

THE LAW FORUM

UNIVERSITY OF BALTIMORE SCHOOL OF LAW

DEPARTMENTS

Letter from the Editor in Chief1

ARTICLES

Reforming the Criminal Law: University of Baltimore School of Law Group
Goes to Annapolis
By Lynn McLain.....2

RECENT DEVELOPMENTS

Duvall v. McGee:21
Lawrence v. Texas:23
Livering v. Richardson's Restaurant:25
MAMSI v. Callaway:27
Pack Shack v. Howard County:29
Rensburg v. Montgomery:31
Roesser v. Anne Arundel County:33
Sell v. United States:35
State v. Lee:37
State v. Rucker:39
Todd v. Mass Transit Administration:41
United States v. Mason:43

FORUM FACES

Professor Jane Murphy.....45

VOLUME 34
ISSUE No. 1

**Senior
Editorial
Board**

Brenda N. Taylor
Editor in Chief

Ronald K. Voss
Managing Editor

Chrys P. Kefalas
Articles Editor

Susan Carol Bell
Manuscripts Editor

Megan M. Bramble
Assistant Articles Editor

John M. Borelli
Production Editor

Allisan Pyer
Recent Developments Editor

Dawn L. Lyon
Business Editor

Jennifer E. Piateski
Assistant RD Editor

2003 Summer/Fall Staff

Associate Editors

Dawn A. Anderson
John A. Carpenter
Bryan C. Hughes
Julie A. Mallis

Staff Editors

Brian Casto
Darren Cooper
Larna M. Cutter
Cendoria Yvonne Dean
Erin S. Galvin
John D. Gifford
Patricia K. Jaron
Katherine Kiemle
Carlin La Bar
Jason L. Levine
Ruthie Linzer
Pete Maheridis
Supriya M. McMillan
Sarah Miller
Erica Mudd
Ju Y. Oh
Charles Paul
Sarah Parrish
Matthew F. Penater
Kristine Rea
Sheryl A. Rickford
Brandy M. Scheydt
Thomas Sova
Victoria Z. Sulerzyski
Andrea Tony
Kevin Trogdon

Faculty Advisor
Professor Barbara White

**UNIVERSITY OF BALTIMORE SCHOOL OF LAW
ADMINISTRATION**

Robert L. Bogomolny
President of the University

Laurence M. Katz
Interim Provost of the University

Gilbert A. Holmes
Dean of the School of Law

Gary L. Wimbish
Assistant Dean for Admissions

Donald H. Stone
Associate Dean for Academic Affairs

Karen Rae Hammer
Associate Dean for Career Services

Tony W. Torain
Associate Dean for Student Affairs

Stephen J. Wilson
*Assistant Dean for Finance and
Administration*

M. Michele Gilligan
*Director, Aberdeen Summer Abroad
Program in Comparative Law*

Mortimer Sellers
*Director, Center for International
and Comparative Law*

Kenneth Lasson
*Director, Haifa Summer Abroad
Program in Comparative Law*

Byron L. Warnken
*Director, Judicial Internship
Program*

Will Tress
Law Librarian

Jane C. Murphy
Director, Clinical Programs

Eric Easton
Co-Director, Legal Skills Program

Odeana Neal
*Director, Attorney Practice
Internship Program*

Amy E. Sloan
Co-Director, Legal Skills Program

Jose F. Anderson
*Director, Litigation Skills
Programs*

Fred B. Brown
Director, Graduate Tax Program

Law Forum Volume 34.1 is a product of the blood, sweat, and tears of the current Editorial Board. It is with great pride and satisfaction that with the publication of Volume 34.1 the *Law Forum* is once again on schedule. To get to this point, the Editorial Board first published five back volumes, which may be accessed at our website at www.ubalt.edu/lawforum.

We believe you will find Professor Lynn McLain's article both interesting and informative. The article describes how University of Baltimore School of Law students worked to change Maryland's Rape Shield Law. The Recent Developments section includes summaries of recent Maryland, Fourth Circuit, and United States Supreme Court cases that will assist Maryland's legal community in staying abreast of changing case law. Finally, we are proud to highlight the many accomplishments of Professor Jane Murphy, who recently received the 2004 USM Regent's Faculty Award for Excellence in Services.

I would like to personally extend an invitation to all readers to submit an article for publication in a future *Law Forum* volume. The *Law Forum* is published twice a year and is always looking for timely articles discussing changes affecting the practice of law in Maryland or articles discussing topics that may impact the practice of law in Maryland. If you are interested in having an article published, please contact our Articles Editor. Contact information is available on the *Law Forum* website.

A special note of gratitude is due to Senior Editorial Board members, whose persistence and hard work made it possible to complete the daunting job we inherited. In particular, I would like to thank those Editorial Board members who I worked closest with: Ron Voss, who was there whenever I needed him; Allisan Pyer and Jenny Piatetski, for selecting and editing quality Recent Developments; and lastly, Susan Bell. Susan and I taught ourselves how to use PageMaker and completed the Herculean task of formatting five back Volumes as well as Volume 34.1. Many thanks also to our Associate and Staff Editors who placed their trust in us to get the *Law Forum* back on track.

One final note of eternal thanks to my husband, Barry, who endured the trials and tribulations of being married not only to a law student, but also to an editor in chief.

Brenda N. Taylor
Editor in Chief

REFORMING THE CRIMINAL LAW: UNIVERSITY OF BALTIMORE SCHOOL OF LAW GROUP GOES TO ANNAPOLIS

By Lynn McLain¹

I. The Law is Ever Evolving

Law students arrive at the beginning of their first year, expecting to “learn the law.” They may naively think of the law as a body of information they must commit to memory.

Law students quickly learn, however, that “studying law” is a more apt phrase for what will be a lifelong undertaking. The law can never be “learned” in the sense of being memorized. Bits and pieces – some of its basic building blocks – can and should be committed to memory. But most important of these are the skills of (1) finding the law applicable to a given problem (which in turn necessitates both analysis that results in asking the right questions and then searching all the appropriate places for the possible answers), (2) analyzing that law, and analogizing and synthesizing it to and with related legal authority, and (3) finally, expressing one’s reasoning and conclusions clearly, both orally and in writing.

Memorizing all of “the law” is impossible for two reasons. First, there is just too much law out there for any one person to memorize. This remains true even if one concentrates on a limited field, such as criminal law, family law, environmental law, trusts and estates, real property law, copyright law, patent law, bankruptcy law, trademark law, or tax law. Secondly, the law is ever evolving. Federal, state, and local agencies make new rulings and adopt new regulations; federal and state legislatures and town councils adopt new statutes and ordinances; executives issue executive orders; and courts all across the country (leaving aside, for a moment, international law) issue new opinions daily.

Law school is merely a three-to-four year concentrated introduction to the study of law, which will become a lifetime avocation for all lawyers. Like most things in life, there are plusses and minuses to this fact. On the plus side, because the law is never finished, it need not remain the same. We can make an effort to reform it when we discern a need for improvement.

II. Law Students Can Achieve Law Reform

The recognition that we may change the law for the better presents both a daunting and empowering challenge. University of Baltimore School of Law faculty, alumni, and students routinely take up this challenge on local, state, national, and international fronts.

Recognition of my students’ power to reform the law was brought home to several of my Evidence students in late fall 2001. In the midst of a section of the course focusing on character evidence in general, we whitewater rafted at a dizzying speed through the federal rape shield law, Federal Rule of Evidence (FRE) 412, and its Maryland state counterpart.² I mentioned a recent decision of the Court of Special Appeals of Maryland that, in my mind, pointed out the need to amend the Maryland statute, and asked that interested students contact me after the end of the semester if they wanted to pursue the challenge.

This article will first provide some background regarding rape shield laws in general and the Maryland statute. It then will chronicle my students’ and my successful efforts over the 2002 and 2003 legislative sessions to reform Maryland criminal and evidence law by legislatively overruling two Maryland appellate cases: *Churchfield v. State*,³ which held that the state rape shield law did not protect victims when the defendant was being tried for sexual child abuse, and *Cooksey v. State*,⁴ which held that Maryland recognizes no crime of continuing sexual offense against a child other than the rather narrowly applicable crime of child abuse.⁵

III. The Rape Shield Laws in General

Both the Maryland rape shield statute and FRE 412 were adopted in the 1970s (1976⁶ and 1978,⁷ respectively) in a national wave of law reform achieved by “the women’s movement.” Studies show that rape was⁸ (and, unfortunately, remains)⁹ a vastly under-reported and, thus, under prosecuted crime.

The 1970s reform was aimed at protecting rape vic-

tims from intimidation caused by having to face public humiliation and harassment during cross-examination as to any consensual sex the victims might have had at anytime in their lives, with anyone other than the defendant.¹⁰ These excoriating cross-examinations became known as “the second rape upon the witness stand.”¹¹ Prior to the adoption of the rape shield laws, many victims who reported rape declined to go forward with the prosecution of their assailants because the victims feared the ordeal of such brutal cross-examinations.

The common-law theory of relevance – which, to many modern ears, no doubt seems so outdated as to be quaint – of this line of questioning was twofold. First, in every case in which a woman complained of a sexual assault, her reputation as a previously unchaste woman was admissible to impeach her credibility by showing that she possessed a character that made her unworthy of belief.¹² Secondly, if consent were raised as a defense, this evidence was admissible as substantive evidence to help prove consent.¹³ The underlying logic was that if the victim consented to sexual activity with one person (*e.g.*, her boyfriend or her fiancé) it increased the likelihood that she consented to sex with the defendant (no matter whether it was acquaintance “date rape” or dragged-by-a-stranger-into-an-alley-rape). The fact that the victim was a “fallen woman” who had had premarital or extramarital sex was provable both by character witnesses who gave reputation or opinion evidence as to the victim’s lack of chastity and, in some jurisdictions, by questioning the victim about specific instances of her prior sexual conduct.¹⁴

The legislators’ response to the women’s movement’s outrage to this line of questioning was to pass “rape shield laws.” Under these statutes and rules, evidence of the victim’s reputation for chastity or lack of chastity is generally wholly inadmissible (unless the prosecution or victim puts it in controversy),¹⁵ as is another witness’s opinion testimony regarding the victim’s character for chastity.¹⁶ Evidence of specific instances of the victim’s prior sexual conduct is sharply curtailed.

Rape shield laws generally provide that a victim’s sexual activity with someone other than the defendant is inadmissible to prove consent to sex with the defendant.¹⁷ The only evidence of prior sex that is admissible on the issue of consent is evidence of prior instances of consensual sex between the victim and the defendant.¹⁸

sent, evidence of specific instances of the victim’s sexual conduct, other than with the defendant, may be admissible under the rape shield laws, but only if shown in a pretrial hearing to have special relevance to the pending case.¹⁹ For example, the rape shield laws do not *per se* preclude the defendant from offering evidence of the victim’s sex with another person if it resulted in physical evidence that has been entered against the defendant or was found at the time of the charged crime, such as semen, or evidence of physical injury.²⁰ To a large extent, however, the tremendous advance of DNA technology makes much of this kind of use of evidence of other sex obsolete.²¹

FRE 412 contains an intentionally vague safety valve permitting the admission of evidence of the victim’s sex with others when its admission is mandated by “the constitutional rights of the defendant” (*i.e.*, the accused’s right to confrontation).²² The Maryland statute guarantees that same protection but uses more helpful language. The Maryland statute provides that evidence that gives the victim a motive to falsely accuse the defendant will be admitted.²³

The Maryland statute provides:

Evidence of a specific instance of a victim’s prior sexual conduct may be admitted . . . only if the judge finds that (1) the evidence is relevant; (2) the evidence is material to a fact in issue in the case; (3) the inflammatory or prejudicial nature of the evidence does not outweigh its probative value; and (4) the evidence is:

- (i) of the victim’s past sexual conduct with the defendant;
- ii) is of a specific instance of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma;
- (iii) supports a claim that the victim has an ulterior motive in accusing the defendant of the crime; or
- (iv) is offered for the purpose of impeachment after the prosecutor has put the victim’s prior sexual conduct in issue.²⁴

Both federal and state laws require that the defendant provide pretrial notice of his or her intent to offer

evidence of specific instances of the victim's sexual activities.²⁵ The trial judge, in an *in camera* (closed) hearing, must evaluate the probative value of such evidence against the risk of unfair prejudice to the victim, confusion and misleading of the jury, and undue consumption of trial time.²⁶

The judge generally must rule pretrial whether the evidence will be permitted.²⁷ The requirement of a pretrial ruling prevents sneak attacks on a victim. If the judge rules pretrial that the evidence will not be permitted, defense counsel cannot delve into it at trial. If the judge rules that the evidence will be permitted, the victim may reevaluate whether she wishes to proceed. The victim also can appeal that interlocutory ruling, because forcing the victim to wait until after the objectionable evidence comes out at trial would provide the victim with no meaningful protection if the trial judge was incorrect. If the appellate court finds the trial judge erred, the victim will be protected at trial.

IV. The Evolution of Maryland's Rape Shield Statute Pre-*Churchfield*

As passed in 1976, Maryland's rape shield statute provided that it would apply in cases of first- or second-degree rape. Rape is defined under Maryland criminal law as involving penetration of the vagina.²⁸ The initial rape shield law, therefore, responded to the need to protect female rape victims from being dragged through the mud by irrelevant cross-examination. The Legislature was responding logically to the identified problem: defendants were unfairly intimidating rape victims by (1) routinely offering reputation or opinion evidence as to the victims' lack of prior chastity and by (2) raising consent as a defense and then harassing and humiliating victims by questioning them about their other unrelated sexual experiences, which were not in fact probative of consent with the defendant.

