Mesa, CA
- College for Lifelong Learning, Durham, NH
- College of Health Sciences, Roanoke, VA
- Coll. of New Rochelle: School of New Resources, NY
- College of the Atlantic, Bar Harbor, ME
- College of the Southwest, Hobbs, NM 1,3
- College of Visual Arts, St. Paul, MN 7
- College of West Virginia, Beckley, WV 1
- Colorado Technical Univ., Colorado Springs, CO
- Columbia College, Chicago, IL
- Columbia College: Hollywood, Tarzana, CA
- Concordia College, Selma, AL
- Concordia University, Portland, OR 3
- Connecticut College, New London, CT 5
- Cornish College of the Arts, Seattle, WA
- CSU Bakersfield, Bakersfield, CA 3
- CSU Chico, Chico, CA 3
- CSU Dominguez Hills, Dominguez Hills, CA 3
- CSU Fullerton, Fullerton, CA 3
- CSU Hayward, Hayward, CA 3
- CSU Long Beach, Long Beach, CA 3
- CSU Los Angeles, Los Angeles, CA 3
- CSU Northridge, Northridge, CA 3
- CSU Sacramento, Sacramento, CA 3
- CSU San Bernadino, San Bernadino, CA 3
- CSU San Marcos, San Marcos, CA 3
- CSU Stanislaus, Stanislaus, CA 3
- Culinary Institute of America, Hyde Park, NY
- Dakota State University, Madison, SD 1,3
· Davenport College of Business, Grand Rapids, MI
· Detroit College of Business, Dearborn, MI
· Dickinson College, Carlisle, PA
· Dickinson State University, Dickinson, ND 1,4
· Dowling College, Oakdale, NY
· Eastern Kentucky University, Richmond, KY 1,2
· Eastern Oregon State College, LaGrande, OR 1,3
· Eastman School of Music of the Univ. of Rochester, NY
· East-West University, Chicago, IL
· Edward Waters College, Jacksonville, FL 1
· Emporia State University, Emporia, KS 2,3
· Fairmont State College, Fairmont, WV
· Fashion Institute of Technology, New York, NY
· Ferris State University, Grand Rapids, MI 3
· Fisher College, Boston, MA
· Florida Christian College, Kissimmee, FL
· Florida Memorial College, Miami, FL 1
· Florida Metropolitan Univ., multiple campuses, FL
· Florida State Univ. System, multiple campuses, FL 3,4
· Fort Hays State University, Hays, KS 1
· Franklin and Marshall College, Lancaster, PA 3
· Franklin University, Columbus, OH
· Free Will Baptists Bible College, Nashville, TN 1
· Gallaudet University, Washington, D.C. 7
· Goddard College, Plainfield, VT
· God’s Bible School and College, Cincinnati, OH 1
· Golden Gate University, San Francisco, CA
· Grambling State University, Grambling, LA 1
· Grand Canyon University, Phoenix, AZ 3
· Grantham College of Engineering, Sidell, LA
· Gratz College, Melrose Park, PA
· Hamilton College, Clinton, NY 7
· Hampshire College, Amherst, MA
· Harrington Institute of Interior Design, Chicago, IL
· Hartwick College, Oneonta, NY
· Hawaii Pacific University, Honolulu, HI
· Heritage College, Toppenish, WA
· Herzing College, Homewood, AL
· Herzing College, New Orleans, LA
· Hesser College, Manchester, NH
· Hilbert College, Hamburg, NY
· Hobe Sound Bible College, Hobe Sound, FL
· Humboldt State University (CSU), Arcata, CA 3
· Humphreys College, Stockton, CA
· Huron University, Huron, SD 3
· Illinois Institute of Art, Schaumburg, IL
· Indiana State University, Terre Haute, IN 1
· Indiana University East, Richmond, IN 1
· Institute of Computer Technology, Los Angeles, CA
· Int’l Acad. of Merchandising & Design, Chicago, IL
· Int’l Acad. of Merchandising & Design, Tampa, FL
· International Business College, Fort Wayne, IN
· International College, Naples, FL
· Iowa State University, Ames, IA 1,3
· JFK University, Orinda, CA
· John Jay College of Criminal (CUNY), New York, NY
· John Wesley College, High Point, NC
· Johnson & Wales University, Charleston, SC
· Johnson & Wales University, Denver, CO
· Johnson & Wales University, North Miami, FL
· Johnson & Wales University, Providence, RI
· Jones College, Jacksonville, FL
Articles

- Juilliard School, New York, NY
- Kansas State University, Manhattan, KS
- Kent State Univ., Stark, OH
- Lake Erie College, Painesville, OH
- Lamar University, Beaumont, TX
- Lancaster Bible College, Lancaster, PA
- La Sierra University, Riverside, CA
- Lawrence Technological University, Southfield, MI
- Lewis and Clark College, Portland, OR
- Lincoln University, Jefferson City, MO
- Lincoln University, Oakland, CA
- Lindsey Wilson College, Columbia, SC
- Long Island Univ.: Brooklyn Campus, Brooklyn, NY
- Longy School of Music, Cambridge, MA
- Louisiana State University, Shreveport, LA
- Magnolia Bible College, Kosciusko, MS
- Manhattan School of Music, New York, NY
- Mannes College of Music, New York, NY
- Martin University, Indianapolis, IN
- Marylhurst College, Marylhurst, OR
- Mayville State University, Mayville, ND
- McNeese State University, Lake Charles, LA
- Medaille College, Buffalo, NY
- Medgar Evers College (CUNY), Brooklyn, NY
- Mercy College, Dobbs Ferry, NY
- Metropolitan State University, St. Paul, MN
- Michigan Technological Univ., Houghton, MI
- Mid-America Bible College, Oklahoma City, OK
- Mid-Continent Baptist Bible College, Mayfield, KY
- Middle Tennessee State Univ., Murfreesboro, TN
- Middlebury College, Middlebury, VT
- Midwestern State University, Wichita Falls, TX
- Miles College, Fairfield, AL
- Milwaukee Institute of Art&Design, Milwaukee, WI
- Minnesota Bible College, Rochester, MN
- Minnesota State University, Mankato, MN
- Minot State University, Minot, ND
- Mississippi Univ. for Women, Columbus, MS
- Mississippi Valley State Univ., Itta Bena, MS
- Missouri Technical School, St. Louis, MO
- Missouri Western State College, St. Joseph, MO
- Montana State Univ.: Billings, Billings, MT
- Montana State Univ.: Bozeman, Bozeman, MT
- Montana State Univ.: Northern, Havre, MT
- Montana Tech of the Univ. of Montana, Butte, MT
- Moorehead State University, Moorhead, MN
- Morris College, Sumter, SC
- Morrison University, Reno, NV
- Mount Holyoke College, South Hadley, MA
- Mt. Sierra College, Monrovia, CA
- Muhlenberg College, Allentown, PA
- NAES College, Chicago, IL
- Naropa University, Boulder, CO
- National American University, Albuquerque, NM
- National American University, Denver, CO
- National American University, Kansas City, MO
- National American University, Rapid City, SD
- National American University, St. Paul, MN
- National Business College, Roanoke, VA
- National Hispanic University, San Jose, CA
- National University, La Jolla, CA
· Nazarene Bible College, Colorado Springs, CO
· Newbury College, Brookline, MA
· New College of California, San Francisco, CA
· New England College, Henniker, NH
· New England Institute of Technology, Warwick, RI
· New School of Architecture, San Diego, CA
· New York City Technical Coll. (CUNY), Brooklyn, CA
· Nicholls State University, Thibodaux, LA
· Norfolk State University, Norfolk, VA
· Northeastern Illinois University, Chicago, IL
· Northeastern State University, Tahlequah, OK
· Northern Arizona University, Flagstaff, AZ
· Northern Kentucky Univ., Highland Heights, KY
· Northern State University, Aberdeen, SD
· Northwest College of Art, Poulsho, WA
· Northwest Nazarene College, Nampa, ID
· Northwestern Oklahoma State Univ., Alva, OK
· Northwestern State University, Natchitoches, LA
· Ohio Univ.: Eastern Campus, St. Clairsville, OH
· Oklahoma Panhandle State Univ., Goodwell, OK
· Oregon State University, Corvallis, OR
· Pacific Union College, Angwin, CA
· Patten College, Oakland, CA
· Paul Quinn College, Dallas, TX
· Pennsylvania Coll. of Technology, Williamsport, PA
· Peru State College, Peru, NE
· Philander Smith College, Little Rock, AR
· Pikeville College, Pikeville, KY
· Pittsburgh State University, Pittsburgh, KS
· Portland State University, Portland, OR
· Prescott College, Prescott, AZ
· Prairie View A&M University, Prairie View, TX
· Presentation College, Aberdeen, SD
· Ringling School of Art and Design, Sarasota, FL
· Robert Morris College, Chicago, IL
· Rocky Mountain College, Billings, MT
· St. Ambrose University, Davenport, IA
· St. Augustine College, Chicago, IL
· St. Augustine’s College, Raleigh, NC
· St. John’s College, Annapolis, MD
· St. John’s College, Santa Fe, NM
· St. Thomas University, Miami, FL
· Salish Kootenai College, Pablo, MT
· San Houston State University, Huntsville, TX
· San Diego State University (CSU). San Diego, CA
· San Francisco State Univ. (CSU), San Francisco, CA
· San Jose State University (CSU), San Jose, CA
· Sarah Lawrence College, Bronxville, NY
· Schiller International University, Dunedin, FL
· Selma University, Selma, AL
· Seton Hill College, Greensburg, PA
· Sheldon Jackson College, Sitka, AK
· Shimer College, Waukegan, IL
· Sierra Nevada College, Incline Village, NV
· Sinte Gleska University, Rosebud, SD
· Sojourner-Douglass College, Baltimore, MD
· Sonoma State University (CSU), Rohnert Park, CA
· South College, Montgomery, AL
· South College, West Palm Beach, FL
· Southeastern Coll. of the Assemblies of God, Lakeland, FL
· Southeastern Louisiana University,
Hammond, LA 1
- Southeastern Oklahoma State Univ., Durant, OK 3
- Southeastern University, Washington, D.C.
- Southern Calif. International College, Santa Ana, CA
- Southern Nazarene University, Bethany, OK 1
- Southern University & A&M College, Baton Rouge, LA 1,2
  - Southern University at New Orleans, New Orleans, LA 1
  - Southern Vermont College, Bennington, VT
  - Southwest State University, Marshall, MN 1,3
- Southwest Texas State University, San Marcos, TX 3
  - Southwestern Adventist College, Keene, TX 1
  - Southwestern Assemblies of God Coll., Waxahachie, TX
    - Southwestern Christian College, Terrell, TX
    - State U of NY/Empire State College, Sarasota Springs, NY
  - Stephen F. Austin State Univ., Nacogdoches, TX 1,3
- Sterling College, Craftsbury Common, VT
- Stillman College, Tuscaloosa, AL 1
- Strayer College, Washington, D.C. 1
- Sul Ross State University, Alpine, TX 3
- Susquehanna University, Selinsgrove, PA 3
- Tarleton State University, Stephenville, TX 3
- Tennessee Temple University, Chattanooga, TN 3
- Texas A&M Int’l University, Laredo, TX 1
- Texas A&M University-Commerce, Commerce, TX 3
- Texas A&M University-Galveston, Galveston, TX 3
- Texas A&M University-Kingsville, Kingsville, TX 3
- Texas A&M University, College Station, TX 3
- Texas College, Tyler, TX 1
- Texas Southern University, Houston, TX 1
- Texas Tech University, Lubbock, TX 3
- Texas Women’s University, Denton, TX 3
- Thomas College, Thomasville, GA
- Thomas Edison College, Trenton, NJ
- Troy State University, Montgomery, AL
- Tuoro College, New York, NY 4
- Turabo University, Gurabo, PR 4