But the limited coverage of the rape shield statute necessitated its repeated amendment as it became clear this defense tactic could be used unfairly in the context of other charged sex crimes as to which consent was a defense.²⁹ In the flurry of piecemeal responses to that problem, the second implicit purpose of the initial law, rejecting the common-law precept that a female who had had sex other than in marriage was unworthy of belief, became obfuscated.

The bills that we proposed in 2002 and 2003, and the one that ultimately passed in 2003, addressed both of these problems, so as to put a stop to the use of such information to impeach a female's credibility and to preclude the need for further piecemeal amendment. The bills also extended the scope of Maryland's "rape shield law" to provide equal protection for male and female victims of sex crimes.

A. Credibility: The Second Tine of the Common-Law Fork

Maryland's 1976 rape shield statute responded most obviously to the outrage voiced over the notion that a woman's consensual sex with one man prior to or outside marriage somehow helped to prove that she consented to sex with any other man. Yet it also implicitly responded to another, at least equally perfidious common-law doctrine: that such a "fallen woman" was unworthy of belief when she testified under oath.

The common law permitted character evidence as to a woman's lack of chastity for these two purposes, consent and credibility, in two ways:

(1) Testimony by character witnesses as to the woman's reputation in the community for lack of chastity³⁰ (later expanded by statute to permit opinion testimony, as well),³¹ and

(2) Proof of specific instances of the woman's sexual conduct other than that pertinent to the charged crime, by questioning the woman herself and, perhaps, by extrinsic evidence as well.³²

The great evidence scholar Dean Wigmore happily embraced this unashamedly sexist doctrine. He wrote, in 1940:

There is . . . at least one situation in which chastity may have a direct connection with veracity, *viz.* when a *woman or young girl testifies as complainant against a man charged with a sexual crime, — rape, rape under age, seduction, assault.* Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal

instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offences by men. *The unchaste* (let us call it) *mentality* finds incidental but direct expression in the narration of imaginary sex-incidents of which the narrator is the heroine or the victim.

* * *

*No judge should ever let a sex-offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician.*³³

Wigmore advocated that rules of evidence “must be modified or interpreted to permit *the woman's character as to chastity* to be considered, inasmuch as this trait may be *inextricably connected with a tendency to untruthfulness in charges of sex offences.*”³⁴

Maryland's General Assembly rejected this line of thinking in two ways in 1976, when it passed the State's first rape shield law. First, it excluded reputation and opinion evidence as to a rape victim's chastity altogether. Second, it restricted evidence of specific instances of the victim's other sexual experiences to those having specific relevance. One of these permissible categories listed in the statute goes directly to the victim's credibility: “Evidence which supports a claim that the victim has an ulterior motive in accusing the defendant of the crime”³⁵

This provision was not intended to un-do the statute's trumping of the common law, which had permitted such evidence *de rigueur* in every case. Rather, it was intended (and subsequently construed) to permit such evidence only when it was highly relevant, in that it provided a specific motive to falsely charge rape. In 1976, the classic hypothetical example of when this provision would apply was when an unmarried female had become pregnant as a result of consensual sex with her lover; wanting to cover up that fact, she falsely cried rape by another person, the defendant.³⁶ Today, the child's paternity could be readily determined.

B. Piecemeal Extension of the Crimes Covered

In 1977, only one year after the initial passage of the rape shield statute, the General Assembly realized that the statute was under-inclusive, and amended it to apply also in prosecutions for commission of any “sexual offense in the first or second degree.”³⁷ Sexual offense in either the first³⁸ or the second³⁹ degree includes engaging in any of various sexual acts with another, other than vaginal intercourse: cunnilingus, fellatio, anilingus, or anal intercourse.⁴⁰ The rationale for the rape shield law's application to rape applied equally when other sexual offenses were charged.

The statute, however, remained under-inclusive. In 1997, it was again amended to explicitly include prosecutions for attempted rape in the first or second degree and attempted sexual offenses in the first or second degree.⁴¹ The evidence of the victim's prior chastity or lack thereof was, of course, no more probative in such cases than it was in cases for the accomplished rape or sexual offense.

Over the years, the courts faced the questions of how to treat the rape shield law if (1) a crime listed in the statute was being prosecuted along with lesser included crimes or (2) only a lesser included crime was being prosecuted.

V. Case Law Pre-*Churchfield* as to Lesser Included Offenses

The Court of Special Appeals quickly discerned that the rape shield law would be entirely foiled if it were held to apply only to the prosecution of a crime listed in the statute, and not to the prosecution of lesser included crimes also being prosecuted in the same trial. In a first-degree rape case, for example, lesser included crimes could include second-degree rape, sexual offense in the first, second, third, or fourth degree, child sexual abuse, sexual abuse of a vulnerable adult, incest, sodomy, and simple assault, as well as attempts at a number of these crimes.⁴² The Court of Appeals thus held, in *Davenport v. State*,⁴³ that the statute also applied to lesser included offenses in a trial for one or more of the offenses enumerated in the statute.

Ten years later, on April 2, 2001, in *Churchfield v. State*,⁴⁴ the Court of Special Appeals declined to extend this holding to the situation when only a lesser included offense was charged. The *Churchfield* case had proceeded to trial only on the charge of sexual child abuse.

VI. *Churchfield*

In *Churchfield*, the Court of Special Appeals not only held the rape shield statute inapplicable where the trial was for sexual child abuse, it returned to the antiquated Wigmore approach that the female victim's lack of chastity was probative of her lack of truthfulness.

A. Background Facts

Christina, the victim in *Churchfield*, was the daughter of the defendant and his second wife. Christina was ten years of age when she was removed from her drug-addicted mother's home in Florida and sent to live with her father and his third wife in Wicomico County, Maryland.⁴⁵ After some time, her adult half-brother (born to her father and his first wife) came to live there also.⁴⁶ Her half-brother impregnated Christina when she was twelve.⁴⁷ Christina gave birth to a baby, who was given to another relative to raise in another state.⁴⁸

A couple of years later, Christina ran away from home to live with a boyfriend's family.⁴⁹ At that time, she confided to the boyfriend's mother that her father had been having sexual intercourse with her.⁵⁰ The boyfriend's mother reported the matter.⁵¹ Social services investigated,⁵² and a Wicomico County Assistant State's Attorney, Angela Di Pietro,⁵³ prosecuted the father.

B. The Charges: *Cooksey's* Effect

Initially, Ms. Di Pietro charged Christina's father with second-degree rape, incest, and second-degree assault, as well as sexual child abuse, all continuing over a certain period of time.⁵⁴ Like most child victims, Christina apparently did not remember the specific dates that each sexual act occurred. The Court of Appeals' June 2000 decision in *Cooksey v. State* intervened.⁵⁵

In *Cooksey*, the child victim, and thus the State, was not able to state precisely when the sexual acts occurred.⁵⁶ *Cooksey* was indicted and charged for committing, *inter alia*, second- and third-degree sexual offenses by, respectively, performing cunnilingus on a child under the age of fourteen, when *Cooksey* was four or more years older than the child, and by engaging in various other specified sexual contacts with the child, continuously "up to fifteen times" over the period of a year.⁵⁷ The Court of Appeals held that Maryland recognizes no crime of continuing sexual

offense other than sexual child abuse, so that *Cooksey's* indictment had to be dismissed.⁵⁸ *Cooksey* held that Maryland law required that such allegations be charged individually for each particular occurrence.

The Court of Appeals held that, of sexual offense crimes, only the crime of sexual child abuse could be charged as a crime continuing over a period of time.⁵⁹ It let stand a count for sexual child abuse of the same child for that conduct "up to fifteen times" over a period of a year, as well as a count of sexual abuse against another child under the age of eighteen, between 75 and 100 times over a three-year period.⁶⁰

In light of the *Cooksey* decision, the Wicomico County State's Attorney's office nolle prossed the second-degree rape, incest, and second-degree assault charges against Christina's father and went to trial only on the charge of sexual child abuse.⁶¹

C. The Trial

At the time of trial, Christina was fifteen years old.⁶² She testified for the State and was extensively cross-examined by defense counsel.⁶³ The defense was permitted to bring out the fact that Christina had a baby when she was twelve and to try to show that she was angry with her father for having made her give up the baby.⁶⁴ The defense also wanted to question Christina as to whether she was, at age fifteen, having sex with two teenaged boyfriends.⁶⁵ The trial judge, the Honorable Donald C. Davis, sustained the prosecution's objection.⁶⁶

Judge Davis ruled that the defense was free to question Christina, and offer others' testimony, about alleged conflicts between father and daughter regarding curfew and other disciplinary matters.⁶⁷ Indeed, the defense did so not only in its questioning of Christina, but also in presenting testimony both by the defendant and by Christina's stepmother. The father testified that he had disciplinary problems with Christina including "clashes" over her manner of dress, wearing make-up, and dating.⁶⁸ The father also admitted, that upon his arrest, he stated, "'I'll take care of that bitch when this is over.'"⁶⁹ The stepmother testified that Christina was a liar and a manipulator.⁷⁰

Such evidence supported the defense's theory that Christina fabricated the rape claim to "get back" at her father for having taken the baby away and for imposing disciplinary rules.⁷¹ But Judge Davis ruled that the de-

fense could not go into whether she was having sex with boys her age.⁷²

In the opinion of the author, Judge Davis ruled correctly under Maryland Rules 5-403⁷³ and 5-611(a).⁷⁴ The jury could well understand the defense's allegation that an out-of-control teenager resented her father's restrictive rules. The fact that Christina was allegedly having sex with teenaged boys added no substantial probative value to her alleged motive to falsely claim rape by her father; going into this matter would result in unfair embarrassment of and prejudice to her, distraction of the jurors from the issues in the case, and undue consumption of court time.

Moreover, there was no risk the jury would conclude that Christina's ability to describe the physical act of sexual intercourse necessarily meant that she had had intercourse with her father. The jury had heard testimony that she had been impregnated, several years before, by her adult half-brother and had given birth to a child.⁷⁵ In addition, the defendant had also managed to testify that Christina "used to brag about having sexual intercourse," before the prosecutor's objection was sustained.⁷⁶

Having heard the sharply conflicting testimony, the jury apparently believed Christina and disbelieved her father; the jury found the father guilty. He was sentenced to fifteen years imprisonment.⁷⁷

D. Reversal and Remand

On appeal, his conviction was reversed. In a decision shocking to this author, a unanimous panel of the Court of Special Appeals (Judge Raymond G. Thieme, Jr. (retired), joined by Judge John J. Bishop (retired) and Judge Peter Krauser) held that Judge Davis's ruling precluding inquiry into Christina's sexual activities with her alleged two boyfriends was an abuse of discretion, constituting reversible error.⁷⁸ Moreover, although an appellate court's role is not to second-guess a jury's findings as to credibility,⁷⁹ the panel appeared to do just that. Judge Thieme, writing for the court, appeared to fully credit the father's testimony; Judge Thieme asserted, "Christina accused her father of *the very activity from which he sought to protect her . . .*"⁸⁰

The Court of Special Appeals remanded the case for a new trial. As Ms. Di Pietro prepared to go to trial again, the father pled guilty in exchange for a lesser sen-

tence (4° years imprisonment, 11° years probation).⁸¹ He will remain a registered sex offender.⁸²

Christina, who was sent to live in a group foster home in Baltimore, is in the process of being adopted by another family.⁸³

E. *Churchfield's* Holding as to the Rape Shield Law

The Court of Special Appeals held in *Churchfield* that because trial proceeded only on sexual child abuse, a crime not listed in the rape shield statute, the rape shield law's protection was unavailable.⁸⁴ The underlying act charged was the same vaginal intercourse as occurs in first- or second-degree rape.⁸⁵ Thus, Christina, a minor victim, lacked the protection that an adult rape victim would have had under the rape shield law. As the students argued in their subsequent written testimony before the House Judiciary Committee and the Senate Judicial Proceedings Committee, the *Churchfield* status quo resulted in Maryland's giving the least protection to those most vulnerable and most in need of the shelter offered by the rape shield statute.⁸⁶

F. The Court of Special Appeals' Theory of Relevance

The rape shield law did not exclude the evidence proffered by the defense in the *Churchfield* trial because the defendant was prosecuted only for sexual child abuse. But in order for exclusion of the evidence to be error, it had to have been otherwise admissible. In order to be admissible, it had to meet the threshold requirement for any evidence: relevance to an issue in the case.⁸⁷

Consent is not a defense to sexual child abuse.⁸⁸ Therefore, the Court of Special Appeals' theory as to relevance of the evidence excluded in *Churchfield* could not have been that it was probative that the girl consented to sex with her own father. Rather, the appellate court's opinion was that the evidence was relevant to Christina's credibility. In Wigmoreque tones, Judge Thieme wrote that the young victim's alleged sex with her teenaged boyfriends was highly probative of her "credibility, especially about her sexual activities, and the extent to which she would go to evade parental restrictions in that area,"⁸⁹ and of her "propensity to lie about sex."⁹⁰ This language rang false to many modern ears, including some at the

University of Baltimore School of Law.

The Court of Special Appeals had in effect told Christina that, even though the jury had found she had been victimized, the jury had been duped. It seemed to this author that the appellate court's clear message to Christina was that she was not only unworthy of belief if she was sexually active, she was also unworthy of protection.

Unfortunately, many fifteen-year-olds are sexually active today.⁹¹ The *Churchfield* approach would permit impeachment of each of them in this manner if they alleged sexual abuse.

Until *Churchfield*, this position would seem to have been universally discredited since the 1970s. As the reviser of Wigmore's treatise wrote in its 1983 edition:

§ 62. Character of complainant in rape and other sex crimes.

Wigmore argued strongly for the admissibility of character for chastity and unchastity in the prosecutions for sex offenses against women, believing that such evidence should be admitted on the issue of the "credibility" of the complainant. Wigmore had a deep-rooted fear of baseless criminal prosecutions instigated by women having a psychological disposition "to imaginary and false charges" and plainly thought that the admissibility of character for unchastity was a necessary safeguard against the possibility of such prosecutions. Wigmore's views were shared by the men of his generation and by the men of the following generation. But *times have changed*, and quite suddenly. In most states [including Maryland, under art. 27, § 461A], the assumption now prevails that character for unchastity is inadmissible, in the absence of special circumstances.⁹²

What was particularly heartbreaking about *Churchfield* was that it is well documented that victims of sexual child abuse, such as Christina (who had

been abused by her half-brother), often become promiscuous as a result of their loss of self-esteem due to the abuse.⁹³ To require trial judges to permit their cross-examination as to their subsequent consensual acts is to "blame the victim" and further destroy their hope of regaining control of their lives. In a terrible irony, the *Churchfield* decision, making such children inherently impeachable, made them "safer" targets for subsequent adult sexual predators.

VII. University of Baltimore Group's Response: Taking up the Cudgel

It is no wonder that when I met Davis Ruark, the Wicomico County State's Attorney, at a Lower Eastern Shore Bar educational event in November 2001, he asked, "What are we going to do about *Churchfield*?" Learning that no one had plans to craft a legislative response, this author (who was to be on sabbatical, writing, in spring 2002 and thus was freed from a class schedule) determined to take up the cause and invited my fall semester Evidence students to help. Over the course of two years, seven students valiantly gave their time and energy to this law reform effort.⁹⁴

Experienced lobbyists know the ropes of legislative procedures well. They also maintain a constant presence in the Legislature. Would-be reformers without those luxuries rely on the good will of sympathetic legislators, private citizens, and public interest groups. We were fortunate to find many of each. Over the Christmas 2001 break, students Ilana Cohen, Christian Elkington, Michele Payer, Carlotta Woodward, and John Maclean volunteered. They in turn solicited letters of support from other students, including Anna Mantegna, who also traveled to Annapolis to testify.

As things developed, we proposed two bills in the January to April 2002 legislative session: one to overrule *Churchfield* by amending the rape shield statute, and one to overrule *Cooksey* by creating a crime in Maryland for a continuing sexual offense against a child. The *Cooksey*/continuing offense bill passed in 2002, and was signed into law by Governor Parris N. Glendening. The *Churchfield*/rape shield bill passed both houses, in slightly different forms, but was not taken up by a Conference Committee, so failed. We vowed to return the next year.

In the 2003 session, Ilana Cohen, Anna Mantegna,

and I returned, joined by first-year student Joyce Lombardi. The rape shield bill passed this time, and was signed into law by Governor Robert L. Ehrlich, Jr. The participating students put their skills in analysis, research, and persuasion to the test through lobbying and providing oral and written testimony, emerging victorious. They are well poised to continue their law reform efforts throughout their legal careers.

A. A Complicated Process: The 2002 Session

Over the 2001 Christmas break, I drafted a proposed amendment to the rape shield statute and worked on obtaining sponsors and co-sponsors interested in overturning *Churchfield*. I met with then Delegate Kenneth Montague, law partner of University of Baltimore alumna, and one of my former students, Gustie Taler. Delegate Montague served on the Judiciary Committee, to which the bill would be assigned, and as chair of its subcommittee on juvenile law. He offered to sponsor the bill.

When I explained the history of the rape shield law as intended to protect women from the unequal treatment provided by the common law, he pulled out his copy of Black's Law Dictionary and discovered that "chaste" had a connotation referring only to females.⁹⁵ We agreed that the bill should make the statute gender neutral. He proposed to do this by adding, after the word "chastity," the gender-neutral phrase, "or prior sexual activity."

In the course of our conversation, I mentioned that a Wicomico County Assistant State's Attorney, Liz Ireland, had identified *Cooksey* as a problem. Saying "in for a penny, in for a pound," Delegate Montague said he would sponsor a bill to correct that problem as well.

1. The *Cooksey* Bill

As Judge Wilner pointed out in *Cooksey*:

All of the courts are sympathetic to the plight of both the young victims, often unable to state except in the most general terms when the acts were committed, and of prosecutors, either hampered by the lack of specific information or, when it is reported that the conduct occurred dozens or hundreds of times over a significant period, faced with the practical problem of how to deal with

such a multitude of offenses. The courts are all also properly concerned with the rights of defendants, who go to trial with a presumption of innocence, and with the ramifications to them of duplicitous pleading.⁹⁶

Judge Wilner quoted the highest court of Rhode Island as having acknowledged that: "reconceptualization of child sexual assault as a continuing course of conduct crime would eliminate duplicity problems in charging these offenses," but concluded, along with Rhode Island's court, that the creation of such a crime was for the legislature, not the court.⁹⁷

The Court of Appeals in *Cooksey* thus invited the General Assembly to act to create a continuing sexual offense statute, as had been done by the legislatures in New York and California, if it deemed it desirable: "New York and California attempted to deal with the problem by statute, allowing the legislative branch, after public hearings, to weigh all of the competing interests and concerns and strike a proper balance. That avenue, of course, is open in Maryland."⁹⁸ I learned that two bills (H.B. 939, sponsored by Del. Grosfeld, and H.B. 156, sponsored by Del. Kelly) had been submitted the previous year to overturn *Cooksey*, but they were not passed by the House Judiciary Committee. We reviewed those bills, and Christian set about researching the other states' laws, referenced by Judge Wilner in *Cooksey*, that recognized crimes of continuing sexual offenses against children. Using those states' statutes, from New York⁹⁹ and California,¹⁰⁰ as well as Arizona's statute, and case law upholding their constitutionality, we arrived at a draft that seemed to take the best from those models.

We proposed recognition of a felony for committing, over a period of ninety days or more, three or more sexual acts against a child under the age of fourteen and proposed that it be punishable by up to thirty years imprisonment.¹⁰¹ To support a conviction, a jury would need only to agree that the defendant committed three or more such acts; if more than three were charged, the jurors would not have to be unanimous as to which three the defendant committed. The draft was supported by a fact sheet summarizing the applicable case law from other states, as well as Maryland's. Ilana, Christian, and I met in Annapolis

with Delegate Montague and his legislative aide, “Brother Frank,” a kind and gifted former Catholic school principal who in mid-life switched gears to law school and a career in law. Delegate Montague submitted the draft to Legislative Reference, which made some nonsubstantive changes.

With our own phone calls and the leadership of Delegate Montague and Brother Frank, as well as the lobbying support of Ellen Mugmon, we added co-sponsors: Delegates Sharon Grosfeld (Chair of the Judiciary Committee’s subcommittee on criminal law), Ann Marie Doory (vice-chair of the Judiciary Committee), and Judiciary Committee members William Cole and Michael Dobson to what had emerged from Legislative Reference as H.B. 1302. I submitted written testimony in support of the bill, using Christian’s research (showing that similar statutes in other jurisdictions have been upheld as constitutional),¹⁰² to support its constitutionality, and obtained promises from Assistant State’s Attorneys John Cox of Baltimore County, Tonia Belton-Gofreed of Prince George’s County, and Liz Ireland of Wicomico County to testify in person at the bill hearings. Other supporting witnesses were Bobbi Seabolt of the American Academy of Pediatrics and Ellen Mugmon of the State Council on Child Abuse and Neglect. Attorney General J. Joseph Curran, Jr., Coalition to Protect Maryland’s Children, Citizens Review Board for Children, Inc., and American Academy of Pediatrics submitted written testimony in support of the bill.

At the committee hearings, Ted Wieseman of the Public Defender’s Office and Lia Young testified against the bill, particularly the length of the maximum sentence. Yet, one argument that proved helpful for us as proponents was that, in the absence of Maryland’s recognition of such an offense, prosecutors had to charge multiple counts of rape or other sex crimes,¹⁰³ and were sometimes obtaining sentences of over 100 years. Placing this crime on the books would give the prosecutors a more appropriate option (although they need not avail themselves of it).¹⁰⁴

H.B. 1302 – the “Cooksey bill” – passed the House Committee, then the House; the Senate Committee, then the Senate; and was signed into law by Governor Glendening. It became effective on October 12, 2002, and is codified as Section 3-315 of the Criminal Law Ar-

ticle of the Maryland Code.¹⁰⁵

2. The Churchfield Bill

In the Senate, we obtained Senator Perry Sfikas’ agreement to be the chief sponsor of the rape shield bill. Senator Philip Jimeno agreed to co-sponsor the bill. The Committee Chairman, Senator Walter Baker, was also highly supportive. I previously had the pleasure of working with all three of them on other legislation.

Our draft of the *Churchfield* bill was pre-filed and sent to Legislative Reference for numbering and for conformity in style with other bills. The rape shield bills became Senate Bill 212 and House Bill 1067. The House Bill was sponsored by Delegate Montague and co-sponsored by Delegates Ann Marie Doory, Sharon Grosfeld, Bill Cole, Pauline Menes, Carmen Amedori, and Tim Hutchins. Legislative Reference rewrote the purpose clause, leaving our statements of intent on the cutting room floor. In light of the fact that the Criminal Law Article 27 of the Annotated Code was being recodified, Legislative Reference also conformed the bill to the new sections of the pending criminal law Article.¹⁰⁶

As with the *Cooksey* bill, we prepared fact sheets, written testimony, and letters (submitted individually by Anna, Christian, Ilana, John, and myself) in support of the *Churchfield* bill. We made three main arguments:

- In order to provide *equal protection* to all victims of sexual crimes, regardless of which particular sexual crime goes to trial, Art. 27, § 461A must be amended to extend to *all victims of all sex crimes*. In order to be sure that the rape shield law is not circumvented, its protection also must extend to charges of lesser included crimes, such as simple assault.
- Part of the current legislative initiative is to make clear that the General Assembly strongly and unequivocally *rejects* the Wigmore view that a female is unworthy of belief because she is not a virgin or is sexually active. Moreover, it *extends that same protection to male victims* by adding the gender-neutral phrase “or prior sexual activity.”

- The bill thus corrects two significant, historical omissions by providing for *equal protection for not only young victims and adult victims*, but also equal protection for *male victims and female victims*.¹⁰⁷

We found support for this initiative to be widespread. Written testimony was also provided by many other groups and individuals in 2002:

- State Council on Child Abuse and Neglect
- Citizens' Review Board for Children
- The House of Ruth
- The Women's Law Center of Maryland
- Deputy State's Attorney for Prince George's County, Robert L. Dean
- Prevent Child Abuse Maryland
- Clinical/Forensic Social Worker in Office of State's Attorney for Baltimore City, Shannon B. Wood
- University of Baltimore School of Law Family Law Association President Dawn Anderson
- American Academy of Pediatrics
- Women Legislators of Maryland
- David Flemmer, Psy.D., Ph.D., child psychiatrist
- Robb Longman, Esq.
- University of Baltimore law students Adam Marker and Rue Stewart

Oral testimony was also provided in 2002 by:

- Baltimore County Assistant State's Attorney John Cox, Chief of Child Abuse and Sex Offense Division
- Wicomico County State's Attorney Davis Ruark and Assistant State's Attorney Angela Di Pietro
- Frederick County Deputy State's Attorney Charles Smith
- Ellen Mugmon, State Council on Child Abuse and Neglect
- Charlie Cooper, Citizens' Review Board for Children
- Bobbie Steyer, The House of Ruth
- Bobbi Seabolt, American Academy of Pediatrics
- Gloria Goldfaden, Prevent Child Abuse Maryland

Opponents were Angela Shelton, Larry Rogers, and Ted Wieseman of the Public Defender's Office. Before the House Judiciary Committee, Terry Rogers of the Public Defender's Office questioned the meaning of the gender-neutral phrase "or other sexual activity."

John Maclean, home in Illinois over Christmas break, had found that Illinois' rape shield statute applied to protect sexual child abuse victims.¹⁰⁸ Back in Baltimore, he wrote an op-ed piece for The Daily Record, supporting the bill.¹⁰⁹ Joe Surkiewicz wrote a news article about our efforts.¹¹⁰

The bill passed the Senate as introduced. But, in response to the Public Defender's issue, the House Committee substituted the phrase "or abstinence" for the phrase "or prior sexual activity," though this change was not intended to have any different substantive effect, and the bill passed the House with that amendment, on the last day of the session. The bill was not taken up in Conference. Because it did not pass both houses in identical form, the bill failed. Ilana, Anna, and I vowed to go back the next year and try again. On May 14, 2002, Christian, Ilana, and I appeared on WCBM's Court Talk, with Harold Dwin, to talk about the bill and our hopes for the next session.

B. The 2003 Session

With the leadership of Ellen Mugmon, a tireless child advocate and member of the State Council on Child Abuse and Neglect, we saw our *Churchfield* topic on the list to be considered in fall 2002 as part of the Women's Legislative Agenda for 2003. Anna and I attended that group's meeting on October 6, 2002. We met with several legislators, including Delegate Liz Bobo and Senator Delores Kelley. I made an oral presentation.

We were pleased to learn later that the bill was adopted as one of the group's top four legislative priorities. We also netted the help of Maryland Citizens Against Sexual Assault, and its lawyer-lobbyist, Lisae Jordan, who volunteered to be the lead contact on the bill for the Women's Legislative Agenda.