U
- Union College, Lincoln, NE 1
- Union College, Schenectady, NY 5
- Union Institute, Cincinnati, OH
- Unity College, Unity, ME
- The University of Alaska, Anchorage 1
- University of Alaska, Fairbanks 1
- University of Alaska Southeast, Juneau, AK 1
- University of Arizona, Tucson, AZ 2,3
- Univ. of Arkansas at Monticello, Monticello, AR 1,7
- University of Central Oklahoma, Edmond, OK 3
- University of Great Falls, Great Falls, MT
- University of Guam, Mangilao, GU
- University of Houston, Houston, TX 3
- University of Houston-Downtown, Houston, TX 1
- University of Iowa, Iowa City, IA 3
- University of Kansas, Lawrence, KS 2,3,4
- Univ. of Louisiana at Monroe, Monroe, LA 1
- Univ. of Maine at Augusta, Augusta, ME 4
- Univ. of Maine at Farmington, Farmington, ME
- Univ. of Maine at Ft. Kent, Ft. Kent, ME
- Univ. of Maine at Presque Isle, Presque Isle, ME
- University of Mary Hardin-Baylor, Belton, TX 1,3
- Univ. of Maryland Univ. College, College Park, MD 6
- University of Michigan, Flint, MI 1
- Univ. of Minnesota: Crookston, Crookston, MN 1
- Univ. of Minnesota: Duluth, Duluth, MN 1,3
- Univ. of Minnesota: Morris, Morris, MN
Kendra Johnson graduated with honors from the University of Baltimore School of Law in May 2003. She will sit for the July 2003 bar. Currently, Kendra is an assistant principal at Cockeysville Middle School within the Baltimore County Public Schools. This paper was written in fulfillment of an upper level writing course, Race and the Law, during fall of 2002 at the University of Baltimore School of Law. Kendra dedicates this paper to Professor Higginbotham, University of Baltimore School of Law Professor, and her parents.

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2 Peter Schrag, The War on the SAT, AMERICAN
3 See id.

4 See id.

5 U.S. Const. Amend. XIV, § 1.

6 See Hobson v. Hansen, 393 U.S. 801 (1968) (ruling that IQ tests used to track students were culturally biased because they were standardized on a white, middle-class sample, thus abolishing the tracking system used in the District of Columbia) and Washington Parish School Board v. Moses, 409 U.S. 1013 (1972) (ruling that the use of IQ tests and achievement tests for placement into special education and later for tracking was unconstitutional).

7 Most arguments began with the Family Education Rights and Privacy Act. 20 U.S.C.S. § 1232g (as amended 2003)(1974), which allows parents and eligible students access to their education records and an opportunity to challenge those records, including the test protocols used for placement of students.

8 Legal issues related to teacher testing are similar to those in occupational testing. The Educational Testing Services (ETS), creators of the National Teacher Examination and the Praxis I and II, suffered criticism because there were allegations that the tests were biased.

9 See Larry P. v. Riles, 793 F.2d 969 (1984) (ruling that the use of IQ tests to place student in special education classes was unconstitutional.) and Parents in Action on Special Education (PASE) v. Hannon, 506 F. Supp. 831 (1980) (ruling that Larry P. v. Riles should be distinguished because the school district at bar used more than just IQ tests to place students in special education classes).


12 This phrase is adapted from the book: A. LEON HIGGINBOTHAM. SHADES OF FREEDOM. (Oxford Press 1996). The phrase characterizes the presumption of African Americans' status within the United States of America that I believed is currently embraced.

13 This article focuses exclusively on undergraduate institutions admission criteria; therefore, the term assessment refers to SAT I/ACT.

14 Alexander Chuang, Is the SAT a Fair Test, at http:www.jiskha.com/features/sat_test_study.html. The article discusses the rationale college officials advanced for changing college admission criteria.

15 Students must show their work. See id. 

16 See id. 

17 Id. 

18 Id. 

19 The ET employs approximately 2,300 regular employees, including staff members with training and expertise in education, psychology, statistics, psychometrics, computer science, and humanities. See Peter Schrag, The War on the SAT. AMERICAN PROSPECT, Vol. 13, Iss. 8, May 2002.

20 SAT I is the revised SAT. ETS attempted to modify the assessment to eliminate the cultural bias in the original SAT.

21 Schrag see supra.

22 The revised SAT is now named the SAT I. This latest revision of the SAT took place in the latter part of the 1990's.

23 He also designed the Iowa Test Basic Skills.

24 See id.

25 “Scores on the SAT I and ACT are highly correlated; in the three most recent concordance tables, the correlations between individuals” SAT I and ACT scores range from 0.89 to 0.92. COLLEGE ENTRANCE EXAMINATION BOARD, ADMISSIONS STAFF HANDBOOK FOR THE SAT PROGRAM 1999-2000 (NEW YORK: AUTHOR, 1999.

26 See id.

27 See supra note 15.

28 See id.


30 See id.

31 Id.

32 Id.

33 See id. at 56.

34 Id.

35 See Jencks, supra note 28, at 56.

36 See id at 57.

37 See id.

38 Id. at 58.

39 Id.

40 Id.

41 Id. at 57.


42 Id.
43 See Jencks, supra note 29, at 57. See also William Thomas, Larry P., Revisited: IQ Testing of African-Americans. San Francisco: California Publishing Company 60. See Appendix A and B.
44 Id.
45 Id.
46 Id.
47 Id.
49 Id.
50 Id.
51 In this context, the term “correct” refers to the number of admissions that resulted in individuals completing their undergraduate education and earning a bachelor’s degree.
52 See Baron, supra at 4.
53 Saul Geiser with Roger Studley, Univ. of Cal., Office of the President, UC and the SAT: Predictive Validity and Differential Impact of the SAT I and SAT II at the University of California (2001).
54 SAT II is an optional assessment that is content specific.
55 Id. at 4.
56 Id.
57 Id. at 9.
59 Id.
60 Id.
62 Id.
63 Id.
65 Id.
66 Id. at 72.
67 Id.
68 Id.

69 Christopher Plumbbee, Despite Complaints of Bias, the SAT I is Still Effective. Old Gold and Black: The Student Newspaper on Wake Forest University, December 6, 2001.
70 Id.
71 Id.
72 Id.
74 The admission process for most colleges and universities is similar. The following is needed for admission into most colleges and universities: application fee, a written application, an essay, specific high school coursework, SAT I or ACT score, a possible interview, and a campus visit are encouraged. In addition, most colleges and universities have deadlines for admission, although some have rolling admissions.
76 Id.
77 U.S. Const. amend. XIV § 1.
79 Giano v. Senkowski, 54 F.3d 1050 (2d Cir. 1995).
80 Richetts v. City of Hartford, 74 F.3d 1397, 1407 (2d Cir. 1996).
81 Rickett v. Jones, 901 F.2d 1058, 1060-61 (11th Cir. 1990).
82 See Giano, 54 F.3d at 1050.
84 The specific federal statute was Title VI of the Civil Rights Act of 1964.
85 See id at 1.
86 Id.
87 Washington v. Davis, 426 U.S. 229 (1976) (Two unsuccessful African Americans, who applied for position for the police force of the District of Columbia, claimed that a test measuring verbal ability, vocabulary, and reading comprehension unconstitutionally discriminated against them. The United States Supreme Court held that the test had not been validated to establish its reliability for measuring subsequent job performance, but no claim was made that administration of the test itself constituted an “intentional” or purposeful” act of discrimination. Therefore, the Court said that there was not a Fourteenth Amendment violation. Intentional discrimination must be allowed and proven to prevail under a Fourteenth Amendment violation claim.)

88 See id.


91 See id.

92 See The Civil Rights Cases, 109 U.S. 3 (1883).

93 Id.

94 Holcomb v. Armstrong, 239 P.2d 545 (Wash. 1952)(requirement of Board of Regents of a state university that all students before registration have an X-ray examination of chest for detection of tubercular infection, constituted “action of the state”).

95 Id.

96 Id.


98 See supra notes 37-55.


100 See id.

101 Id.

102 See supra note 65, and accompanying text.

103 Id.

104 See supra notes 76-77 and accompanying text.

105 See supra note 76-77 and accompanying text.

106 See supra note 76-77 and accompanying text.


115 Buchanan v. City of Bolivar, Tenn., 99 F. 3d 1352 (6th Cir. 1996).


117 Guardian Ass’n v. Civil Service Com’n of City of New York, 463 U.S. 582, 584 (1983); See generally Alexander at 110.


119 Id. at 668.

120 See id. at 679.

121 Debra P v. Turlington, 644 F. 2d 397, 403 (5th Cir. 1981).

122 Id.

123 Id.


125 Id.

126 Id.

127 Id.

128 Id.

129 Id.

130 See id at 1.

131 See id.


133 See id.

134 See at. 1.

135 Id.

136 Id. at 279.

137 The opinion split was 5-4.

Section 601 of The Civil Rights Act 1964 states that Title VI prohibits discrimination based on race, color, or national origin in covered programs and activities. 42 U.S.C.A. § 2000d.

Section 602 of The Civil Rights Act 1964 authorizes federal agencies to effectuate § 601 by issuing regulations, and the Department of Justice (DOJ) in an exercise of this authority promulgated a regulation forbidding funding recipients to utilize criteria or administrative methods having the effect of subjecting individuals to discrimination based on the prohibited grounds. 42 U.S.C.A. § 2000d-1.

See id. (Stewart, J. concurring).
See id. at 703.
See id. at 297 (2001)(Stevens, J., dissenting).
Alexander, 532 U.S. at 280. (Section 601 of The Civil Rights Act 1964 states that Title VI prohibits discrimination based on race, color, or national origin in covered programs and activities. 42 U.S.C.A. § 2000d).
See Alexander, 532 U.S. at 298.
See Cannon, 441 U.S. at 680.
See id.
Cannon, 441 U.S. at 680.
See Guardians Assn. v. Civil Serv. Comm’n of New York City, 463 U.S. 582, 607 (1983) (a clear majority of the Court expressly stated that private parties may seek injunctive relief against governmental practices that have the effect of discriminating against racial and ethnic minorities).
See Alexander, 532 U.S. at 307 (citing Regents v. Bakke, 438 U.S. at 265, 287 (1978)).
See Bakke, 438 U.S. at 265, 308.
Id.
See Alexander, 532 U.S. at 281. Section 602 of The Civil Rights Act 1964 authorizes federal agencies to effectuate section 601 by issuing regulations, and the Department of Justice (DOJ) in an exercise of this authority promulgated a regulation forbidding funding recipients to utilize criteria or administrative methods having the effect of subjecting individuals to discrimination based on the prohibited grounds. See 42 U.S.C.A. § 2000d.