The redistricting and the 2002 elections had lost us several of our sponsors and supporters, including Senators Sfikas and Baker and Delegates Montague and Cole. Delegate Grosfeld was elected to the Senate and Delegate Doory moved to another committee in the House.

Delegate Montague was appointed by Governor Ehrlich to be the Secretary of Juvenile Services. But again, we were fortunate. Ilana, first-year evening student Joyce Lombardi, and I met with Delegate Pauline Menes, who agreed to be our lead sponsor in the House, and with Senator Jennie Forehand, who agreed to be the lead sponsor in the Senate. Our sponsors submitted the bill as it had passed the House in 2002; it became numbered S.B. 453 in the Senate and H.B. 196 in the House.

S.B. 453 was sponsored by Senator Forehand and co-sponsored by Senators Jim Brochins, Ulysses Currie, Brian Frosh (new chair of the Judicial Proceedings Committee), Rob Garagiola, Leo Green, Sharon Grosfeld, Paula Hollinger, Nancy Jacobs, Phil Jimeno, Delores Kelley, Gloria Lawlah, Thomas Middleton, and Leonard Teitelbaum.

H.B. 196 was sponsored by Delegate Menes and co-sponsored by Delegates Joanne Benson, David Boschert, Bennett Bozman, Anthony Brown, Joan Cadden, Jon Cardin, Mary Conroy, Steven DeBoy, Sr., Ann Marie Doory, Don Dwyer, Adelaide Eckardt, Barbara Frush, Tawanna Gaines, Marilyn Goldwater, Tim Hutchins, Mary-Dulany James, Sally Jameson, Darryl Kelley, Kevin Kelly, Nancy King, Ruth Kirk, Susan Lee, Mary Ann Love, Richard Madaleno, Jr., Salima Marriott, Brian Moe, Karen Montgomery, Dan Morhaim, Shirley Nathan-Pulliam, Doyle Niemann, Rosetta Parker, Obie Patterson, Carol Petzold, Neil Quinter, Justin Ross, Luiz Simmons, Ted Sophocleus, Veronica Turner, House Judiciary Chairman Joe Vallario, and Bobby Zirkin.

I met with Chairman Vallario and counsel to the House Judiciary Committee to discuss the bill. Ilana, Joyce, Anna, Lisae Jordan, and Ellen Mugmon met with numerous legislators and talked up the bill, as did Senator Forehand and her legislative aide, Maureen Reynolds, Delegate Menes and her aide, Grace Mary Brady.

In response to the questions raised during the meetings with individual legislators, Ilana set about delving into the legislative history of the original rape shield statute and each of its prior amendments. This endeavor entailed many hours spent poring over microfiche in the General Assembly's Annapolis library. Joyce used the Internet to research other states' rape shield laws. She discovered that Maryland's and Georgia's were the only two not to cover all sex offenses: Georgia's does not apply to sexual

battery or aggravated sexual battery, although it does apply to sexual child abuse.¹¹¹

Written testimony in support of the bills was submitted not only by us, but also by:

- Maryland Family Violence Council, Attorney General J. Joseph Curran, Jr.
- House of Ruth, Dorothy Lennig
- Maryland Network Against Domestic Violence
- Maryland Commission on Women
- League of Women Voters
- Maryland Coalition Against Sexual Assault
- University of Baltimore Center for Families, Children, and the Courts
- Maryland State's Attorney's Association, by Sue Schenning, Deputy State's Attorney for Baltimore County
- State Council on Child Abuse and Neglect
- Citizens' Review Board for Children
- Prevent Child Abuse Maryland
- Women's Law Center of Maryland
- Glenn Ivey, State's Attorney for Prince George's County
- American Association of University Women
- Maryland Jewish Alliance
- Family Law Association, student group, University of Baltimore School of Law
- Joseph Mantegna, retired police officer, Baltimore City
- Robb Longman, Esq.
- David Flemmer, Psy.D., Ph.D., child psychiatrist, Student Services, Montgomery County Public Schools
- University of Baltimore School of Law students Brendan O'Connell, Thomas Merrill, Jennifer Merrill, Rue Stewart, Sheila Garrity, and Lawrence Katz

Oral testimony other than ours and the sponsors' was provided by:

- Baltimore County Assistant State's Attorney Sue Hazlett, Child Abuse and Sex Offense Division, Chair of Maryland State's Attorneys' Association's Child Abuse Subcommittee
- Ellen Mugmon, State Council on Child Abuse and

- Neglect
- Lisae Jordan, MCASA
- Claude de Vastey, Women's Bar Association
- Cynthia Golomb, Maryland Network Against Domestic Violence

I wrote an op-ed piece for The Daily Record¹¹² and Joyce contacted various news reporters and wrote letters to the editor of The Baltimore Sun.

S.B. 453 passed both Committees and both Houses, was signed by Governor Ehrlich, and went into effect October 1, 2003.¹¹³ The 2003 bill protects child abuse victims to the same extent as adult victims, and male victims as much as female victims. Opinion evidence or reputation evidence as to a victim's sexual orientation will now be precluded.¹¹⁴ But the statute does not preclude *the prosecution* from presenting evidence of the victim's prior specific acts or the absence thereof.¹¹⁵

VIII. Conclusion

The University of Baltimore law students who participated in reforming Maryland's criminal law by the adoption of the *Cooksey* bill, H.B. 1302, in 2002 and the rape shield/*Churchfield* bill, S.B. 453, in 2003 should be proud, as should all the dedicated public servants, including former Delegate Montague, Senator Forehand, and Delegate Menes, who led the fight for their passage. May the good works of all continue.

Appendix A

The "*Cooksey* Bill," H.B. 1302, enacted in 2002, and codified at Md. Crim. L. Code Ann. § 3-315 reads:

§ 3-315. Continuing course of conduct with child.

(a) *Prohibited*. – A person may not engage in a continuing course of conduct which includes three or more acts that would constitute violations of § 3-303, § 3-304, § 3-305, § 3-306, or § 3-307 [rape in the first degree, rape in the second degree, sexual offense in the first degree, sexual offense in the second degree, or sexual offense in the third degree] of this subtitle over a period of 90 days or more, with a victim who is under the age of 14 years at any time during the course of conduct.

(b) *Penalty*. – (1) A person who violates this sec-

tion is guilty of a felony and on conviction is subject to imprisonment not exceeding 30 years.

(2) A sentence imposed under this section may be separate from and consecutive to or concurrent with a sentence under § 3-602 [sexual abuse of a minor] of this title.

(c) *Determination*. – In determining whether the required number of acts occurred in violation of this section, the trier of fact:

(1) must determine only that the required number of acts occurred; and

(2) need not determine which acts constitute the required number of acts.

(d) *Merger*. – (1) A person may not be charged with a violation of § 3-303, § 3-304, § 3-305, § 3-306, or § 3-307 of this subtitle involving the same victim in the same proceeding as a violation of this section unless the other violation charged occurred outside the time period charged under this section.

(2) A person may not be charged with a violation of § 3-303, § 3-304, § 3-305, § 3-306, or § 3-307 of this subtitle involving the same victim unless the violation charged occurred outside the time period charged under this section.

Appendix B

The "*Churchfield* Bill," S.B. 453, enacted in 2003, amended as shown, Md. Crim. L. Code Ann. § 3-319, reads:

Sexual Offenses - Reputation and Opinion Evidence and Evidence of Sexual Conduct-Admissibility

Article-Criminal Law § 3-319

FOR the purpose of applying to sexual crimes against both males and females, the sexual abuse of a minor, the sexual abuse of a vulnerable adult, and lesser included crimes a prohibition against admitting in a prosecution reputation and opinion evidence relating to a victim's chastity or abstinence; applying to sexual crimes against both males and females, the sexual abuse of a minor, the sexual abuse of a vulnerable adult, and lesser included crimes and au-

thorization for admitting in a prosecution under certain circumstances a specific instance of a victim's sexual conduct; making a technical change; and generally relating to admissibility of reputation and opinion evidence and evidence of sexual contact.

(a) Evidence relating to a victim's reputation for chastity OR ABSTINENCE and opinion evidence relating to a victim's chastity OR ABSTINENCE may not be admitted in a prosecution for ~~rape, a sexual offense in the first or second degree, attempted rape, or an attempted sexual offense in the first or second degree~~: (1) A CRIME SPECIFIED UNDER THIS SUBTITLE 3 OR A LESSER INCLUDED CRIME; OR (2) THE SEXUAL ABUSE OF A MINOR UNDER § 3-602 OF THIS TITLE OR A LESSER INCLUDED CRIME; OR (3) THE SEXUAL ABUSE OF A VULNERABLE ADULT UNDER § 3-604 OF THIS TITLE OR A LESSER INCLUDED CRIME.

(b) Evidence of a specific instance of a victim's prior sexual conduct may be admitted in a prosecution ~~for rape, a sexual offense in the first or second degree, attempted rape, or an attempted sexual offense in the first or second degree~~ described in subsection (a) of this section only if the judge finds that: (1) the evidence is relevant; (2) the evidence is material to a fact in issue in the case; (3) the inflammatory or prejudicial nature of the evidence does not outweigh its probative value; and (4) the evidence:

(i) is of the victim's past sexual conduct with the defendant;

(ii) is of a specific instance of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma;

(iii) supports a claim that the victim has an ulterior motive to accuse the defendant of the crime; or

(iv) is offered for impeachment after the prosecutor has put the victim's prior conduct in issue.

(c) (1) Evidence described in subsection (a) or (b) of this section may not be referred to in a statement to a jury or introduced in a trial unless the court has first held a closed hearing ~~under paragraph (2) of this subsection~~ and determined that the evidence is admissible.

(2) The court may reconsider a ruling excluding the evidence and hold an additional closed hearing if new information is discovered during the course of the trial that may make the evidence admissible.

ENDNOTES

1. Professor of Law and Dean Joseph Curtis Faculty Fellow, University of Baltimore School of Law; J.D., Duke University Law School, 1974; B.A., University of Pennsylvania, 1971.

Lynn McLain was an associate in the litigation department at Piper and Marbury in Baltimore, a graduate fellow at Duke University, and then in 1977 joined the faculty at the University of Baltimore School of Law, where she teaches courses in evidence and copyright law. Professor McLain is admitted to the bars of the Court of Appeals of Maryland (December 1974), the United States District Court for the District of Maryland (March 1975) and the United States Supreme Court (March 1990). In addition, Professor McLain is the author of a three-volume treatise, *Maryland Evidence: State and Federal*, as well as a book entitled *Maryland Rules of Evidence*. As a Special Reporter for the Rules Committee of the Court of Appeals of Maryland, she participated in drafting Maryland's rules of evidence.

2. At the time the pertinent statute was codified at MD. ANN. CODE, art. 27, § 461A. It was recodified in 2002 as MD. CRIM. L. CODE ANN. § 3-319.

3. *Churchfield v. State*, 137 Md. App. 668, 769 A.2d 313 (2001).

4. *Cooksey v. State*, 359 Md. 1, 752 A.2d 606 (2000).

5. Child abuse, as defined by the Maryland statute, may be committed only by "(1) A parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor . . . [or] (2) A household member or family member" of the child. MD. CRIM. L. CODE ANN. § 3-602(b) (Supp. 2003). Thus, for example, a teacher who meets a young student at home on the weekend and sexually abuses him would not commit child abuse. *Cf. Anderson v. State*, 142 Md. App. 498, 790 A.2d 732 (2002) (act qualified as child sexual abuse because teacher gave student ride to teacher's house from school); 82 Op. Att'y Gen. Md. 97-017 (1997).

6. 1976 Md. Laws ch. 574 (codified as MD. ANN. CODE, art. 27, § 461A). In 2002, section 461A was recodified as § 3-319 of the Criminal Law article of the Maryland Annotated Code.

7. H.R. 4727. *See* Cong. Rec. H11944 (Oct. 10,

1978); Cong. Rec. S18579 (Oct. 12, 1978).

8. See 124 Cong. Rec. 34,913 (1978) (remarks of Rep. Holtzman) (“Since rape trials become inquisitions into the victim’s morality, not trials of the defendant’s innocence or guilt, it is not surprising that [rape] is the least reported crime. It is estimated that as few as one in ten rapes is ever reported.”).

9. See McCORMICK ON EVIDENCE § 193 at 685 & n.30 (5th ed. 1999) (citing collections of studies).

10. See 124 Cong. Rec. 34,912 (1978) (remarks of Rep. Mann) (“[F]or many years in this country, . . . [d]efense lawyers were permitted great latitude in bringing out intimate details about a rape victim’s life. Such evidence quite often serves no real purpose and only results in embarrassment to the rape victim and unwarranted public intrusion with her private life.”). See generally LYNN McLAIN, 5 MARYLAND EVIDENCE: STATE AND FEDERAL §§ 412:1-412:2 (2d ed. 2001 & Supp. 2003) (citing numerous sources).

11. See generally Margaret Berger, *Man’s Trial, Woman’s Tribulation*, 77 COLUM. L. REV. 1 (1977).

12. See notes 30-34 *infra* and accompanying text.

13. See 1 WIGMORE ON EVIDENCE §§ 62 & 200 (3d ed. 1940) (admissibility of evidence of victim’s reputation for unchastity is “generally conceded,” though “many jurisdictions” preclude evidence of her other specific acts of unchastity; Wigmore argued for admissibility of specific instances); 1A WIGMORE §§ 62-62.1 (rev. 1983).

14. *Id.* See, e.g., *Humphreys v. State*, 227 Md. 115, 121, 175 A.2d 777, 780 (1961); *State v. Lucado*, 40 Md. App. 25, 35-37, 389 A.2d 398, 404-05 (1978).

15. FED. R. EVID. 412(a) (criminal and civil cases) & (b)(2) (civil cases only); MD. CRIM. L. CODE ANN. § 3-319(b)(ii)-(iv) (2002).

16. FED. R. EVID. 412; MD. CRIM. L. CODE ANN. § 3-319(a) (2002).

17. *E.g.*, *Wheeler v. State*, 88 Md. App. 512, 527-28, 596 A.2d 78, 86 (1991).

18. FED. R. EVID. 412(b)(1)(B); MD. CRIM. L. CODE ANN. § 3-319(b)(i) (2002).

19. FED. R. EVID. 412(b)(1)(A) & (C)); MD. CRIM. L. CODE ANN. § 3-319(b)(ii)-(iv) (2002).

20. FED. R. EVID. 412(b)(1)(A); MD. CRIM. L. CODE ANN. § 3-319(b)(ii) (2002) (“the source or origin of semen, pregnancy, disease, or trauma”). See *United States*

v. Bear Stops, 997 F.2d 451 (8th Cir. 1993) (reversible error to exclude evidence that victim had been assaulted by others on another occasion when offered to provide alternative explanation for victim’s manifesting post-abuse syndrome and for physical evidence).

21. DNA evidence can pinpoint the identity of the individual whose blood, semen, hair, saliva, skin, etc. is found on the victim. See generally John P. Cronan, *The Next Frontier of Law Enforcement: A Purpose for Complete DNA Databanks*, 28 AM. J. CRIM. L. 119, 121 (2000).

22. FED. R. EVID. 412(b)(1)(C). See, e.g., *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam) (state trial court committed reversible constitutional error when it excluded evidence of a rape victim’s cohabitation at the time of trial with the man to whom she reported the rape [a man of another race than the victim, but of the same race as the defendant]; the defense was consent, and the defendant argued that the victim’s relationship with her boyfriend gave her a motive to lie).

23. MD. CRIM. L. CODE ANN. § 3-319(b)(iii) (2002) (the evidence “supports a claim that the victim has an ulterior motive to accuse the defendant of the crime . . .”). See *Johnson v. State*, 332 Md. 456, 632 A.2d 152 (1993) (reversible error to exclude evidence that the victim admittedly had recently exchanged sex for drugs, when defense was that she had agreed to do so, but defendant had failed to give her drugs).

24. MD. CRIM. L. CODE ANN. § 3-319(b) (2002). See, e.g., *White v. State*, 324 Md. 626, 638-39, 598 A.2d 187, 193 (1991) (trial judge properly balanced probative value against prejudice; “Proffered evidence must contain a direct link to the facts at issue in a particular case before it can be admitted.”).

25. FED. R. EVID. 412(c)(1); MD. CRIM. L. CODE ANN. § 3-319(c) (2002).

The United States Supreme Court has upheld the facial constitutionality of the similar notice and hearing requirements of Michigan’s rape-shield statute. *Michigan v. Lucas*, 500 U.S. 145 (1991), on remand, 484 N.W.2d 685 (Mich. App. 1992), appeal after remand, 507 N.W.2d 5 (Mich. App. 1993). In that case, the Michigan Court of Appeals had ruled that precluding a defendant (because of his failure to give notice and to comply with other statutory requirements) from presenting evidence of his own

prior sexual conduct with the victim violated, *per se*, the Sixth Amendment.

The Supreme Court majority reversed, but remanded to the Michigan court to determine, first, whether its statute permitted preclusion and, second, whether preclusion was constitutional under the facts of the particular case. In reaching this resolution, the majority, in an opinion by Justice O'Connor, recognized that "[t]he notice-and-hearing requirement serves legitimate state interests in protecting against surprise, harassment, and undue delay. Failure to comply with this requirement may in some cases justify even the severe sanction of preclusion." 500 U.S. at 152-53.

Maryland's statute was upheld as constitutional in *Thomas v. State*, 301 Md. 294, 483 A.2d 6 (1984).

26. *See* FED. R. EVID. 412(b)(1) (evidence must be "otherwise admissible under these rules," thus including, by reference, FRE 403); MD. CRIM. L. CODE ANN. § 3-319(b) (2002); *Smith v. State*, 71 Md. App. 165, 181-90, 524 A.2d 117, 125-29 (1987) ("Whether evidence of prior sexual contact will be admitted to explain, *inter alia*, the presence of semen requires the trial court to determine whether the probative value of the evidence of the victim's prior sexual contact *substantially outweighs* the danger of undue prejudice.").

27. FED. R. EVID. 412(c)(2); MD. CRIM. L. CODE ANN. § 3-319(c) (2002). *See Doe v. United States*, 666 F.2d 43 (4th Cir. 1981) (if the court orders evidence of the victim's sexual conduct may be admitted at trial, the victim has the right to an immediate appeal of that order).

28. MD. CRIM. L. CODE ANN. §§ 3-303(a)(1) and 3-304(a)(1) (2002) refer only to "vaginal intercourse."

29. *See* 1977 Md. Laws ch. 294 (adding prosecutions for a "sexual offense in the first or second degree"); 1997 Md. Laws ch. 311 & 312 (adding prosecutions for attempted rape and attempted sexual offenses in the first or second degree).

30. Such reputation evidence was admissible on the issue of consent. *E.g.*, *Caldwell v. State*, 276 Md. 612, 349 A.2d 623 (1976); *Giles v. State*, 229 Md. 370, 379-80, 183 A.2d 359, 363 (1962), *vacated & remanded on other grounds*, 386 U.S. 66 (1967); *Humphreys v. State*, 227 Md. 115, 121, 175 A.2d 777, 780 (1961); 1 MCCORMICK ON EVIDENCE § 193 at 681-82 (5th ed. 1999); 1A WIGMORE ON EVIDENCE § 62 (rev. 1983).

31. MD. CTS. & JUD. PROC. CODE ANN. § 9-115 (2002 Repl. Vol.) (originally enacted as MD. ANN. CODE, art. 35, § 13C (1957)).

32. *See* 1 MCCORMICK ON EVIDENCE § 193 at 681-82 & n.9 (5th ed. 1999) (jurisdictions were divided as to whether proof by specific instances was permitted); 1 WIGMORE ON EVIDENCE §§ 62 & 200, *supra* note 13.

33. 3 WIGMORE ON EVIDENCE § 924a at 459-60 (3d ed. 1940) (some emphasis in original, some added). *See also id.* §§ 934a, 963, & 982; *id.* §§ 62 & 200.

34. *Id.* § 924b at 466 (emphasis added).

35. MD. CRIM. L. CODE ANN. § 3-319(b)(iii) (2002) (previously MD. ANN. CODE, art. 27, § 461A(a)(3) (1996 Repl. Vol.)). *See Olden v. Kentucky*, 488 U.S. 227 (1988) (defendant's confrontation right violated by preclusion of evidence that victim's affair with boyfriend created motive for her to falsely claim rape); *Johnson v. State*, 332 Md. 456, 632 A.2d 152 (1993) (abuse of discretion to exclude evidence of victim's having had sex with others in exchange for crack cocaine – on dates prior to alleged rape – when defense witnesses and defendant testified that she had made such an arrangement with them, though they failed to give her the drugs promised).

36. *See State v. DeLawder*, 28 Md. App. 212, 344 A.2d 446 (1975) (when the defense was that the victim thought she was pregnant by another, and charged the accused with rape in order to avoid disclosure of her having voluntarily had sexual intercourse, the Court of Special Appeals held that exclusion of evidence that she did have intercourse with others violated the defendant's right of confrontation) (case was decided before rape shield statute was enacted).

37. 1977 Md. Laws ch. 294.

38. MD. CRIM. L. CODE ANN. § 3-305 (2002).

39. *Id.* § 3-306.

40. *Id.* § 3-301(e).

41. 1997 Md. Laws. ch. 311 & 312.

42. *See* MD. CRIM. L. CODE ANN. §§ 3-304 through 3-312, 3-321 through 3-323, 3-602, and 3-604 (2002 & Supp. 2003). *See also Starkey v. State*, 147 Md. App. 700, 810 A.2d 542 (2002) (defendant was convicted of third-degree sexual offense for receiving fellatio from the young victim; statute prohibiting lesser crime of perverted sexual practices, including but not limited to fellatio did not control, so as to preclude conviction for

third-degree sexual offense); Jennifer McMenamin, *Rape Charges Added to Child Sex Abuse Case of Former Carroll Schools Superintendent*, BALT. SUN, Mar. 7, 2003, at 2B, col. 5 (defendant indicted for second-degree rape, in addition to charges of “two counts of sexual child abuse, third- and fourth-degree sex offenses, and one count of second-degree assault”); Jason Song & Jonathan D. Rockoff, *Dundalk Teacher Charged in Sex Crime*, BALT. SUN, Jan. 9, 2003, at 2B, col. 5 (defendant charged with “second-, third-, and fourth-degree sex offenses, possession of child pornography and filming a child in a pornographic act”).

43. *Davenport v. State*, 89 Md. App. 517, 598 A.2d 827 (1991).

44. *Churchfield v. State*, 137 Md. App. 668, 769 A.2d 313 (2001).

45. *Id.* at 673, 769 A.2d at 316.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 674, 769 A.2d at 316.

50. *Id.*

51. *Id.*

52. *Id.*, 769 A.2d at 316-17.

53. Ms. Di Pietro is a University of Baltimore School of Law alumna.

54. *Id.* at 677-78 & n.2, 769 A.2d at 319. Christina testified that the first incident of vaginal intercourse occurred in January or February 1999 and that the last incident occurred during the first week of January 2000, but “she could not say how many times it happened.” *Id.* at 673-74, 769 A.2d at 316.

55. *Cooksey v. State*, 359 Md. 1, 752 A.2d 606 (2000).

56. *Id.* at 3, 752 A.2d at 607.

57. *Id.* at 3-4, 752 A.2d at 607.

58. *Id.* at 17, 22-23, 752 A.2d at 614-15, 617-18. The Court of Appeals, in a unanimous decision authored by Judge Wilner, held that the counts for second- and third-degree sexual offenses had to be dismissed as duplicitous, because under MD. ANN. CODE, art. 27, §§ 464A and B, they are “single act” crimes. 359 Md. at 6, 352 A.2d at 608. Convictions under those sections would be valid only if the jurors unanimously agreed that the defendant had committed the same single act proscribed.

As those counts had been alleged, jurors could potentially return a guilty verdict if some of them agreed that the defendant committed the sexual conduct on, for example, August 23 and others found that he had done so on October 13. Such a jury verdict would violate the rule of juror unanimity. It also would not disclose to the judge how many, if any, offenses on which the jury agreed, which could be pertinent to sentencing. Finally, a mistrial for a hung jury could not lead to a new trial without violating double jeopardy principles, because it might be that the first jury had believed that the defendant did not commit one or more of the alleged multiple acts.

Therefore, the charging of “separate criminal acts, committed not as part of a single continuing incident but over an extended period of time, to form a singular continuing crime” was not permissible under §§ 464A or 464B. 359 Md. at 17, 769 A.2d at 614-15.

59. *Id.* The Court of Appeals held that child “[a]buse, as defined in [MD. ANN. CODE, art. 27,] § 35C is . . . a crime that can be committed both by a single act and through a continuing course of conduct consisting of multiple acts.” 359 Md. at 23-24, 752 A.2d at 617-18.

60. *See id.* at 4-5, 23-24, 352 A.2d at 607-08, 617-18.

61. Telephone conversations of author with Elizabeth Ireland, Esq., Dec. 20, 2001, and Angela Di Pietro, Esq., Jan. 3, 2002; *Churchfield*, 137 Md. App. at 677-78 & n.2, 769 A.2d at 319 & n.2.

62. *Churchfield*, 137 Md. App. at 673, 769 A.2d at 316.

63. Testimony of Angela Di Pietro before the House Judiciary Committee, Annapolis, Md., Mar. 6, 2002; *Churchfield*, 137 Md. App. at 681, 769 A.2d at 320-21.

64. *Churchfield*, 137 Md. App. at 680, 769 A.2d at 320.

65. *Id.* at 676-82, 769 A.2d at 318-21.

66. *Id.* at 681, 769 A.2d at 321.

67. *Id.* at 680-81, 769 A.2d at 320.

68. *Id.* at 675, 769 A.2d at 317.

69. *Id.* at 674, 676, 769 A.2d at 317.

70. *Id.*

71. *Id.* at 685-86, 769 A.2d at 323.

72. *Id.* at 676-81, 769 A.2d at 318-20.

73. *See* 5 LYNN MCLAIN, MARYLAND EVIDENCE: STATE AND FEDERAL § 403:1 (2d ed. 2001) (citing, e.g.,

Lyba v. State, 321 Md. 564, 570-71, 583 A.2d 1033, 1036 (1991)).

74. See 6 LYNN McLAIN, MARYLAND EVIDENCE: STATE AND FEDERAL §611:2 at 583-86 & nn. 3 and 5 (2d ed. 2001 & Supp. 2003) (citing, e.g., Coleman v. State, 321 Md. 586, 609, 583 A.2d 1044, 1055 (1991)).

75. *Churchfield*, 137 Md. App. at 673, 769 A.2d at 316.

76. *Id.* at 676, 769 A.2d at 317.

77. *Id.* at 672, 769 A.2d at 316.

78. *Id.* at 672, 687-89, 769 A.2d at 316, 324-25.