See id.
See Alexander, 532 U.S. at 303.
For a historical legal analysis of race and the American colonial period, see IN THE MATTER OF COLOR. A. LEON HIGGINBOTHAM. SHADES OF FREEDOM (Oxford Press 1978).
Chief Justice Roger Taney, speaking for the majority in Dred Scott v. Sandford, 60 U.S. 393 (1856).
Id. at 407.
Civil Rights Cases, 109 U.S. 3 (1883).
Crandall v. State, 10 Conn. 339 (1834).
See id.
See id.
Roberts v. City of Boston, 59 Mass. 198 (1849).
Plessy v. Ferguson, 163 U.S. 537 (1896).
The other case is Dred Scott v. Sanford, 60 U.S. 393 (1857).
Plessy, 163 U.S. at 550-51.
HIGGINBOTHAM, SHADES OF FREEDOM at 119.
Buchanan v. Warley, 245 U.S. 60 (1917).
HIGGINBOTHAM, SHADES OF FREEDOM at 119.
See id. at 125. Eventually, restrictive covenants were held unconstitutional. See Shelley v. Kraemer, 334 U.S. 1 (1948).
Gong Lum v. Rice, 275 U.S. 78 (1927).
See id.
Articles

185 Image De Tejas, 87 F.Supp. 2d at 667.
186 Id.

187 Id.
188 Alexander, 532 U.S. 275.
189 See supra note 7.
191 See supra notes 37-55.
192 Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on the ground of race, color, or national origin. 42 USCS § 2000d (1964). 42 USCS § 2000d (1964) imposes upon federal officials not only duty to refrain from participating in discriminatory practices, but affirmative duty to police operations of and prevent such discrimination by state or local agencies funded by them. NAACP, Western Region v. Brennan, 360 F. Supp. 1006 (1973).
193 See supra note 7.
194 See Dred Scott v. Sandford, 60 U.S. 393 (1857).
195 See Plessy v. Ferguson, 163 U.S. 537 (1896).
196 See supra note 7.
197 Cummings v. County Board of Education, 175 U.S. 528 (1903) (upholding a Georgia county Board of Education decision to close an all African American school, but keep the all European American school open) and Berea College v. The Commonwealth of Kentucky, 211 U.S. 45 (1908) (holding that the state has police power to regulate all state legislation based on race classification, thus a Kentucky statute was upheld).
198 See supra note 137.
**Goldberg v. Miller:**
Guardian *Ad Litem* Fees May Not be Characterized as Child Support

By: Jennifer Merrill

In a case of first impression, the Court of Appeals of Maryland held guardian *ad litem* fees may not be characterized as child support. *Goldberg v. Miller,* 371 Md. 591, 612, 810 A.2d 947, 960 (2002). In so holding, the court concluded the Maryland Legislature did not intend for guardian *ad litem* fees to be included in calculating child support awards as such inclusion would not be in the best interests of the child. *Id.* at 601, 810 A.2d at 953.

As a result of a heated divorce and child custody dispute between Robert and Mary Miller, the Circuit Court for Montgomery County appointed David Goldberg ("Goldberg") as guardian *ad litem* for the Miller’s minor child in August of 1999. For more than a year after the initial appointment, Goldberg represented the parties’ minor child in several other proceedings related to the Millers’ custody battle. Robert Miller was adverse to Goldberg’s continuing appointment, but the circuit court struck down his objections.

After hearings were held regarding payment of the guardian *ad litem* fees, the court entered an award of $21,728.00 to be paid to Goldberg by the Millers. Robert Miller was ordered to pay $14,340.48 and Mary Miller was ordered to pay the remainder. The day following this judgment, Robert Miller filed for bankruptcy.

In order to secure payment from Robert Miller, Goldberg requested the court to characterize the guardian *ad litem* fees as child support to prevent their eligibility for discharge in the bankruptcy proceeding. Goldberg argued that if the fees were characterized as child support, then Robert Miller’s federal retirement benefits would become eligible for garnishment in order to satisfy the debt.

In compliance with Goldberg’s request, the circuit court entered a Supplemental Order stating all fees awarded to him were intended to be in the nature of child support in accordance with the definition of child support within Volume 5 of the Code of Federal Regulations, section 581.102(d), the federal child support garnishment regulation. Robert Miller’s motion to vacate the Supplemental Order was subsequently denied. On appeal, the Court of Special Appeals of Maryland reversed the decision of the circuit court, holding the trial court had exceeded its authority by characterizing the guardian *ad litem* fees as child support.

The Court of Appeals of Maryland granted certiorari to address whether the trial court possessed “the authority to treat guardian *ad litem* fees as child support.” *Goldberg,* 371 Md. at 596-97, 810 A.2d at 950. Considering Goldberg’s request to characterize the fees as child support was based on his desire to garnish Robert Miller’s federal pension under 5 C.F.R. § 581.102(d), the court began its analysis with an examination of the federal regulation. *Id.* at 598, 810 A.2d at 951-52.

The federal regulation expressly permits garnishment of a federal pension for child support obligations. *Id.* at 598-99, 810 A.2d at 951-52. The regulation allows attorney’s fees to be characterized as child support as long as three requirements are met under 5 C.F.R. § 581.307. *Id.* at 599, 810 A.2d at 951-52. The requirements set forth, “(1) the award of attorney’s fees must come through a ‘legal process’; (2) the ‘legal process’ must expressly describe the attorney’s fees as child support; and (3) the court issuing the legal process must possess the authority to treat attorney’s fees as child support.” *Id.* at 599, 810 A.2d at 952.

The court recognized the circuit court’s Supplemental Order and its explicit language charac-
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terizing the fees as child support as satisfying the first two requirements under the regulation. *Id.* at 600-01, 810 A.2d at 952-53. Accordingly, the court focused on the third requirement regarding the authority of the circuit court to treat the fees as child support. *Goldberg*, 371 Md. at 601, 810 A.2d at 953.

Maryland’s Legislature promulgated child support guidelines in 1989 to “provide courts with uniform criteria that they must consider in awarding child support.” *Id.* at 604, 810 A.2d at 955. Aside from the “enumerated criteria” in the guidelines, the Legislature expressly provided health insurance and medical expenses may also be characterized as child support. *Id.* at 604-05, 810 A.2d at 955. Both the legislative history and the guidelines are void as to any reference to treatment of attorney’s fees as child support. *Id.* at 607, 810 A.2d at 956. In view of the specificity of the Legislature’s treatment of expenses that may be considered child support, the court determined the legislature did not intend to allow guardian *ad litem* fees to be included in a support award. *Id.*

As further support for the legislative intent to exclude guardian *ad litem* fees in a support award, the court looked to Section 12-103(a) of Maryland’s Family Law Article. *Id.* at 606, 810 A.2d at 956. This provision allows the court to exercise its discretion to award counsel fees to “either party” in matters of child support, custody, or visitation. *Id.* However, counsel fees under this provision are for the benefit of the aggrieved party, not the child, and do not include guardian *ad litem* fees. *Goldberg*, 371 Md. at 606, 810 A.2d at 956. Moreover, the fee award under this provision may not be characterized as child support. *Id.*

The court also noted Maryland’s Family Law Article sets forth guardian *ad litem* provisions in Title 1 and not in the Title 12 child support provisions. *Id.* at 607, 810 A.2d at 956-57. In consideration of the statutory scheme and legislative history of child support awards in Maryland, the court concluded the circuit court did not possess the authority to characterize Goldberg’s fees as child support. *Id.* at 608, 810 A.2d at 957.

Next, the court considered the public policy ramifications of allowing guardian *ad litem* fees to be characterized as child support. *Id.* at 610-611, 810 A.2d at 958-59. The court noted child support and alimony debts are legally enforceable through contempt proceedings in Maryland. *Id.* As a result, a parent that cannot meet the obligation may be jailed for failure to do so. *Goldberg*, 371 Md. at 610-611, 810 A.2d at 958-59. The court stated, “the possibility of receiving such a harsh penalty could lead to unjust consequences . . . [in that] the award of attorney’s fees could result in imprisonment for the parent.” *Id.* Furthermore, the requirement to pay the attorney’s fees out of the support award could result in the financial needs of the child going unmet. *Id.*

The ruling by the Court of Appeals of Maryland in *Goldberg* reflects the desire of the Legislature to protect the best interests of the child by mandating uniform child support awards. Additionally, the decision accurately reflects the legitimate policy concerns of allowing attorney’s fees to be characterized as child support. However, the opinion also exemplifies the need to create a system for securing payment to guardian *ad litem* attorneys in Maryland. These attorneys perform an essential function in representing the needs of minor children in contested and high conflict domestic legal matters by acting as their guardian during proceedings. Without payment of fees, this valuable service to children may no longer be available during a time when it is most crucial.
INS v. Ventura:
The Court of Appeals Should Remand to the Board of Immigration Appeals When Deciding an Issue Before the Board Has an Opportunity to Address the Matter

By: Andrea Tony

The United States Supreme Court held the Court of Appeals for the Ninth Circuit should remand to the Board of Immigration Appeals ("BIA") when deciding issues the BIA never had an opportunity to address. INS v. Ventura, 123 S.Ct. 353 (2002). In so holding, the Court found the court of appeals exceeded its authority when deciding the issue of changed circumstances on its own, instead of remanding the case to Immigration and Naturalization Service. Id. at 355-56.

In 1993, Guatemalan citizen Orlando Ventura ("Ventura") entered the United States illegally. In 1995, the Attorney General began deportation proceedings. Two years later, an immigration judge considered Ventura's application for asylum and withholding of deportation based upon a fear and threat of persecution "on account of [a] political opinion." Ventura testified that the Guatemalan military threatened to kill or harm him unless he joined the guerrilla army.

The immigration judge denied Ventura asylum because he failed to show the guerrillas' were interested in him "on account of his political opinion." The BIA, reviewing the matter de novo, agreed Ventura failed to prove the statutory requirement that he faced persecution "on account of" a qualifying ground. The Court of Appeals for the Ninth Circuit reversed and held the evidence in the record failed to show sufficient change in Guatemala. The Supreme Court granted certiorari to decide whether the court of appeals exceeded it authority when deciding on its own the "changed circumstances" issue.

The Supreme Court began its analysis by outlining the law that allows INS to make the basic asylum eligibility decision in this case. Id. at 355. The Court noted "a judicial judgment cannot be made to do service for an administrative judgment." Id. at 355 (citing SEC v. Chenery Corp., 318 U.S. 80, 88 (1943)). Similarly, an appellate court cannot interfere with the subject matter Congress has assigned exclusively to an administrative agency. Id. at 355. The Court stated that an appellate court should remand to the agency for additional investigation or explanation. Id. at 355.

Next, the Court explained the court of appeals should generally remand a case back to an agency for a decision on an issue that statutes placed in agency hands. Id. In the instant case, the BIA had not ruled on the "changed circumstances" issue. Id. The agency encompasses a high level of expertise in evaluating the matter and can make an initial determination, thus providing an analysis to help a court determine if the agency overstepped its boundaries. Id. at 355-56. The Court further noted that the court of appeals committed a clear error by not only disregarding the agency’s role, but also by creating independent, "potentially far-reaching legal precedence about the significance of political change in Guatemala, a highly complex and sensitive matter.” Id. at 356.

Subsequently, the Court identified two problems with the court of appeals’ reliance on the outdated basic record evidence. Ventura, 123 U.S. at 356. First, the 1997 State Department report regarding Guatemala proved, at best, ambiguous about the circumstances. Id. But, the Court pointed out that the majority of the report stated relations between the Guatemalan Government and the guerrillas had changed consid-
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erably, including a signed peace agreement between the two parties calling for a cease fire. *Id.*

The Court further noted the court of appeals erroneously relied on parts of the report that indicate even after the cease-fire, the guerrillas continued to employ death threats, and crime and violence seemed to be higher than previous years. *Id.* However, the court of appeals failed to consider a section of the report that added, “only party leaders and high profile activists generally would be subject to harassment and only in their home communities.” *Id.*

Second, the court of appeals failed to consider that a decision to remand the case would allow for the presentation of further evidence on the current political circumstances in Guatemala, since the five-year-old report in evidence seemed obsolete. *Id.*

The decision in *Ventura* demonstrates the Court’s reluctance to allow appellate courts to decide issues of first impression when administrative law requires otherwise. This case reinforces the great deference the Court gives agency decisions with a sharp focus on the recent circumstances. The climate of United States Immigration law changed drastically after September 11, 2001. Immigration lawyers seeking asylum for their clients in the United States must be more aware of the potential for procedural discrepancies when advising their clients about potential options.

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In re Thomas J.: Juveniles Have a Constitutional Right to a Speedy Trial Under the Due Process Clause of the Fourteenth Amendment and Article 21 of the Maryland Declaration of Rights

By: Brenda N. Taylor

In a case of first impression, the Court of Appeals of Maryland held juveniles have a constitutional right to a speedy trial under the Due Process Clause of the Fourteenth Amendment and Article 21 of the Maryland Declaration of Rights. In re Thomas, 372 Md. 50, 811 A.2d 310 (2002). The court further held when applying the Barker test delays due to the State’s negligence are weighed against the State. Id. at 76, 811 A.2d at 326.

In 1996, Thomas J. ("Thomas"), then fourteen years old, was arrested for attempted robbery and later released to his mother ("Mrs. J.") after she signed a release requiring her to notify the court if she or Thomas moved. The court issued a writ of attachment following three unsuccessful attempts to serve a summons because Thomas moved. The writ was returned when Thomas was seventeen.

Thomas filed a preliminary motion to dismiss in the Circuit Court for Prince George’s County on grounds he was denied a speedy trial. The juvenile court denied the motion. Thomas appealed and the Court of Special Appeals of Maryland reversed the judgment. The Court of Appeals of Maryland granted certiorari to address the issue of first impression, whether the constitutional right to a speedy trial applies to juvenile proceedings.

The court’s analysis began with a review of a juvenile’s right to a speedy trial. The court noted the United States Supreme Court has been reluctant to bestow all rights constitutionally assured to adults in criminal proceedings to state juvenile proceedings. Id. at 58, 811 A.2d at 315. The court determined that relief must arise from a violation of [Thomas’] due process rights under the Fourteenth Amendment. Id.

Rights guaranteed to Maryland adult criminal defendants are not guaranteed in juvenile proceedings. Id. Rather than incorporate all “adult” rights to juveniles, the court of appeals approaches juvenile rights in criminal prosecutions on a “right-by-right” basis. Id.

Maryland Rule 11-114(b)(1) protects juveniles against delayed proceedings when they are detained and not given an adjudicatory hearing within thirty days of court ordered detention, or not detained and not given an adjudicatory hearing within sixty days after they are served with the petition. In re Thomas, 372 Md. at 61, 811 A.2d at 316-317. The court concluded Rule 11-114(b)(1) failed to protect Thomas from substantial delay because he was not detained and received the petition three years and four months after his arrest. Id. at 60, 811 A.2d at 316.

Next, the court looked to the Due Process Clause of the Fourteenth Amendment and Article 21 of the Maryland Declaration of Rights. Id. at 61, 811 A.2d at 317. The court based its federal constitutional analysis on the “essentials of due process and fair treatment” established by the Supreme Court in In re Gault, 387 U.S. 1 (1967). Id. at 64-65, 811 A.2d at 319.

Noting that neither the Supreme Court nor the court of appeals had considered a juvenile’s constitutional right to a speedy trial, the court cited other jurisdictions where the right to a speedy trial is extended to youthful offenders in juvenile proceedings. Id. at 66-67, 811 A.2d at 319-320. The court held, “as a matter of fundamental fairness,” juveniles have a right to a speedy trial under the Due Process Clause of the Fourteenth Amendment and Article 21 of the Maryland Declaration of Rights because speedy trials safeguard the fact-finding process. Id. at 70, 811 A.2d at 332. However, the court declined to establish a specific length of delay that would violate this right. In re Thomas, 372 Md.
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The court relied on case law and the Supreme Court’s four-part balancing test established in Barker v. Wingo, 407 U.S. 514 (1972), subsequently adopted by the court in Divver, to determine whether Thomas’ right to a speedy trial was violated. Id. at 72, 811 A.2d at 323; See Divver v. State, 356 Md. 379 (1999). The Barker factors include 1) the length of delay; 2) the reason for the delay; 3) the accused’s assertion of the right to a speedy trial; and 4) whether the accused was prejudiced by the delay. Id. at 72, 811 A.2d at 323.

Beginning with the Barker analysis, the court stated length of delay “is a triggering mechanism and is not necessarily . . . sufficient to compel dismissal.” Id. at 73, 811 A.2d at 324. In Divver, the court held length of delay “is measured from the date of arrest or filing of indictment, information, or other formal charges to the date of trial.” Id. Thomas’ date of arrest was January 18, 1996 and the writ was returned on April 22, 1999, a delay of three years and four months. Id. The court found the delay sufficient enough to raise a presumption of prejudice and compel the court to consider the remaining three Barker factors. In re Thomas, 372 Md. at 73, 811 A.2d at 324.

Next, the court considered the reason for the delay. Id. at 74, 811 A.2d at 324. Finding no evidence the State intended to hamper Thomas’ defense, or that Mrs. J. intended to elude the juvenile proceedings by moving, the court opined the State is obligated to make a reasonable attempt to locate alleged delinquents. Id. at 75, 811 A.2d at 325. Mrs. J. “reasonably kept in contact” with authorities and the State merely relied upon a writ, causing the court to weigh the delay against the State due to the State’s negligence. Id. at 76, 811 A.2d at 326.

Whether an accused asserted a right to a speedy trial is the third Barker factor. Id. at 76, 811 A.2d at 326. Thomas did not assert his right to a speedy trial. Id. However, in Brady v. State, 288 Md. 61 (1980), the court held when a defendant is unaware of a charge, a failure to demand a speedy trial cannot be weighed against him. In re Thomas, 372 Md. at 76, 811 A.2d at 326. Therefore, because Thomas did not know about the delinquency petition, the court did not weigh this factor against him. Id. at 76, 811 A.2d at 326.

Concluding its analysis, the court analyzed the fourth Barker factor -- prejudice to the accused. Id. at 77, 811 A.2d at 326. Prejudice is assessed in light of three interests established in Barker to protect the constitutional right to a speedy trial. The interests include: 1) prevention of oppressive pretrial incarceration; 2) minimization of anxiety and concern of the accused; and 3) limitation of the possibility that the defense will be impaired. Id. at 77, 811 A.2d at 326.

The court determined Thomas was not oppressively incarcerated. Id. The court further determined Thomas did not state with particularity a claim of anxiety or concern. Id. at 78, 811 A.2d at 327. However, the court opined the State failed to meet its goal to minimize the time between Thomas’ arrest and disposition to prevent anxiety and psychological harm. In re Thomas, 372 Md. at 78, 811 A.2d at 327. Although not dispositive, the court concluded Thomas was neither anxious nor concerned. Id. at 78, 811 A.2d at 327.

In assessing prejudice to the accused, the court stated, “it speaks more to a presumed prejudice” because actual prejudice is difficult to prove. Id. The court also stated substantial delays give rise to a presumption of prejudice. Id. at 79, 811 A.2d at 327. The importance of prejudice increases with the length of delay. Id. at 80, 811 A.2d at 328(quoting Doggett v. United States, 505 U.S. 647 (1992)). The court held the three year and four month delay presumptively prejudicial and concluded that Thomas’s constitutional due process and speedy trial rights were violated. Id. at 80, 811 A.2d at 328.

The Court of Appeals of Maryland joined other jurisdictions in recognizing, as a matter of fundamental fairness, juvenile’s rights to a speedy trial. This constitutional right, combined with protections provided by Maryland Rule 11-114(b)(1), will insure that youthful offenders are not unfairly prejudiced by substantial delays. The onus is now upon Maryland’s juvenile justice system to fashion appropriate measures to prevent violations of Maryland juveniles’ rights to a speedy trial.
Medex v. McCabe:
Incentive Payments are Wages Earned by an Employee and an Employee is Entitled to Recover Incentive Fees as Wages

By: Supriya McMillan

The Court of Appeals of Maryland held incentive payments are wages earned by an employee, and an employee is entitled to recover incentive fees as wages. Medex v. McCabe, 372 Md. 28, 811 A.2d 297 (2002). In addition, the court held an employee is entitled to a jury trial to determine whether a bona fide wage dispute existed and to determine if treble damages should be awarded if there was no bona fide dispute. Id.

Timothy McCabe (“McCabe”) was employed by Medex as a sales representative until February 4, 2000. He earned a salary plus incentive fees. The incentive fees were paid in a series of incentive compensation plans. McCabe’s incentive compensation was subject to the provision that the payment was conditional upon meeting targets and that he had to be an employee at the end of the incentive plan and time of actual payment.

For the year 2000, Medex adopted an Account Manager Sales Incentive Plan. As stated in the employee handbook, the payment of the incentive fees was contingent on continued employment at the time of payment. McCabe resigned from Medex after the fiscal year but prior to the incentive plan payment. Because McCabe resigned before the date of the incentive fee payment, Medex refused to pay the fees to him.

McCabe filed suit in the District Court of Maryland for Baltimore County but the case was transferred to the Circuit Court for Baltimore County because Medex requested a jury trial. Then parties filed a Joint Motion to Bifurcate. In the joint motion, the parties requested that an initial ruling be made on the applicability of Md. Code Ann., Lab. & Empl. § 3-501 (2002). Based on the motion, the case would go to trial only if the court found Medex was in violation of Section 3-501 and if the case went to trial McCabe could seek additional recovery for attorneys’ fees and treble damages. The trial court found Section 3-501 was inapplicable to Medex and entered judgment in favor of Medex.

The Court of Special Appeals of Maryland reversed the circuit court. The court of special appeals held McCabe had earned the incentive fees as wages under Section 3-501 (c) and the additional conditions placed by Medex were invalid under both Maryland statutory and common law. The court of special appeals further held that there was a bona fide dispute that would preclude an award of treble damages. Therefore, McCabe’s recovery was limited to actual wages withheld.

The Court of Appeals of Maryland granted certiorari to determine whether incentive fees included in an employee’s compensation, but not yet due for payment when the employee resigns, must be paid even though there is an express term in the employment contract stating the contrary. The court also granted McCabe’s cross-petition to determine whether a bona fide dispute existed.

The Court of Appeals of Maryland held incentive payments were wages earned by an employee and therefore an employee can recover the fees under the Act. The court further held an employee is entitled to a jury determination on whether a bona fide dispute existed.

The court stated to be covered under the Act the incentive fees must constitute wages under Section 3-501(c). Id. at 35, 811 A.2d at 301. According to the statute, wage means “all compensation that is due to an employee for employment.” Id. at 35, 811 A.2d at 302. Wages include “bonuses, commissions, fringe benefits, or any other remuneration promised for service.” Id. The court concluded
the commissions are within the scope of the Act and an employee may bring a cause of action for an employer’s failure to pay the earned commission even though it was not yet payable upon resignation. *Id.*

Next, the court declared the incentive fees could be considered wages if they are considered a bonus for continued employment. *Id.* at 36, 811 A.2d at 302. While Section 3-501(c)(2) includes bonuses as wages, the court cautioned that not all bonuses are considered wages in Maryland. *Id.* Bonus payments were considered wages when they are paid in exchange for the employee’s work. *Id.* The court held that even if the incentive fees were bonuses, they fell within Section 3-501 as wages because McCabe earned them by meeting target goals and selling certain goods. *Medex*, 372 Md. at 37, 811 A.2d at 302-303 (2002).