In a prescient comment, Judge Thieme wrote for the panel: “We recognize that our holding today might concern strong advocates for the rights of victims of child abuse and other crimes of a sexual nature.” *Id.* at 695, 769 A.2d at 329.

79. E.g., *Smith v. State*, 145 Md. App. 400, 434, 805 A.2d 1108, 1128 (2002) (Eyler, J., dissenting, joined by Murphy, C.J., D. Eyler, Krauser, and Greene, JJ.).

80. *Churchfield*, 137 Md. App. at 696, 769 A.2d at 329.

81. Telephone conversation of Angela Di Pietro, Esq., with author, Jan. 3, 2002; testimony of Angela Di Pietro, Esq. before the House Judiciary Committee, Mar. 6, 2002, Annapolis, Md.

82. *Id.* See MD. CRIM. PRO. CODE ANN. § 11-701 (2002) (establishing registration procedure).

83. Telephone conversation of the author with Angela Di Pietro, Esq. (Jan. 3, 2002).

84. *Churchfield*, 137 Md. App. at 677-78, 769 A.2d at 318-19.

85. See notes 28 and 50 *supra* and accompanying text.

86. Written testimony of Ilana Cohen and Anna Mantegna (on file with author).

87. FED. R. EVID. 401, 402; MD. RULES 5-401, 5-402.

88. The statute does not require that the act be against the will of, or without the consent of, the victim. See MD. CRIM. L. CODE ANN. § 3-602 (Supp. 2003). Cf. *Owens v. State*, 352 Md. 663, 687-90, 724 A.2d 43, 55-56 (1999) (Maryland’s statutory rape law is a flat prohibition of certain sexual conduct regardless of defendant’s intent to violate law and regardless “whether the victim purported to consent”), *cert. denied*, 527 U.S. 1012 (1999); *Lusby v. State*, 217 Md. 191, 141 A.2d

893 (1958) (sexually abused daughter was victim of father, not his accomplice in incestuous relationship); *Taylor v. State*, 214 Md. 156, 133 A.2d 414 (1957) (juvenile’s consent no defense in sodomy case). See generally Wayne LaFave, SUBSTANTIVE CRIMINAL LAW § 6.5(a) (2d ed. 2003) (because crime is against society, consent by a victim is generally not a defense to a criminal prosecution; rape is an exception to this general rule).

89. *Churchfield*, 137 Md. App. at 682, 769 A.2d at 321.

90. *Id.* at 686, 769 A.2d at 324.

91. Karen S. Peterson, *Sexually Active Teens are Often Clueless; May Lack Basic Knowledge about Disease, Birth Control*, USA TODAY, May 20, 2003, at D.08.

92. 1A WIGMORE ON EVIDENCE § 62 (Tillers rev., 1983) (emphasis added).

93. Jennie G. Noll, et al., *A Prospective Investigation of the Impact of Childhood Sexual Abuse on the Development of Sexuality*, 71 J. CONSULTING & CLINICAL PSYCHOLOGY 575, 582 (2003). See also Written Testimony of David Flemmer, Psy.D., Ph.D., provided to the House Judiciary Committee, Annapolis, Md., Feb. 11, 2003 (stating that sexual abuse may arouse a compulsive yearning for giving and receiving sexual pleasure because of the conditioning of inappropriate sexual activity).

94. Those students were Ilana Cohen, J.D., May 2003; Christian Elkington, J.D., December 2002; Joyce Lombardi, J.D. expected May 2006; John Maclean, J.D., May 2003; Anna Mantegna, J.D., May 2003; Michele Payer, J.D., May 2003; and Carlotta Woodward, J.D., May 2003. The author also wishes to thank Steve Goldberg, J.D. expected May 2004, who contributed his research assistance for this article.

95. BLACK’S LAW DICTIONARY 214 (5th ed., 1979) provides:

Chaste. Never voluntarily having had unlawful sexual intercourse. An unmarried woman who has had no carnal knowledge of men. *New v. State*, 141 Tex. Crim. 536, 148 S.W.2d 1099, 1101 (1941).

See also *Lucado v. State*, 40 Md. App. 25, 389 A.2d 398 (1978) (evidence that male victim’s reputation that he was not homosexual – offered to rebut male defendant’s testimony that victim had “started messing around with [him]” – did not relate to his “chastity” and therefore was not excluded by the rape shield statute). In

Lucado, the Court of Special Appeals relied on legislative history of the 1976 and 1977 acts, as well as on Webster's Dictionary, and legal precedent. Judge Wilner, writing for the panel, explained: "In the law, these terms ['chaste' and 'chastity'] have been traditionally used with particular reference to women; indeed, they have been associated with nearly every vestige of the different, and generally unequal, treatment of men and women by the law." *Id.* at 34-35 & nn. 7-9; 389 A.2d at 403-04 & nn. 7-9.

96. *Cooksey*, 359 Md. at 18-19, 752 A.2d at 615.

97. *Id.* at 19, 752 A.2d at 616.

98. *Id.* at 27, 752 A.2d at 620.

99. N.Y. PENAL LAW § 130.75 (McKinney 1997 & Supp. 2001).

100. CAL. PENAL CODE § 288.5 (West 1999). Christian also located ARIZ. REV. STAT. § 13-1417 (2001) and WIS. STAT. ANN. § 948.025 (West 2001) as additional models for such statutes.

101. In comparison, maximum penalties for "one act" sexual offenses are as follows:

Then Art. 27, § 464 (now Crim. L. § 3-305): First-degree sexual offense (*sexual act* using dangerous weapon, suffocation, strangulation, disfigurement, serious physical injury, or such threats, including the threat of kidnapping or murder to victim or another known to the victim.; or aided by another person(s); or in connection with burglary): life (unless defendant has previously been convicted of this crime of first-degree rape, or unless victim was a child under sixteen and defendant was also convicted under § 338 [kidnapping], then life without parole) (same penalty as rape in the first degree, now § 3-303).

Then § 464A (now § 3-306): Second-degree sexual offense (*sexual act* without consent by force or threat of force; or with mentally or physically incapacitated victim; or with victim under fourteen and defendant at least four years older than victim): twenty years (same penalty as rape in the second degree, now § 3-304).

Then § 464B (now § 3-307): Third-degree sexual offense (*sexual contact* [defined differently from "sexual act"] under same conditions as first-degree or second-degree sexual offense, or *vaginal intercourse* [defined separately from "sexual act"] by a twenty-one-year-old or older

with a person fourteen or fifteen years old): ten years.

Then § 464C (now § 3-308): Fourth-degree sexual offense (*sexual contact* without consent; or *sexual act* [not aided and abetted by another person] when victim is fourteen or fifteen and defendant is at least four years older than victim; or *sexual act* or vaginal intercourse with a victim who is fourteen or fifteen and defendant is at least four years older than victim [unless defendant was at least twenty-one, in which case it is third-degree sexual offense]): one year or \$1,000 or both.

Then § 461(e) (now § 3-301(e)): "Sexual act" means cunnilingus, fellatio, anilingus, anal intercourse, or penetration by an object into another person's genital opening or anus reasonably construed to be for sexual arousal, gratification, or abuse. (Vaginal intercourse is covered separately, in rape statutes: § 3-303, first degree [life or life without parole] and § 3-304, second degree [twenty years]).

Then § 461(f) (now § 3-301(f)): "Sexual contact" means intentional touching of victim or defendant's genital and/or other intimate area (other than by penis, mouth, or tongue) for purposes of sexual arousal, gratification, or abuse.

The crime of sexual child abuse (then § 35C, now § 3-602) has a maximum sentence of twenty-five years, whether for one instance or for many instances proved under the same count. The crime of a continuing course of sexual conduct with a child, set forth in Appendix A, has a maximum sentence of thirty years. MD. CRIM. L. CODE ANN. § 3-301 *et seq.* (2002 & Supp. 2003).

102. *People v. Adames*, 62 Cal. Rptr. 2d 631, 54 Cal. App. 4th 198 (Cal. Ct. App. 1997); *People v. Calloway*, 176 Misc. 2d 161, 672 N.Y.S.2d 638 (N.Y. Sup. Ct. 1998); *State v. Molitor*, 210 Wis. 2d 415, 565 N.W.2d 248 (Wis. Ct. App. 1997).

103. Precedent for this approach can be found in *State v. Mulkey*, 316 Md. 475, 560 A.2d 24 (1989). In *Mulkey*, the Court of Appeals reversed the dismissal of an indictment. The Court held that the State's charges may well have been alleged with the requisite "reasonable particularity," when each of twelve different, specific sexual

Articles

offense counts charged only one offense, but as having occurred between June 1 and September 3, 5, or 6. The trial court was directed, on remand, to consider certain factors:

In a sexual offense case involving a child victim, the trial court's determination as to how "reasonably particular" a charging document should be as to the time of the offense should include [among other things] the following relevant considerations: 1) the nature of the offense; 2) the age and maturity of the child; 3) the victim's ability to recall specific dates; and 4) the State's good faith efforts and ability to determine reasonable dates." *Id.* at 488, 560 A.2d at 30.

104. *See* *People v. Johnson*, 40 Cal. App. 4th 24, 46 Cal. Rptr. 2d 836 (Cal. Ct. App. 1996) (prosecutor was not required to charge under continuous course of conduct statute, rather than ten counts of lewd act on child).

105. 2002 Md. Laws ch. 26, § 12; ch. 278, § 2. *See* Appendix A.

106. H.B. 1067 and S.B. 212, which were identical. -

107. Fact Sheet, p.2, submitted by this author, 2002 legislative session (on file with author).

108. ILL. REV. STAT. 1985, ch. 38, ¶¶ 115-17.

109. John Maclean, *A Shield for Minors, Too*, THE DAILY RECORD, Mar. 23, 2002, at 2B, col. 3.

110. Joe Surkiewicz, *Fixing a Hole in the Shield*, THE DAILY RECORD, Mar. 23, 2002, at 1B, col. 2.

111. *Stinson v. State*, 256 Ga. App. 902, 904, 569 S.E.2d 858, 861 (2002).

112. Lynn McLain, *Law Must Protect Child Victims*, THE DAILY RECORD, Jan. 11, 2003.

113. 2003 Md. Laws ch. 89. *See* Appendix B, *supra*.

114. With regard to similar results in Arkansas and Illinois, *see* *Logan v. Lockhart*, 994 F.2d 1324, 1330-31 (8th Cir. 1993) (trial court's application of Arkansas law to exclude evidence of male rape victim's past homosexual activity as irrelevant and more prejudicial than probative was not violation of due process); *State v. Campos*, 507 N.E.2d 1342 (Ill. App. Ct. 1987) (male child victim; rape shield statute applicable).

On the subject of male rape, see generally Nicholas

Burgess, *Male Rape: Offenders and Victims*, 137 AM. J. PSYCHIATRY 806 (1980).

115. *See* MD. CRIM. L. CODE ANN. § 3-319(b)(4)(iv) (Supp. 2003) (permitting impeachment "after the prosecutor has put the victim's prior sexual conduct in issue").

Duvall v. McGee:
**Tort Judgment Creditors Are Not Included in the Narrow Class of Creditors
Entitled to Invade a Spendthrift Trust**

By : Kevin Trogdon

The Court of Appeals of Maryland held tort judgment creditors are not included in the narrow class of creditors entitled to invade a spendthrift trust. *Duvall v. McGee*, 375 Md. 476, 826 A.2d 416 (2003). The court determined the rationale underlying decisions permitting invasion of a spendthrift trust for payment of alimony, child support, or taxes are not applicable to an obligation owed to ordinary creditors. *Id.*

James McGee (“McGee”) was convicted of felony murder for his participation in a robbery that resulted in the death of Katherine Ryon (“Ryon”). Robert Duvall (“Duvall”), Personal Representative of Ryon’s Estate, brought suit in the Circuit Court for Anne Arundel County seeking compensatory and punitive damages. The parties executed a settlement agreement for a judgment against McGee.

The settlement agreement acknowledged McGee as the beneficiary of a spendthrift trust (“Trust”) established by his deceased mother. Under the Trust’s terms, McGee was prohibited from alienating Trust principal or any other portion of the Trust while in the hands of the Trustee, and specifically shielded Trust principal and income from McGee’s creditors. Additionally, periodic income payments were made

to McGee by the Trustee. Pursuant to the settlement agreement, Duvall was prohibited from attaching or garnishing the periodic payments made to McGee by the Trustee.

To satisfy the judgment entered pursuant to the settlement agreement, Duvall served a Writ of Garnishment on the Trustee to invade the Trust principal. Duvall moved for summary judgment, arguing as a matter of public policy tort judgment creditors should be deemed a special class of creditors entitled to invade a spendthrift trust. The court denied Duvall’s motion for summary judgment and granted McGee’s cross-motion. Duvall appealed to the Court of Special Appeals of Maryland; however before it was heard, the Court of Appeals of Maryland granted certiorari.