The court determined the incentive fees were owed to McCabe as wages due under Md. Code Ann., Lab. & Empl. § 3-505 (2002). *Id.* at 37, 811 A.2d at 303. Even though the language of the employment contract stated very clearly that the fees were payable only if the employee remained employed at the time of payment, the court held the court of special appeals was correct in refusing to enforce the provision based on the intent of the General Assembly in enacting the statute. *Id.*

Section 3-505 states an employer must pay earned wages to an employee, regardless of the termination of the employee. *Medex*, 372 Md. at 39, 811 A.2d at 304. The court stated Section 3-505 was clear in its purpose and complied with the public policy reasons for its enactment. *Id.* The public policy reasons behind Section 3-505 were to allow employees to collect earned wages and to give employers an incentive to pay them. *Id.*

The court further stated language in contracts cannot be used to eliminate an employee’s right to be compensated for his or her efforts. *Id.* If a contract provision conflicts with public policy, the provision is invalid to the extent that it violates public policy. *Id.* In the case at hand, the court held the provision was a violation of public policy and therefore not enforceable against McCabe. *Id.*

Finally, the court held a jury must decide whether there is a bona fide dispute between McCabe and Medex. *Id.* at 42-43, 811 A.2d at 306. Md. Code Ann., Lab. & Empl. § 3-507.1 (2002) states if an employer withholds wages in violation of Section 3-105 and there is no bona fide dispute as to the wages, then the employee is entitled to sue for treble damages. *Id.* The court stated a bona fide dispute is determined on a case-by-case basis by looking at the circumstances surrounding the dispute. *Id.* at 43, 811 A.2d at 306. Further, the court held the jury must be allowed to decide whether a bona fide dispute existed and consequently whether treble damages should be awarded. *Id.* The judge determined whether attorneys’ fees and costs should be awarded. *Id.*

The decision by the Court of Appeals of Maryland in *Medex v. McCabe* allows employees to have more leverage against their employers if a dispute arises regarding wages after termination of employment. By allowing a broad definition of wages, former employees will be able to successfully argue that they are entitled to more than the basic compensation. However, the court does limit an employee’s right to treble damages only if he or she can prove to a jury that there was violation of Section 3-105 and there was no bona fide dispute. The decision, in effect, allows employees to overturn express compensation terms in employment contracts based on the premise that they go against public policy.
Recent Developments

**Nussle v. Porter:**
Prison Inmates are Required to Exhaust Administrative Remedies When Seeking Redress for General Circumstances or Particular Episodes of Alleged Excessive Force or Some Other Wrong

By: Mollie Shuman

Prison inmates are required to exhaust administrative remedies when seeking redress for general circumstances or particular episodes of alleged excessive force or some other wrong. *Nussle v. Porter*, 534 U.S. 516, 532, 122 S.Ct. 983, 992 (2002). The Supreme Court stated that the exhaustion requirement is mandatory for all actions brought with respect to prison conditions. *Id.* at 520, 122 S.Ct. at 986.

Ronald Nussle (“Nussle”), a state prison inmate at the Cheshire Correctional Institution, claimed that he sustained a prolonged period of harassment and intimidation from numerous corrections officers. Perceived as a friend of the Governor of Connecticut with whom officers were feuding over labor issues, Nussle allegedly endured a severe beating in violation of the Eighth Amendment’s ban on cruel and unusual punishment. The prisoner claimed that he was ordered to leave his cell, where several officers unjustifiably attacked him.

Although the Connecticut Department of Correction maintained a grievance system for prisoners, Nussle bypassed the procedure despite a provision of the PLRA of 1995, as amended in 42 U.S.C. § 1997e(a), which orders: “No action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” Without filing a grievance under applicable Connecticut Department of Correction procedures, Nussle commenced a federal action under 42 U.S.C. § 1983.

The Court of Appeals for the Second Circuit held that the exhaustion of administrative remedies is not required for a claim such as the one Nussle asserted. *Id.* The court opined that PLRA’s use of “prison conditions” covers only conditions affecting prisoners generally, not single incidents directed at particular prisoners. *Id.* Nonetheless, other federal appellate courts have stated that prisoners alleging assaults by guards are required to meet the PLRA’s exhaustion requirement before commencing a civil rights action. *Id.* at 523, 122 S.Ct. at 987. The Supreme Court granted certiorari to determine whether the prison grievance process must precede court action. *Id.*

In 1980, Congress introduced a limited, discretionary exhaustion prescription for suits initiated by state prisoners. *Nussle*, 534 U.S. at 523, 122 S.Ct. at 987. This statute surpassed 42 U.S.C. § 1983, which authorized plaintiffs pursuing civil rights claims to bypass administrative remedies before filing suit in court. *Id.* In 1996, as part of the PLRA, Congress invigorated the exhaustion requirement to mandate all “available” remedies to be exhausted. *Id.* at 524, 122 S.Ct. at 988.

Moreover, Congress enacted Section 1997(e)(a) to reduce the quantity and improve the quality of legal action with the introduction of an exhaustion requirement for suits initiated by state prisoners. *Id.* at 524-25, 122 S.Ct. at 988. Congress required prisoners to address complaints internally before initiating a federal case in efforts to reduce frivolous claims and even improve prison administration and inmate satisfaction. *Id.* at 525, 122 S.Ct. at 988.

Absent Congress’s definition of the term “prison condition” in the text of the exhaustion provision, the Court opined that the PLRA and
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the McCarthy v. Bronson holding may elucidate meaning. Id. at 526, 122 S.Ct. at 989 (citing 500 U.S. 136, 111 S. Ct. 1737 (1991)). The McCarthy court analyzed the pertinent language of 28 U.S.C. § 636(b)(1)(B), which states: “a judge may . . . designate a magistrate to conduct hearings . . . of applications . . . made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.” Nussle, 534 U.S. at 526, 122 S. Ct. at 989.

Pursuant to McCarthy, the Court interpreted the term “prison condition” in its entire context rather than in isolation. Id. at 527, 122 S. Ct. at 990. By avoiding a specialized exception of subcategories, the Court held this language as further support of Congress’s intent to authorize the nonconsensual reference of all prisoner petitions to a magistrate. Id. at 527, 122 S. Ct. at 989. Thus, the PLRA’s dominant concern to promote administrative redress, reduce groundless claims, and discourage frivolous claims encouraged the Court to classify suits about prison guards’ use of excessive force as within the term, “with respect to prison conditions.” Id. at 528, 122 S.Ct. at 990.

Nussle placed principal reliance on Hudson v. McMillian, 503 U.S. 1 (1992), and Farmer v. Brennan, 511 U.S. 825 (1994), to define the proof requirements of what injury a plaintiff must allege and what mental state a plaintiff must plead and prove. Nussle, 534 U.S. at 528, 122 S.Ct. at 990. Although insignificant to the case at hand, the Court extended the rationale to suggest Congress’ intent to require exhaustion. Id. The Court noted that eliminating judicial discretion to use the exhaustion requirement and deleting the former constraint that administrative remedies be plain, speedy, and effective before exhaustion could be required emphasized the necessity of this requirement. Id. at 524, 122 S.Ct. at 988.

The Nussle holding provides great insight into the legal rights of Maryland prisoners. The Court plainly emphasized a lack of discretion among claims of inmates, whether pertaining to particular episodes of violence or general circumstances of injustice. The Court’s holding emphasized that all claims of state inmates must be exhausted through administrative remedies before they may be addressed in a judicial forum. This exhaustion requirement would provide relief to the overworked district judges who may be handling frivolous cases or cases that could be resolved by utilizing internal administrative proceedings.

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Piselli v. 75th St. Medical:
The Limitations Period for Bringing a Medical Malpractice Claim Does Not Commence Running Against a Minor Until He Reaches the Age of Majority

By: Bryan C. Hughes

The Court of Appeals of Maryland held that the limitations period for bringing a medical malpractice claim does not commence running against a minor’s claim until he reaches the age of majority. Piselli v. 75th St. Med., 371 Md. 188, 194, 808 A.2d 508, 511 (2002). Requiring otherwise, the court determined, would place an unreasonable restriction upon the remedies available to a child and a child’s access to the courts in violation of Article 19 of the Maryland Declaration of Rights. Id. at 215, 808 A.2d at 523-24.

Christopher Piselli (“Christopher”) first complained of pain in his left hip in August 1993. His father promptly took him to 75th St. Medical Center in Ocean City, Maryland where Dr. Lynn Yarborough examined him and determined that Christopher most likely pulled a hamstring muscle. Several days later, the injury was aggravated and Christopher was taken by ambulance to a hospital where it was found that Christopher had a fracture in his hip. After a period of attempted rehabilitation, Christopher suffered a series of complications starting in the fall of 1993. Following surgery, doctors informed the family that Christopher had a permanent disability that would significantly impair his ability to participate in certain activities and would require multiple surgeries.

In July 1998, Christopher’s parents filed a medical malpractice claim in the U.S. District Court for the District of Maryland, individually and on behalf of Christopher, against 75th St. Medical Center and Dr. Yarborough. The jury acquitted Dr. Yarborough, but found that 75th St. Medical did not meet the requisite standard of care in treating Christopher, and that this deviation proximately caused Christopher’s injury. The jury further determined that Christopher’s parents discovered the injury to Christopher in November 1993, but Christopher did not discover the injury until 1999.

Following the jury’s verdict, the district court ruled the action barred by the statute of limitations pursuant to Section 5-109 of the Courts and Judicial Proceedings Article. The court determined that the statute of limitations commenced running in November 1993 when Christopher’s parents learned of the injury, and entered judgment for 75th St. Medical Center on that basis. The Piselli’s appealed to the United States Court of Appeals for the Fourth Circuit, which certified the following question to the Court of Appeals of Maryland: “[W]hether, when a claim is brought by parents on behalf of a child who was injured before reaching age eleven, the three-year statute of limitations of Section 5-109(a)(2) begins to accrue upon the discovery of the injury by the child or upon discovery of the injury by the parents.” Id. at 193, 808 A.2d at 510-11.

The court of appeals recognized this as an issue of first impression in the State, the resolution of which was dispositive of the case. Id. at 197-98, 808 A.2d at 513. The action was filed within three years of the date Christopher discovered the injury, but more than three years after his parents’ discovery. Id. Therefore, if the statute of limitations commenced from the time of Christopher’s discovery of the injury, the jury’s verdict would stand with regard to Christopher’s claim, but if it began accruing from the time of the parent’s discovery, the action was barred. Piselli, 371 Md. at 197-98, 808 A.2d at 513 (2002)).

The court reformulated the question certified by the U.S. court of appeals to consider whether the limitations periods prescribed by Section 5-109 for the claim of a minor are “unreasonable restrictions upon a traditional remedy and the
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minor’s access to the courts and, therefore, are in violation of Article 19 [of the Maryland Declaration of Rights].” Id. at 207, 808 A.2d at 519. Article 19 prohibits unreasonable restrictions of remedies that are traditionally available to plaintiffs, and restrictions that limit a plaintiff’s access to the courts. Id. at 207, 808 A.2d at 518.

In light of the reformulated question, the court looked to relevant case law. In Garay v. Overholtzer, the court recognized that a parent’s cause of action and a claim brought on behalf of a child are distinct and separate. Id. at 209, 808 A.2d at 520 (citing Garay v. Overholtzer, 332 Md. 339, 631 A.2d 429 (1993)). In Johns Hopkins Hosp. v. Pepper, the court applied its decision in Garay to a medical malpractice claim brought on behalf of an infant child, holding that the doctrine of necessaries protects a minor’s right to recover medical expenses that his parents cannot afford to pay and for which the child may ultimately be liable. Id. at 210-11, 808 A.2d at 522 (citing Johns Hopkins Hosp., 346 Md. 679, 697 A.2d 1358 (1997)). The court further noted the well-established principle in the State of Maryland that the statute of limitations typically does not begin running against a child until the child reaches the age of majority. Id. at 212, 808 A.2d at 522.

In consideration of these factors, the court determined that permitting the limitations period prescribed by Section 5-109 to begin accruing from the time of a minor’s injury would place “an unreasonable restriction upon a child’s remedy and the child’s access to the courts” pursuant to Article 19 of the Maryland Declaration of Rights. Piselli, 371 Md. at 215, 808 A.2d at 524 (2002). If allowed, the child’s separate cause of action would be dependent upon his parents filing an action in a timely manner. Id. As a child is not able to bring a tort action on his own behalf until reaching the age of eighteen, the limitations period for the child’s claim should not begin running until the child reaches that age. Id. at 215-16, 808 A.2d at 524.

The court of appeals held that the statute of limitations for a child’s medical malpractice claim, as prescribed by Section 5-109 of the Courts and Judicial Proceedings Article, begins running when the child reaches the age of majority. In so holding, the court opens a door previously closed to children injured as minors whose claims were not filed in a timely manner by their parents.

In a climate already strained by the constantly rising costs of medical malpractice premiums, due in large part to exorbitant jury awards, this decision is likely to exacerbate the problem by dramatically increasing the number of potential plaintiffs. This decision reflects the court’s conviction that the rights of children must be protected and should not be limited by the vigilance of their parents. Accordingly, a child’s right to bring suit for tortious injuries suffered during childhood is, in this decision, extended to an age in which the child is capable of making decisions in his own best interest.

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Sprietsma v. Mercury Marine: 
Federal Boat Safety Act Does Not Preempt State Common Law Tort Claims

By: Carl Zacarias

The United States Supreme Court held the Federal Boat Safety Act (FBSA) does not preempt state common-law tort claims. *Sprietsma v. Mercury Marine, Inc.*, 123 S.Ct. 518 (2002). Specifically, the Court held neither the express preemption clause of the FBSA, the Coast Guard’s decision not to adopt a regulation, or any other implicit preemption within the FBSA preempted state common-law tort claims arising out of failure to install propeller guards on boat engines. *Id.* at 529. In so holding, the Court stated the most natural reading of the FSBA saving clause, read in conjunction with the preemption clause, indicates the Act was intended to preempt performance standards and equipment requirements imposed by positive state enactments. *Id.*

Sprietsma was killed in a boating accident when the propeller of an outboard motor struck her. In a common law tort action in Illinois state court, her estate claimed the Mercury motor that struck her was unreasonably dangerous because it had no propeller guard. The trial court found the action expressly preempted by the FSBA, and dismissed the complaint. The Illinois Supreme Court rejected the expressed preemption rationale, but affirmed on implied preemption grounds. The United States Supreme Court granted certiorari on the issue of whether a state common-law tort action seeking damages from the manufacturer of an outboard motor is preempted by either the FBSA, or the decision of the Coast Guard not to promulgate a regulation requiring propeller guards on motor boats.

Before examining the theories of preemption asserted by Mercury, the Court reviewed the history of federal regulation of boat safety. *Sprietsma*, 123 S.Ct. at 524. The Court observed Congress enacted the FBSA to improve the safety of recreation boats. *Id.* at 524-25. The Congressional purpose behind the FBSA is “to improve boating safety,” to authorize “the establishment of national construction and performance standards for boats and associated equipment” and to encourage greater “uniformity of boating laws and regulations as among the several States and the Federal Government.” *Id.*

The Court next reviewed the authority of the Coast Guard to issue regulations establishing “minimum safety standards for recreational vessels and associated equipment,” and requiring the installation or use of such equipment. *Sprietsma*, 123 S.Ct. at 525. In particular, the Court pointed out the power of the Coast Guard to issue exemptions from its regulations if it determined that boating safety “will not be adversely affected.” *Id.* (citing 49 C.F.R. § 4305 (1997)).

As a primer to its analysis, the Court set forth the preemption and savings clauses in question, and the facts behind the Coast Guard’s consideration of propeller guard regulation. *Sprietsma*, 123 S.Ct. at 525-26. The preemption clause states that a State “may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment that is not identical to a regulation prescribed under Section 4302 of this title.” *Id.* (citing 46 U.S.C. § 4311(g).) The saving clause states that “[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.” *Id.*

As for the Coast Guard inaction, in 1990 the Coast Guard concluded, after extensive study, the available accident data did not support the adoption of a regulation
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requiring propeller guards on motors. *Id.* However, the Coast Guard stated it would continue to review information “regarding development and testing of new propeller guard devices or other information on the state of the art.” *Id.* at 526.

The Court began its analysis by treating the issue of expressed preemption first. *Id.* at 526-27. The Court held the language of the preemption clause is the most naturally read as not encompassing common-law claims for two reasons. *Id.* First the Court observed the article ‘a’ before ‘law and regulation’ implies statutes, not common law. *Id.* Second, the terms “law” and “regulation” used together in the preemption clause indicate that Congress preempted only positive enactments by states. *Id.* The FBSA’s saving clause buttresses this conclusion because it “assumes that there are some significant number of common law liability cases to save and the language of the preemption provision permits a narrow reading that excludes common law actions.” *Id.*

The Court further stated that the contrast between its general reference to liability at common law and the more specific clause indicates it was drafted to preempt performance standards and equipment requirements imposed by statute or regulation. *Id.* The Court noted the rationale for Congress not to preempt common-law claims, which necessarily perform an important remedial role in compensating accident victims. *Id.*

On the issue of implied preemption, the Court began by stating the general rule on the issue. *Spriestsma*, 123 S.Ct. at 527-28. Implied preemption is found where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Id.* With that rule in mind, the Court rejected Mercury’s argument the Coast Guard’s decision not to adopt a regulation requiring propeller guards on motor boats is the functional equivalent of a regulation prohibiting all states and their political subdivisions from adopting such a regulation. *Id.*

The Court did recognize a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated. *Id.* at 528. The absence of federal regulation has as much preemptive force as a decision to regulate, but that was not the case here. *Id.* The Court found the stated reasons the Coast Guard gave for not issuing a regulation did not clearly indicate an intent or purpose to leave the area of propeller guards unregulated. *Id.*

Finally, the Court rejected the idea that the statutory scheme of the FBSA implicitly preempted state common-law tort action. *Spriestsma*, 123 S.Ct. at 529. The Court held the FBSA did not so completely occupy the field of safety regulation of recreational boats as to foreclose state common-law remedies. *Id.* The Court compared this case with *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S.Ct. 988 (1978), which held for field-preemption rules to apply there must be a “field reserved for federal regulation” and that “Congress had left no room for state regulation of these matters.” *Id.* The FBSA’s structure and framework do not convey a clear and manifest intent to preempt all state common law relating to boat manufacture. *Id.*

In conclusion, the Supreme Court’s holding in *Spriestsma* greatly affects many Maryland lawyers practicing in the areas of products liability and maritime law. Remedies in Maryland tort law are now available in boat safety cases. To the further advantage of plaintiff’s lawyers, the FBSA standards and regulations can be used to provide proof of negligence while still permitting large damage awards in state common law.
Thomas v. State:  
Evidence of a Defendant’s Refusal to Provide a Blood Sample is Inadmissible to Show Consciousness of Guilt  

By: Gage Lester

The Court of Appeals of Maryland held evidence of a defendant’s refusal to provide a blood sample was inadmissible to show consciousness of guilt. Thomas v. State, 372 Md. 342, 812 A.2d 1050 (2002). In so holding, the court clearly stated when and how consciousness of guilt evidence can be used to show an inference of guilt. Id.

Garrison Thomas (“Thomas”) was convicted of killing Beverly Renee Mitchell (“Mitchell”). Her body was found in Charles County on March 23, 1995 and on March 24, 1995, the police found a witness, Novella Harris (“Harris”), and Mitchell’s car in Southeast Washington, D.C. Harris informed police that Thomas came to her house, on March 23, 1995, driving Mitchell’s car seeking narcotics. Additionally, Harris informed police she saw Thomas wipe the car down, attempt to discard the keys in two different locations, and eventually attempt to set fire to the car.

On June 25, 1998, over three years after Mitchell was murdered and with the investigation stalling, the police decided to attempt to collect hair and blood samples from Thomas. The police met Thomas at his residence and informed him he was required to give them hair and blood samples. Thomas resisted, stating, “you ain’t getting it.” He was forcibly restrained while a nurse drew blood. Eventually, Thomas provided police with a hair sample and a second blood sample. The laboratory examination of Thomas’ blood excluded him as a source of the blood at the crime scene.

Thomas’ trial began in 1999 in the Circuit Court for Charles County. Thomas attempted to preclude the state from introducing evidence he resisted police when they tried to collect a sample of his blood. The trial court decided to allow the evidence, and Thomas was convicted and sentenced to life imprisonment for felony murder. Thomas noted a timely appeal to the court of special appeals. The court of special appeals affirmed the decision and the court subsequently granted Thomas’ petition for writ of certiorari.

The court began its analysis by examining whether the fact Thomas resisted police when they tried to obtain a blood sample was admissible in evidence as consciousness of guilt. Id. at 350, 812 A.2d at 1055. The fundamental test in assessing admissibility is relevance. Id. (citing Maryland Rule 5-402). Relevant evidence is evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Thomas, 372 Md. at 350-51, 812 A.2d at 1055 (quoting Maryland Rule 5-401).

A person’s post-crime behavior, called consciousness of guilt, is sometimes admissible as circumstantial evidence from which guilt may be inferred. Id. at 351, 812 A.2d at 1055. This evidence is often considered because the commission of a crime can be expected to leave some mental traces on the criminal. Id. Similar to all circumstantial and direct evidence, evidence of consciousness of guilt must have a probative value that outweighs its prejudicial effect on the defendant and in addition, it must be relevant. Id.

The court determined, in order for Thomas’ consciousness of guilt to be considered relevant, four inferences would have to be drawn. Id. at 356, 812 A.2d at 1058. First, Thomas’ resistance to the blood test demonstrated a desire to conceal evidence. Thomas, 372 Md. at 356, 812 A.2d at 1058. Second, a connection must be formed between Thomas’ desire to conceal evidence and his consciousness of guilt. Id. Third, his consciousness of guilt was...
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caused by the murder of Mitchell. *Id.* Finally, a connection between a consciousness of guilt of the murder of Mitchell, and actual guilt of the murder must be made. *Id.*

Using these inferences, the court concluded there was no evidence in the record for a jury to find any alleged consciousness of guilt on Thomas’ part connected to the murder of Mitchell. *Id.* The court also noted there was no evidence that Thomas was aware that the police were testing his blood in connection with the murder investigation of Mitchell. *Thomas,* 372 Md. at 357, 812 A.2d at 1059. As a result, the court concluded there were numerous other logical inferences that could be drawn from a defendant refusing to give blood. *Id.* Therefore, the court reversed the trial court’s decision and held the evidence was inadmissible. *Id.*

Finally, the court addressed Thomas’ inability, during pretrial discovery, to obtain the psychiatric records of the state’s key witness, Harris. *Id.* The court explained Thomas failed to demonstrate likelihood that the records contained any relevant information. *Id.* As a result the court agreed with the court of special appeals and held the psychological records were not discoverable. *Thomas,* 372 Md. at 358-59, 812 A.2d at 1059-60.

This case demonstrates the tremendous effect that circumstantial evidence can have on a trial. While prosecutors statewide may disagree with this decision, the holding in this case is necessary in order to maintain the notion of a fair trial for criminal defendants. Additionally, this case clearly defines the narrow circumstances when consciousness of guilt evidence is admissible in Maryland. Without this decision, limiting the admissibility of consciousness of guilt evidence, a criminal defendant may be convicted for behavior that has nothing to do with the crime with which he is charged. This is integral in the maintenance of the innocent until proven guilty standard that our justice system is founded on.
The Court of Appeals of Maryland held jury instructions cannot substantially deviate from the American Bar Association’s Criminal Justice Standards of the Maryland Pattern Jury Instructions. Thompson v. State, 371 Md. 473, 485, 810 A.2d 435, 442 (2002). The court found the trial judge erred in instructing the jury with an “attitude of jurors” instruction, rather than the “duty to deliberate” instruction, as required by the Maryland Pattern Jury Instruction 2:01. Id.