The court of appeals began its analysis by recognizing spendthrift trusts are valid instruments under Maryland law. *Id.* at 483-84, 826 A.2d at 420. The court concluded principal of a spendthrift trust is not subject to garnishment while in the hands of a trustee. *Id.* (citing *Smith v. Towers*, 69 Md. 77, 14 A. 497 (1888)). The court reasoned although the right to sell and dispose of property is a necessary incident to absolute ownership of property, “the reasons on which the rule is founded do not apply to the transfer of

property in trust.” *Id.* at 485, 826 A.2d at 421 (quoting *Smith*, 69 Md. at 87, 14 A.2d at 499). Moreover, the court determined the only restraint on the right to dispose of trust property is when it is in the best interest of the community. *Id.*

As such, the court identified three circumstances where it had held, on public policy grounds, spendthrift trusts may be invaded for indebtedness: (1) alimony arrearage; (2) child support; and (3) income tax. *Id.* at 489, 826 A.2d at 423-24. The court recognized a fundamental difference between these obligations and those of ordinary creditors. *Id.* at 489, 826 A.2d at 424. The court reasoned a beneficiary’s wife and children are not creditors and the beneficiary’s liability to support them is not a debt. *Id.* at 493, 826 A.2d at 426. “The obligation to pay alimony in a divorce proceeding is regarded not as debt, but as a duty growing out of the marital relation and resting upon sound public policy.” *Id.* at 491, 826 A.2d at 425. Similarly, the court recognized the obligation to pay taxes is not considered debt, nor is the government viewed as a mere creditor. *Id.* at 493, 826 A.2d at 426. The court reasoned the obligation owed to ordinary creditors, however, grows out of contract, not statutory, duty. *Id.* at 492, 826 A.2d at 425.

Upon finding Ryon was only an

Recent Developments

ordinary creditor, the court held McGee's obligation was dissimilar to cases where invasion of a spendthrift trust was allowed for payment of alimony, child support, or taxes. *Id.* at 493, 826 A.2d at 426.

Therefore, the court concluded the Trust had no duty to Ryon's estate. *Id.* The court reasoned to allow the invasion of the Trust for payment of the tort judgment against McGee frustrates the Trust donor's intent and would, in effect, impose liability on the Trust for the beneficiary's wrongful acts. *Id.*

The court rejected Duvall's next argument that certain creditors' interests are great enough to usurp spendthrift trust terms. *Id.* at 494, 826 A.2d at 427. The court opined ordinary creditors are on notice of a spendthrift trust when they voluntarily extend credit and are able to regulate conduct in light of this information. *Id.* at 499, 826 A.2d at 429. Although the court admitted tort judgment creditors are not on notice, "that fact alone does not make the claim . . . anything other than a debt or make its exemption from the bar of a spendthrift trust, a matter of public policy." *Id.* at 500, 826 A.2d at 430. To support this conclusion, the court focused on a Uniform Trust Act section 503 comment that specifically does not support including tort judgment creditors among creditors who can invade a spendthrift trust. *Id.* at 500, 826 A.2d at 416 n.15.

Finally, the court addressed Duvall's argument that, as a matter of public policy, McGee should not be allowed to receive benefits from the Trust to the exclusion of his creditors.

Id. at 500, 826 A.2d at 430. The court agreed Maryland public policy does not endorse a system where criminals derive financial benefit from their illegal activity, as evidenced by the "slayer's rule." *Id.* The court concluded, however, that any benefit McGee received from the Trust vested prior to the commission of his criminal acts and was completely independent of his criminal conviction. *Id.* at 500-01, 826 A.2d at 430. The court stated situations where criminals were rewarded for criminal acts by way of book, television, and movie royalties were unlike this case because McGee derived no benefit from his criminal act. *Id.* Instead, the court concluded McGee only benefited as a life beneficiary under the Trust executed by his deceased mother. *Id.* at 501, 826 A.2d at 430-31.

In *Duvall v. McGee*, the Court of Appeals of Maryland declined to expand the narrow class of creditors allowed to invade spendthrift trusts. By doing so, the court drew a "duty-debt" distinction for determining what is commensurate with public policy. As a result, this ruling preserves the right of spendthrift trust beneficiaries from having trust principal attached by tort judgment creditors. Thus, the court sent a message that unless a beneficiary has a statutory duty, the intent of a spendthrift trust settlor trumps creditors' interests.

THE CAREER SERVICES CENTER

**WOULD LIKE TO ASSIST
YOU WITH**

**ALL YOUR PROFESSIONAL
STAFFING NEEDS**

**PLEASE TURN TO US TO
FIND THE FINEST**

**LAW CLERKS
RESEARCH ASSISTANTS
ASSOCIATES
TEMPORARY ATTORNEYS
STAFF ATTORNEYS**

**To list a position, or for more
information, please contact**

**Karen Rae Hammer
Associate Dean**

at

**THE UNIVERSITY OF
BALTIMORE
SCHOOL OF LAW
1420 North Charles Street
Baltimore, Maryland 21201
(410) 837-4404**

or logon to

law.ubalt.edu/careers

Lawrence v. Texas:
Texas Homosexual Sodomy Statute Violated the Fourteenth Amendment
Due Process Clause

By: Sarah Miller

The United States Supreme Court held a Texas homosexual sodomy statute violated the Fourteenth Amendment Due Process Clause. *Lawrence v. Texas*, 123 S.Ct. 2472, 2484 (2003). In so holding, the Court overruled its controversial decision in *Bowers v. Hardwick*. *Id.* (citing *Bowers*, 478 U.S. 186 (1986)). *Id.*

Houston police, responding to a reported weapons disturbance, were dispatched to the private residence of John Geddes Lawrence (“Lawrence”). Upon entering the premises, officers encountered Lawrence and another man, Garner, engaging in sexual intercourse. Both men were arrested and charged for violation of Texas Penal Code Annotated § 21.06(a) (2003), which prohibits “deviant sexual intercourse with another individual of the same sex.”

Lawrence and Garner challenged the statute’s validity under the Fourteenth Amendment Equal Protection Clause and a similar Texas Constitutional provision at a *de novo* trial in Harris County Criminal Court. The claims were rejected and both men were convicted. They appealed to the Court of Appeals for the Texas Fourteenth District, which consid-

ered the constitutional arguments under the Fourteenth Amendment Equal Protection and Due Process Clauses. The court, sitting *en banc*, affirmed the convictions after applying the *Bowers* analysis. The United States Supreme Court granted certiorari.

The issue was whether the Court should overrule *Bowers*, which upheld a similar statute under due process analysis. *Id.* at 2475. In its analysis, the Court divided the issue into three questions: whether the Texas statute violated 1) the Fourteenth Amendment Equal Protection Clause; 2) the Fourteenth Amendment Due Process interests in liberty and privacy; and 3) whether *Bowers* should be overruled. *Id.* at 2476.

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. *Id.* at 2482. The Court turned immediately to a discussion of due process cases that set the stage for *Bowers*, in which a Georgia statute prohibiting homosexual sodomy was upheld. *Id.*, 123 S.Ct. at 2476-77.

The first case leading to the *Bowers* decision was *Griswold v.*

Connecticut, which held the right to make certain decisions regarding sexual conduct is confined to the marital relationship. *Id.* at 2476-77. (citing *Griswold*, 381 U.S. 479 (1965)). *Eisenstadt v. Baird* extended this right beyond the marital relationship, granting an individual, married or not, freedom from unwarranted governmental intrusion into fundamentally private matters. *Id.* (citing *Eisenstadt*, 405 U.S. 438 (1972)). Additionally, *Roe v. Wade*, 410 U.S. 113 (1973) and *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977), “confirmed that the reasoning of *Griswold* could not be confined to the protection of rights of married adults.” *Id.* at 2477.

In the *Bowers* substantive decision, the Court did not continue with the liberal trend of the aforementioned cases, but used a conservative approach that purported to have historical support in Judeo-Christian morality. *Id.* at 2478, 2481. The *Bowers* Court considered only the specific sexual conduct prohibited by the statute, showing no concern for the far-reaching emotional consequences of a statute criminalizing homosexual sodomy. *Id.* at 2478. The Court, in the instant case, feared the

Recent Developments

Bowers Court failed to “appreciate the extent of the liberty at stake.” *Id.* at 2478. The sexual conduct was only one element of a more enduring bond created by a personal relationship. *Id.*

In response to the *Bowers* oversight, the Court discussed at length the history of sodomy laws in this country and demonstrated the historical premises relied upon in *Bowers* were overstated and inaccurate. *Id.* at 2480. Sodomy laws are not often enforced against consenting adults in private. *Id.* at 2479. Furthermore, sodomy laws were understood to include relations between heterosexuals as well as homosexuals. *Id.* at 2478. Finally, laws targeting same-sex couples did not develop until the last third of the twentieth century and are nearly abolished today. *Id.* at 2479-80. The Court reasoned the moral rationale that brought about laws targeting same-sex couples should not be forced on society. *Id.* at 2480.

In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the Court stated, “[o]ur obligation is to define the liberty of all, not to mandate our own moral code.” *Id.* at 2480. The Court, in the instant case, followed this rationale and cited many post-*Bowers* authorities that concur as well. *Id.* at 2481. Also, the Court noted that five years prior to *Bowers*, the European Court of Human Rights considered a case similar to *Bowers* and the instant case. *Id.* The European court invalidated laws proscribing sexual

conduct, acknowledging societal change. *Id.*

The foundation of *Bowers*, weak from the beginning, “has sustained serious erosion” in intervening years. *Id.* at 2482-83. The Court held States can no longer demean a person’s existence by criminalizing private consensual sexual conduct. *Id.* at 2484. Private citizens’ rights “to liberty under the Due Process Clause gives them the full right to engage in conduct without intervention of the government.” *Id.*

By overruling *Bowers*, the Court has once again expanded the scope of liberties granted under the Fourteenth Amendment Due Process Clause. This decision affords homosexuals the ability to freely engage in all aspects of consensual sexual relationships without fear of criminal prosecution.

The University of Baltimore Law Forum

Articles Solicitation

**The University of Baltimore
Law Forum is currently
requesting articles for
submission relating to issues
of importance in Maryland
and/or Federal law.**

**Please contact or
submit materials to:**

**Articles Editor
University of Baltimore
Law Forum**

**1420 North Charles Street
Baltimore, Maryland 21201
(410) 837-4493**

E-Mail:

lawforum@ubalt.edu

or visit our website

at

www.ubalt.edu/lawforum

Livering v. Richardson's Restaurant:

An Off Duty Employee Is Entitled to Workers' Compensation Benefits if Injury Is Sustained on Employer's Premises and the Reason for the Employee's Visit Benefits the Employer

By: Cendoria Yvonne Dean

The Court of Appeals of Maryland held an off duty employee is entitled to workers' compensation benefits if the injury is sustained on the employer's premises and the reason for the employee's visit benefits the employer. *Livering v. Richardson's Rest.*, 374 Md. 566, 823 A.2d 687 (2003). The court based its holding on the Maryland Workers' Compensation Act, which is designed to protect employees and provide benefits for injuries sustained while performing work-related duties during the course of employment. *Id.*

Linda Livering ("Livering") was employed by Richardson's Restaurant ("Richardson's") as a salad preparer. Richardson's posted new employee work schedules on the Sunday preceding the Thursday start day. Richardson's had a tendency of changing schedules after posting and, on one occasion, such a change caused Livering to be five hours late for work. Livering did not have a telephone to call and check her schedule. Therefore, on her day off she stopped by the restaurant. As she exited the restaurant she fell on the outside ramp, dislocating and breaking her wrist.

Livering filed a claim with the Maryland Workers' Compensation

Commission, which ruled in favor of the employer. On judicial review, the Circuit Court for Washington County affirmed the Commission's decision. Livering appealed to the Court of Special Appeals of Maryland. However, the Court of Appeals of Maryland granted certiorari on its own motion to determine whether the employee's accidental injury arose out of and during the course of employment in accordance with the Labor and Employment Article of the Annotated Code of Maryland § 9-101(b)(1).

The court commenced its analysis by explaining the purpose of the Maryland Workers' Compensation Act. The Act is a remedial measure protecting workers injured on the job and their families from diversity and is construed in favor of an injured worker. *Id.* at 574, 823 A.2d at 691.

The court next discussed Section 9-101(b)(1). An injured worker's accidental injury must arise out of and occur in the course of employment to qualify for benefits under the statute. *Id.* "Arise out of" refers to the causal connection between the employment and the injury." *Id.*, 823 A.2d at 692. The injury must occur while performing work-related duties or

as an incident to employment to arise out of employment. *Id.* at 574, 823 A.2d at 692. Maryland uses the positional risk test to determine whether an injured worker qualifies for benefits. *Id.* at 575, 823 A.2d at 692. The positional risk test is a "but for" test, based on the contention that employment requirements placed an employee in the position where the injury occurred. *Id.*

The court of appeals cited two cases illustrating the "but for" test. In *Mulready v. Univ. Research Corp.*, an employee fell in a hotel bathtub and was injured while on a business trip. *Id.* at 574, 823 A.2d at 692 (citing *Mulready*, 360 Md. 51, 756 A.2d 575 (2000)). The court concluded, "but for" the employer's travel requirement she would not have been in the hotel. *Id.* In *Montgomery County v. Wade*, a police officer was injured while traveling in a patrol car on personal errands. *Id.* at 576, 823 A.2d at 693 (citing *Wade*, 345 Md. 1, 690 A.2d 990 (1997)). The court concluded, "but for" the department offering a special program where officers could use patrol cars in this manner the officer would not have been injured. *Id.*

The court next determined

whether an injury occurred in the course of employment. *Id.* This requirement refers to where and when the injury occurred and whether the activity was a normal incident of the employment relationship. *Id.* at 577, 823 A.2d at 693. To analyze the “in the course of” test, the court deferred to Maryland law, which recognizes workers injured on an employer’s premises while receiving wages or gathering tools may be eligible for workers’ compensation benefits. *Id.*

The court noted *Consolidated Engr. Co. v. Feikin*, 188 Md. 420, 52 A.2d 913 (1947) and *Nails v. Mkt. Tire Co.*, 29 Md.App. 154, 347 A.2d 564 (1975), to illustrate the application of the “in the course of” test. In *Feikin*, the employee was injured while collecting day wages and the court held an employment contract may continue until wages are actually paid. *Id.* at 578, 823 A.2d at 694. Similarly, in *Nails*, a terminated employee was injured when he returned to the employer’s premises to collect his tools; the court held the injury occurred in the course of employment. *Id.* at 579, 823 A.2d at 694. The court’s position was activities in *Feikin* and *Nails* were “incidents of employment because they comprise part of the employment contract.” *Id.*

The court of appeals then applied these tests to determine whether Livering’s injury arose out of and occurred in the course of employment. Richardson’s constantly changed work schedules,

requiring employees to note the changes. *Id.* at 580, 823 A.2d at 695. Richardson’s did not require employees to go to the restaurant to check work schedules. *Id.* However, Richardson’s was aware that it happened and the practice was not prohibited. *Id.* at 580, 823 A.2d at 695. Therefore, Livering had a duty to check her work schedule, which was incident to her employment and satisfied the positional risk test. *Id.* The court concluded “but for” Livering fulfilling her duty to check her schedule she would not have been injured. *Id.*

Finally, the court of appeals addressed the employer benefit component. Livering was late on one occasion because of a schedule change and was questioned about her tardiness. *Id.* at 571, 823 A.2d at 690. The court concluded Livering checking her schedule was an employment duty to make certain she reported to work on time. *Id.* at 580, 823 A.2d at 695. Therefore, fulfilling this duty benefitted Richardson’s, demonstrating there was “a clear nexus between her work and the injury.” *Id.* at 580, 823 A.2d at 695.