During a search of the defendant’s residence, pursuant to a search warrant, officers recovered marijuana, cash, and drug paraphernalia. Thompson was arrested and while in custody admitted the marijuana was for personal use, although he sometimes sold it to his friends. Thompson was indicted for possession with intent to distribute a controlled dangerous substance, possession of controlled paraphernalia, and possession of a controlled and dangerous substance.

Thompson was convicted in the Circuit Court of Montgomery County on all charges. He appealed to the Court of Special Appeals of Maryland alleging the judge erred in allowing a midtrial amendment to the indictment. In addition, Thompson claimed the judge improperly substituted the requisite “duty to deliberate” jury instruction with an improper “attitude of jury” instruction. The court of special appeals affirmed Thompson’s conviction.

The Court of Appeals of Maryland granted certiorari to determine the legality of the midtrial amendment to the indictment and the significance of the trial judge altering the jury instructions with a personalized jury deliberation instruction.

First, the court addressed whether the trial judge violated Maryland Rule 4-325 by instructing the jury with what he called the “attitude of jury” instruction rather than the required “duty to deliberate” from the Maryland Pattern Jury Instructions. Id. at 478-79, 810 A.2d at 438-39. The court adopted the American Bar Association’s Criminal Justice Standard to measure the appropriateness of the “duty to deliberate” jury instructions. Id. at 480-81, 810 A.2d at 440 (citing Kelly v. State, 270 Md. 139, 310 A.2d 538 (1973)). The Kelly court approved a specific instruction to be used by judges before a jury begins deliberations. Thompson, 371 Md. at 482, 810 A.2d at 441. The court referred to this instruction as an Allen-type jury charge because of its modified language and the recognition that judges may personalize jury instructions as long as they reasonably adhere to the ABA standards. Id. at 482, 810 A.2d at 441. An Allen charge encouraged deadlocked jurors to reach a verdict by stressing deference of the minority jurors to the views of the majority. Id. It was derived from an instruction approved by the United States Supreme Court. Id. (citing Allen v. United States, 164 U.S. 492, 17
In Maryland, the court noted an *Allen* charge may not be used on a deadlocked jury because it does not adhere to ABA standards. *Id.* The court stated it was coercive and an impermissible interference with the function of the jury. *Id.* In addition, it encouraged minority jurors to acquiesce to the views of the majority. *Thompson*, 371 Md. at 482, 810 A.2d at 441 (citing *Burnette v. State*, 280 Md. 68, 371 A.2d 663 (1977)). Further, the court found *Allen* instructions given before jury deliberations are just as coercive as the instructions given to deadlocked jurors. *Id.* at 484, 810 A.2d at 442 (citing *Goodmuth v. State*, 302 Md. 613, 490 A.2d 682 (1985)).

In the instant case, the court held some portions of the judge’s “attitude of jurors” instruction gave deference to the ABA standards, but there were substantial deviations. *Id.* at 485, 810 A.2d at 442. The trial court’s “final test” jury instruction suggests to jurors that collective judgment is more important than adherence to individual principles and honest convictions. *Id.* at 486-87, 810 A.2d at 443. This concept was found to be coercive and an obstacle to a jury’s function. *Id.* at 483, 810 A.2d at 441. It implies there is a standard of service to which a good juror should aspire, one that requires a verdict be reached rather than an adherence to his or her own personal beliefs and judgments. *Id.* at 486, 810 A.2d at 443.

Next, the court addressed the issue of whether a midtrial amendment to the indictment had double jeopardy implications. *Thompson*, 371 Md. at 487, 810 A.2d at 444. The court found a mid-trial amendment is problematic when it changes the nature of the offense. *Id.* at 487-88, 810 A.2d at 444.

The purpose of an indictment is to provide notice to the accused of the charges and to guard against the possibility of unfair surprises at trial. *Id.* at 488, 810 A.2d at 444. Adequate notice is given when the charging document contains both a characterization of the crime and the particular act alleged to have been committed. *Id.* at 489, 810 A.2d at 445.

In the present case, the court noted, under Maryland Rule 4-202(a), a citation of authority error in an indictment is not grounds for dismissal or reversal of a conviction. *Id.* The statutory reference existed as a matter of convenience to the parties and possessed no substance of its own. *Id.* Accordingly, the body of the indictment determines the character of the offense and not the statutory reference. *Thompson*, 371 Md. at 489, 810 A.2d at 445. By changing the indictment from a violation of Md. Code Ann., [possession of controlled paraphernalia] § 287A (1957, 1996 Repl. Vol.) to Md. Code Ann., [possession of controlled paraphernalia with intent to distribute] § 287(d)(2)(1957, 1996 Repl. Vol.) the state did not change the character of the offense, and therefore, the midtrial amendment was not a double jeopardy violation. *Id.* at 489, 810 A.2d at 445.

The court of appeal’s holding in *Thompson* supports the right of a defendant to have his or her jury instructions adhere to ABA standards. The ABA standards, of the Maryland Pattern Jury Instructions, were adopted to provide guidance. The court clearly articulated judges may personalize jury instructions, especially prior to deliberations, as long as they adhere to these standards. This ruling is significant to Maryland attorneys because it shows there are limits to how far a judge can deviate from established jury instruction standards. It demonstrates that jurors should not surrender their honest convictions in order to return a verdict. Individual principles and honest opinions should always prevail over the primacy of collective judgment.
Wholey v. Sears Roebuck: 
Terminating Employees for Reporting Suspected Criminal Activity to the Appropriate Authorities Constitutes Wrongful Discharge

By: Julie A. Mallis

The Court of Appeals of Maryland held that terminating employees for reporting suspected criminal activity to the appropriate authorities constitutes wrongful discharge. Wholey v. Sears, 370 Md. 38, 803 A.2d 482 (2002). In so holding, the court refused Wholey’s invitation to adopt an all-encompassing public policy mandate for investigating and reporting criminal activity, stating that changing the law in such a way is a task better suited for the Legislature. Wholey, 370 Md. 38, 70, 803 A.2d 482, 501.

Beginning in February 1972, Edward L. Wholey (“Wholey”) worked as a security officer for Sears, Roebuck and Co. (“Sears”) at its store in Glen Burnie, Maryland. His duties included investigating and reporting thefts by both employees and customers.

In March of 1995, Wholey observed the manager of the store in Glen Burnie taking items into his personal office from the store floor. The items would then disappear from his office. After this happened several times, Wholey reported this behavior to his superior, John Eiseman (“Eiseman”), who told him to “maintain his scrutiny.” As this type of activity continued, Wholey again informed Eiseman and was given the use of a surveillance van to observe the manager outside of the store and permission to install a camera. Later that day, he informed Eiseman the camera was installed and suggested that Eiseman inform the District Store Manager about it. Shortly thereafter, he was ordered to remove the camera.

On February 6, 1996, Sears fired Wholey from his job because his superiors did not like his “cop mentality” or the way he handled the situation with the manager. In September, Wholey filed a complaint in Anne Arundel County against Sears and Eiseman, alleging wrongful discharge and defamation.

With respect to the wrongful discharge and defamation claims, the jury found for the defendants. The jury returned a verdict for Wholey on the wrongful discharge claim and for Sears on the defamation claim. Sears appealed the wrongful discharge judgment to the court of special appeals, which reversed, holding, as a matter of law, Sears did not violate public policy by terminating Wholey. The Court of Appeals of Maryland granted certiorari to consider whether a public policy mandate exists in Maryland to ensure that an at-will employee will not be terminated for investigating and reporting suspected criminal activity.

The court began its discussion by defining an at-will employee, such as Wholey, as one who has “an employment contract of infinite duration which is terminable for any reason by either party.” Id. at 48, 803 A.2d at 487. One exception to this rule is the tort of wrongful discharge. Wholey, 370 Md. 38, 48, 803 A.2d 482, 487. In the case of Adler v. Am. Standard Corp., 291 Md. 31, 35, 432 A.2d 464, 467 (1981), the court held that even an at-will employee may maintain a cause of action for wrongful termination for public policy reasons. Id. Therefore, to establish a wrongful discharge, the basis for the discharge must violate a “clear mandate of public policy” and there must be a connection between the conduct of the employee and the reason for which he was fired. Id. at 50-51, 803 A.2d at 489.

The court discussed two limiting factors with respect to adopting new public policy mandates. Id. at 52, 803 A.2d at 490. The first is to “provide a remedy for an otherwise unremedied violation of public policy.” Id. Second, public policy should be distinguishable from statutory and constitutional mandates. Id. at 52, 803 A.2d at 490. The court did not limit itself strictly to prior judicial opinions, legislative en-
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A wrongful discharge tort exists for at-will employees for two reasons. Id. First, the Legislature has refused to provide a statutory remedy for private employees who report criminal activity. Id. Second, under Md. Code, Art. 27, §762, the Criminal Law Article, the Legislature created a misdemeanor offense for one who retaliates against a person who reports a crime. Wholey, 370 Md. 38, 57, 803 A.2d 482, 492.

To fall into the category of persons who qualify for this public policy exception to at-will employment, the employee must report the suspected activity to appropriate law enforcement or judicial officials. Id. at 62, 803 A.2d at 496. Simply investigating the suspected activity and reporting it to co-employees or supervisors did not put Wholey into that category. Id.

Wholey cannot argue that he was acting in the “public good” by investigating the criminal activity. Id. at 65, 803 A.2d at 498. The court held the “public good” is best served by reporting criminal activity, not merely investigating it. Id. This holding is justified by the fact that the Legislature has declined to hold citizens criminally responsible for failing to investigate or report criminal activity. Wholey, 370 Md. 38, 65, 803 A.2d 482, 498. The court simply refused to create a blanket exception to the notion of at-will employment, which would state that investigating criminal activity is a “per se public benefit, the termination for which, is actionable in tort law.” Id. at 67, 803 A.2d at 499.

The Court of Appeals of Maryland did not hold there is a legal duty to report criminal activity in Maryland. Id. at 70, 803 A.2d at 500-501. However, should one decide to report criminal activity to the appropriate authorities, the Legislature determined that they should be protected from retaliation for public policy reasons. Id. It is not fair to punish a person for reporting criminal activity, Wholey, 370 Md. 38, 59, 803 A.2d 482, 494, but in order to qualify for this protection, the criminal activity must be reported to the appropriate authorities. Id. at 62, 803 A.2d at 496. Therefore, while a public policy mandate exists for those employees that report criminal activity, Wholey was not entitled to the protection because he did not report this activity to the appropriate authorities. Id. at 70, 803 A.2d at 500-501.

Following the decision in this case, the court did not purport to create a blanket provision that allows a public policy exception to the at-will employment doctrine in all circumstances. This case demonstrates that the Court of Appeals of Maryland respects the concept of separation of powers by its recognition that a court’s task is to interpret the law and not to create or change it. Holding that such an all-encompassing provision exists would, in effect, be creating law, which is a function of the Legislature, not the court of appeals.
HOUSE BILL 249: CRIMINAL PROCEDURE - VEHICULAR HOMICIDE AND PROBATION BEFORE JUDGMENT

By: Julie A. Mallis

House Bill 249, crossfiled with Senate Bill 94, prohibits a court from staying entry of a judgment, deferring further proceedings, and placing defendant on probation when the defendant pleads guilty or nolo contendere or is found guilty of driving under the influence of alcohol or drugs if that person is convicted of or placed on probation for any of those offenses within the last ten years. This Bill changed current law by extending the time period from five to ten years. This Bill repealed and reenacted, without amendments, Maryland Annotated Code, Criminal Procedure Article, Section 6-220 (b) and (c); and repealed and reenacted, with amendments, Criminal Procedure Article, Section 6-220 (d) and took effect on October 1, 2003.

A court may stay entering of a judgment, defer further proceedings, or place a defendant on probation in those instances when it is in the public’s or defendant’s best interests. As part of probation conditions, a defendant may be required to pay a fine or participate in a rehabilitation program, a parks program, or a voluntary hospital program. The defendant may also be placed in custodial confinement for a period of time during probation. Before these sanctions are imposed, however, the defendant is entitled to notice and a hearing to determine conditions of probation.

HOUSE BILL 253: EDUCATION - RESIDENT TUITION CHANGES

By: Ju Y. Oh

House Bill 253, entitled “Higher Education – Resident Tuition Charges – Immigrant Students and United States Military Personnel and Dependents,” was established to prohibit specified higher education institutions from awarding degrees to individuals under certain circumstances as well as exempting certain nonresident aliens from paying nonresident tuition. This Bill amends Md. Educ. Code Ann. § 15-106.3, and took effect July 1, 2003.

An individual who attended a public or private secondary school for three years in Maryland or received a Maryland high school diploma, shall be exempt from paying nonresident tuition at a public higher education institution. Additionally, the individual must file an application to become a permanent resident and apply to attend a public higher education institution within a certain time period. The Bill also prohibits a public higher education institution from awarding a degree to an individual who qualifies for resident tuition charges under this section until the individual files an affidavit or pays the difference between the nonresident and resident tuitions.

Furthermore, active duty members of the United States armed forces, their spouses, and dependants can qualify for the exemption if the member is stationed in Maryland, resides in Maryland, or is domiciled in Maryland. This subsection is also applicable to honorably discharged veterans in the same manner as other individuals.
HOUSE BILL 333: COURTS AND JUDICIAL PROCEEDINGS - STATE’S RIGHT OF APPEAL IN CRIMINAL CASES

By: John M. Borelli

House Bill 333 added a provision to the Maryland law authorizing a new ground for appeal by the state following a final judgment in a criminal case. The Bill provides for an appeal when the state alleges the trial court imposed or modified a sentence in violation of the Maryland Rules.

The House Bill faced little opposition in the Maryland Legislature, passing the House of Delegates by a vote of 133-3 and the Senate by a vote of 45-0. Delegates Carmen Amedori, Anthony J. O’Donnell and Theodore Sophocleus sponsored the Bill.

House Bill 333 affects Section 12-302(c)(2) of the Courts and Judicial Proceedings Article of the Maryland Annotated Code. The statute currently provides for an appeal when the state alleges the trial judge failed to impose the sentence mandated by the Maryland Code.

This Bill took effect October 1, 2003.

HOUSE BILL 346: FAMILY LAW - GROUNDS FOR ABSOLUTE DIVORCE

By: Jennifer Merrill

House Bill 346 repealed and reenacted, with amendments, the Maryland Annotated Code, Family Law Article, Section 7-103. Pertaining to absolute grounds for divorce, the Bill expands conditions under which an absolute divorce will be granted without a requisite waiting period.

House Bill 346 adds cruelty of treatment and excessively vicious conduct towards a minor child of the complaining party as further grounds for immediate absolute divorce in Maryland. Prior to the passage of House Bill 346, the only grounds available for an absolute divorce without a waiting period were adultery, cruelty of treatment toward the complaining party, and excessively vicious conduct towards the complaining party. A controversial provision that would have prohibited a minor child from being compelled to testify in certain divorce proceedings was removed before the House would pass the Bill.

The Bill took effect on October 1, 2003.
HOUSE BILL 805/SENATE BILL 626: AGRICULTURE - MARYLAND AGRICULTURAL LAND PRESERVATION FOUNDATION EASEMENTS

By: Megan M. Bramble

House Bill 805 and Senate Bill 626 modified current law and provided that farm and forest related uses and home occupations be allowed on land subject to a Maryland Agricultural Land Preservation Foundation (“MALPF”) easement. The Bill also modified the MALPF’s lot exclusion policy by giving landowners a choice of designating family lots or one unrestricted lot, limiting family lot rights to a maximum of three depending on property size, reflecting in the easement value the unrestricted lot rights that are retained, providing that the unrestricted lot right is transferable to subsequent owners and providing that other dwellings present on the property when the easement is sold may be subdivided from the property.

This Bill affected Section 2-513 of the Agricultural Article of the Maryland Annotated Code. The intent of the MALPF is to preserve agricultural land and its products in an effort to control urban sprawl, curb the spread of urban deterioration, and protect open-space land. Under this Bill, a landowner whose land is subject to an easement may not use the land for any commercial, industrial, or residential purpose unless otherwise provided for by the Bill.

This Bill was fully supported by the Maryland Legislature, passing the House of Delegates by a vote of 141-0 and the Senate by a vote of 46-0. Delegate James sponsored the House Bill, while Senators Middleton, Dyson, and Colburn sponsored the Senate Bill.

This Bill took effect October 1, 2003.

SENATE BILL 4: COURTS AND JUDICIAL PROCEEDINGS - SMALL CLAIMS ACTIONS

By: Brian Casto

Senate Bill 4 repealed and reenacted, with amendments, Maryland Annotated Code, Courts and Judicial Proceedings, Sections 4-402(d)(1)(i), 4-405, 6-403, and 12-401(f). The Bill increased the minimum amount in controversy requirements for district court jurisdiction, pleadings, and appeals.

Under current law, the district and circuit courts have concurrent jurisdiction for all civil matters with an amount in controversy over $2,500. The district court has exclusive jurisdiction over small claims actions under $2,500. The district court does not require formal pleadings when the amount in controversy is $1,000 or less. Appeals from district court decisions are allowed only when the matter concerns $2,500 or more.

Under the new law, the $2,500 levels for jurisdiction and appeal are raised to $5,000. The $1,000 threshold for pleadings is $2,500.

This Bill took effect October 1, 2003.
SENATE BILL 186: CRIMINAL PROCEDURE - CRIMINAL INJURIES COMPENSATION

By: Brenda N. Taylor

Senate Bill 186 repealed and reenacted with amendments Criminal Procedure Article Section 11-811 of the Annotated Code of Maryland. The enacted changes make a parent or guardian living with a child crime victim eligible for an award from the Criminal Injuries Compensation Fund. Up to 30 days of lost earnings is available if the loss resulted from the parent or guardian providing care to the child crime victim. The changes make crime victims who suffer catastrophic injury resulting in permanent total disability eligible for an additional $25,000 above the current $25,000 limit.

The Senate Bill faced no opposition from the Maryland Legislature, passing the Senate by a vote of 46-0 and the House of Delegates by a vote of 139-0. The Bill was sponsored by the Chairman of the Judicial Proceedings Committee at the request of the Department of Public Safety and Correctional Services.

Specifically, Bill 186 affected Section 11-811(a)(3) of the Criminal Procedure Article and provides that a parent or guardian of a child crime victim who resides with the victim may be eligible for an award of up to 30 days of lost earnings as a result of caring for the victim. Under Section 11-811(b)(1), the award may not exceed $25,000 for a disability or dependency related claim except as provided in Section 11-811(b)(1)(II). Section 11-811(b)(1)(II) provides an additional award up to $25,000 if the victim’s injury results in permanent total disability.

This Bill took effect October 1, 2003.

SENATE BILL 320: ENVIRONMENT - NOISE CONTROL AND POLLUTION

By: John A. Carpenter

Senate Bill 320 (cross-filed with House Bill 174) entitled “Department of the Environment-Noise Control and Pollution,” repealed and reenacted, with amendments, the Environment Article Sections 3-105, 3-202, 3-205 and 3-302 of the Maryland Annotated Code. The purpose of this Bill is to make several changes relating to noise control and pollution provisions administered by the Maryland Department of the Environment (“MDE”).

Specifically, the Bill encourages a political subdivision to consider complying with State and local noise control standards before acting on a proposed variance request or change in zoning classifications, and prior to the issuance of a building or activity permit. This Bill also increases the membership of the Environmental Noise Advisory Council (“Council”) from five to eleven. Under this Bill, the MDE Secretary appoints new members of the Council from names submitted by the Maryland Municipal League, the Maryland Association of Counties, the Maryland Chamber of Commerce, the President of the Senate, and the Speaker of the House. Further, before proposing any revisions to the governing statute or environmental noise regulations, MDE is required to submit the proposed revisions to the Council for advice, to hold public hearings, and prepare and solicit technical input. Finally, the Bill expands the Interagency Noise Control Committee to include three additional State agencies: the Department of Health and Mental Hygiene, the Department of Business and Economic Development, and the Department of Labor, Licensing, and Regulation. This Bill took effect July 1, 2003.
SENATE BILL 363: CRIMINAL PROCEDURE - POST-CONVICTION REVIEW AND FELONY CONVICTIONS

By: Bryan C. Hughes

Senate Bill 363 required the State to preserve DNA evidence collected in certain cases for the duration of the original sentence for which the evidence was initially obtained, thus preserving the evidence for postconviction review. The Bill also expanded the list of persons required to submit DNA samples to include any person convicted of a felony or burglary misdemeanor. The provisions requiring submission of DNA samples apply retroactively, as well as prospectively, to include any person convicted of a felony or burglary misdemeanor before, and incarcerated on or after, the bill’s effective date.

The Bill further establishes a permanent DNA Technology Fund in the State of Maryland to provide grants to local and State law enforcement agencies to assist them in acquiring DNA technology equipment for testing and preserving DNA samples. Senate Bill 363 allowed the State to improve upon its recent successes in matching evidence obtained at crime scenes with DNA samples contained in the database. Furthermore, it provided for the preservation of the evidence for post-conviction proceedings.

This Bill took effect October 1, 2003.

SENATE BILL 687: HEALTH MAINTENANCE ORGANIZATIONS - PATIENT ACCESS TO CHOICE OF PROVIDER

By: Purvi Patel

Both houses of the General Assembly passed the nurse practitioner’s bill, which had been introduced into the Legislature since 1999. The Bill (cross-filed with House Bill 974) required a Health Maintenance Organization (“HMO”) to give consumers a choice between a certified nurse practitioner or physician as their primary care provider. Currently, a nurse practitioner is not permitted to be an HMO consumer’s primary care provider. An HMO was required to have patients relaying a medical complaint to be solely evaluated by a physician. The new Bill broadens the alternatives available to a patient in choosing his primary care provider.

Under the Bill, the nurse practitioner must follow certain provisions in order to remain a patient’s primary care provider. Specifically, the nurse practitioner must share a location with their collaborating physician, who in turn must provide continuing medical attention if so required. The Bill also requires the certified nurse practitioner to provide contact information of the collaborating physician to his patient.

This Bill was introduced to allow consumers access to nurse practitioners, who are generally a less expensive choice for medical attention than a doctor’s visit. Negative effects of the Bill include nurse practitioners being unable to treat all patients due to restrictions on their practice. Also, more expenses upon patients who must be referred to physicians.

The Bill is not expected to increase health care premiums because both savings and costs are associated with nurse practitioner’s visits. The Bill also is not expected to materially affect the State’s health plan.

Although the Bill has passed both chambers of the Legislature, its future lies in the hands of Governor Ehrlich. In 2001, a similar bill was vetoed by then Governor Glendening.