The *Livering* holding will impact Maryland workers’ compensation claims and Maryland employers. The “arise out of and in the course of employment” statutory requirements are not narrowly applied. The circumstances of an accidental injury must be analyzed broadly. Any showing that an employer benefited from employee actions when the employee was injured will most likely result in a

compensable claim for the employee. Employers cannot leave room for implications or assumptions about work schedules or, on a broader note, any aspect of employment or post-employment.

MAMSI Life & Health Ins. Co. v. Callaway:
Autoerotic Asphyxiation Constitutes Intentional Self-Injury in a Life Insurance Contract Exclusion Clause

By: Matthew F. Penater

The Court of Appeals of Maryland held autoerotic asphyxiation constitutes intentional self-injury in a life insurance contract exclusion clause. *MAMSI Life & Health Ins. Co. v. Callaway*, 375 Md. 261, 825 A.2d 995 (2003). The court held in a case of death resulting from autoerotic asphyxiation, although death may not have been the intended outcome, the self-inflicted strangulation *was* intended and voids coverage under an exclusion clause for self-inflicted injury. *Id.* at 282, 825 A.2d at 1007.

David Callaway (“Callaway”) was found dead in his home on July 5, 2000. It was undisputed that his death resulted from autoerotic asphyxiation. Autoerotic asphyxiation involves applying suffocation devices during masturbation to cut off oxygen flow to the brain, thereby increasing sexual pleasure. Callaway was found lying on his back with a plastic bag around his head, a belt tightened around his throat, and next to a wall covered with pictures of naked females. The medical examiner determined the cause of death was asphyxiation and classified the incident as accidental. Callaway’s life insurance policy was with MAMSI Life & Health Ins. Co. (“MAMSI”) and contained a clause excluding payment of benefits when

death resulted from intentional self-injury. When Callaway’s beneficiaries attempted to collect benefits, MAMSI denied payment claiming Callaway’s death resulted from intentional self-injury.

The beneficiaries of Callaway’s life insurance policy filed suit against MAMSI in the Circuit Court for Wicomico County claiming breach of the life insurance contract. Both parties filed cross-motions for summary judgment. The circuit court granted MAMSI’s motion, holding Callaway’s death resulted from intentional self-injury. The beneficiaries appealed to the Court of Special Appeals of Maryland, which reversed. The Court of Appeals of Maryland granted certiorari to determine whether death resulting from autoerotic asphyxiation was death from intentional self-injury as excluded in the insurance policy.

The court of appeals began its analysis by identifying rules of contract interpretation and focusing on “language employed by the parties.” *Id.* at 279, 825 A.2d at 1005. “The determination of whether language is susceptible to more than one meaning includes consideration of the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution.” *Id.* The court

continued by stating the structure and language of the contract established two separate issues.

The first issue was whether the insured’s death was an accident. The court briefly noted this issue was tied to the overall nature of the event. The court did not discuss the first issue in depth, but merely stated, “[i]t is possible therefore to find the death itself to have been accidental although the insured may have intended the events that eventually led to his death.” *Id.* at 280, 825 A.2d at 1006.

The court then focused on the second issue, whether Callaway intended to cause the injury that led to his death. The court looked to other jurisdictions to define injury. The court of appeals cited *Sims v. Monumental Gen. Ins. Co.*, which held partial strangulation occurring during autoerotic asphyxiation constitutes an injury as defined in an accidental death insurance policy. *Id.* at 280, 825 A.2d at 1006 (citing *Sims*, 960 F.2d 478 (5th Cir. 1992)). That court noted evidence showing partial strangulation involved damage to neck tissue and stated “partial strangulation is an injury in and of itself.” *Id.* at 281, 825 A.2d at 1006.

The Court of Appeals of Maryland also cited *Cronin v. Zurich Am. Ins.*, which held partial

strangulation during autoerotic asphyxiation was an “injury” excluded under a life insurance contract exclusion clause. *Id.* (citing *Cronin*, 189 F.Supp.2d 29 (S.D.N.Y. 2002)). The *Cronin* court also noted partial strangulation caused temporary cell damage and reduced brain activity. *Id.*

The court of appeals next turned to the court of special appeals’ findings, which held partial strangulation accompanied with a successful autoerotic experience did not constitute an injury. *Id.* at 282, 825 A.2d at 1007. The lower court claimed this type of partial strangulation did not meet the general understanding of the term injury. *Id.*

Relying on *Sims* and *Croner*, the court of appeals reversed and held a layperson would recognize this type of partial strangulation as an injury. *Id.* at 283, 825 A.2d at 1007. The court further held “by depriving his brain of oxygen, the insured injured his brain and rendered it incapable of functioning, which eventually led to his death.” *Id.* at 283, 825 A.2d at 1008.

The Court of Appeals of Maryland held autoerotic asphyxiation constitutes intentional self-injury in a life insurance contract exclusion clause and determined Callaway took actions that harmed his body. The harm constituted injury and the injury caused Callaway’s death. This reasoning is simple in theory and clear in application. In so holding, the court is shifting more responsibility onto insureds for their own actions. On the other hand, the court of appeals

has given insurance companies a possible escape hatch from paying benefits. Future decisions will be needed to qualify just how far this holding may be pushed.

UNIVERSITY OF BALTIMORE LAW

ALUMNI RESOURCE DIRECTORY

Please check any area of interest and complete the form below.

**Send completed form to:
University of Baltimore Alumni Services
Attn: Law Resources Directory
1130 N. Charles Street
Baltimore, Maryland 21201
fax: (410) 837-6255
e-mail: alumni@ubalt.edu**

- Mentor first year law students;**
- Speak to a class of students about your practice speciality;**
- Judge a trial and/or appellate advocacy program;**
- Participate in the EXPLOR Program;**
- Serve on the Alumni Association’s Law Liaison Committee;**
- Serve on reunion committee; and/or**
- Assist in fund raising activities for the School of Law.**

NAME: _____
POSITION: _____
EMPLOYER: _____
EMPLOYER’S ADDRESS: _____
WORK PHONE: _____
HOME ADDRESS: _____
CITY, STATE, ZIP: _____
HOME PHONE: _____
YEAR OF GRADUATION: _____
PRACTICE SPECIALITY AREAS: _____
E-MAIL ADDRESS: _____

Pack Shack v. Howard County:
**Zoning Ordinance Placing Burdensome Restrictions on Location and
Operation of Adult Businesses Violates Article 40 of the Maryland Declaration of
Rights and the First Amendment of the United States Constitution**

By: Erin Galvin

The Court of Appeals of Maryland held a zoning ordinance placing burdensome restrictions on location and operation of adult businesses violated Article 40 of the Maryland Declaration of Rights and the First Amendment to the United States Constitution. *Pack Shack v. Howard County*, 377 Md. 55, 832 A.2d 170 (2003). The court further held the restrictions, which were beyond those necessary to promote the secondary impacts associated with such businesses, denied adult businesses the reasonable opportunity to operate within the county. *Id.* at 64, 832 A.2d at 176.

On December 1, 1997, the Howard County Council (“Council”) passed Bill 65-1997 (“ordinance”) amending sections of Howard County zoning regulations by imposing restrictions on the operation of adult businesses. The ordinance restricted interior arrangement of adult businesses, prohibited outside display of adult material, and required a permit for operation. Moreover, the permit process required full disclosure of all parties having a financial interest in the adult business itself, as well as all parties with an interest in the real property where the business is

located. Pack Shack, Inc. (“Pack Shack”) was an adult entertainment business located in Howard County and subject to the zoning ordinance.

Pack Shack filed a complaint in the Circuit Court for Howard County seeking injunctive relief and a declaratory judgment claiming the ordinance violated the free speech clause of the First Amendment to the United States Constitution. The trial court granted an injunction ordering Pack Shack to comply with the zoning ordinance. The Court of Special Appeals of Maryland affirmed. Pack Shack petitioned the Court of Appeals of Maryland for certiorari, which was granted.

The court began its analysis by looking to United States Supreme Court decisions addressing similar constitutional issues involving zoning ordinances and adult businesses. *Id.* at 65, 832 A.2d at 176. Reviewing these decisions, the court determined for a content-neutral zoning ordinance to be constitutional, it must satisfy three requirements. *Id.* at 68, 832 A.2d at 178. First, the ordinance must serve an unrelated purpose to the suppression of speech no greater than necessary to further its purpose. *Id.* Second, the ordinance must be designed to minimize the

incidental burden on speech leaving open other avenues of communication. *Id.* Finally, the ordinance must provide for reasonable and adequate procedural safeguards with regard to permit provisions. *Id.* at 68, 832 A.2d at 178.

Before considering factors to determine the ordinance’s constitutionality, the court considered whether the ordinance imposed a content-neutral time, place, and manner restriction on adult businesses. *Id.* at 68-69, 832 A.2d at 178. The court analyzed the ordinance’s purpose, relying on the trial court’s record and Supreme Court cases. *Id.* at 69, 832 A.2d at 179. In so doing, the court concluded one purpose was to limit adverse effects of adult entertainment businesses, which adequately established an independent governmental interest. *Id.* at 69-70, 832 A.2d at 179.

Another purpose the court examined was legislative motive. *Id.* at 70, 832 A.2d at 179. Pack Shack alleged one Council member openly expressed a desire to ban all adult businesses from the county. *Id.* at 69, 832 A.2d at 178. The court reasoned a legislator’s alleged motive was not sufficient to invalidate the ordinance. *Id.* at 70,

832 A.2d at 179. As a result, the court concluded the zoning ordinance was content-neutral and, therefore, subject to intermediate scrutiny. *Id.* at 71, 832 A.2d at 180.

Next, the court addressed whether the ordinance permitted alternative avenues of communication to allow adult businesses an opportunity to operate. *Id.* at 80, 832 A.2d at 185. One factor considered was whether other sites within the county were available for adult businesses. *Id.* Another factor was the percentage of land allocable to adult businesses. *Id.* at 83-84, 832 A.2d at 187.

Using these factors, the court determined the ordinance substantially limited availability of sites for adult businesses and the regulation was overbroad. *Id.* at 82, 832 A.2d at 186. The court agreed with Pack Shack's estimate that there was less than one-tenth of one percent of land available for adult businesses. *Id.* at 84, 832 A.2d at 188. The court opined this was too minute to satisfy the requirement of adequate alternative channels of communication. *Id.*

Finally, the court examined the ordinance's permit provision as a prior restraint because obtaining a permit "requires governmental permission to engage in protected speech." *Id.* at 71, 832 A.2d at 180. The court noted an unlawful prior restraint is one that provides too much discretion to the government official and fails to place limits on the time to generate a decision about the permit. *Id.* at 72,

832 A.2d at 180. In this case, the court held the ordinance allowed government officials "considerable room for exercise of judgment" with respect to satisfying permit requirements. *Id.* at 73, 832 A.2d at 181.

Furthermore, the court of appeals listed three procedural safeguards to avoid constitutional problems with respect to the permit process. *Id.* at 72, 832 A.2d at 180. First, brief periods to review any prior restraint must be maintained. *Id.* Second, swift judicial review of any administrative decision must be available. *Id.* Finally, the government must bear the burden to suppress the speech and the burden of proof in court. *Id.*

In this case, the court held the permit process failed to provide a link between the governmental interest of combating adverse effects of adult businesses and the disclosure requirement of all parties with a financial interest in the business. *Id.* at 79, 832 A.2d at 184. The permit requirements encumbered the process itself and restricted Pack Shack from reasonably operating in the county. *Id.*, 832 A.2d at 185. As a result, the court held the zoning ordinance unconstitutional because it violated the First Amendment of the United States Constitution and Article 40 of the Maryland Declaration of Rights. *Id.* at 85, 832 A.2d at 188.

The dissent disagreed with the majority as to rendering the entire ordinance unconstitutional. *Id.* Rather, the dissent argued, since Howard County zoning regulations

contain a severability provision, the particular portion addressing the government's discretion could be narrowly construed. *Id.* According to the majority, the distance requirements provided no standard of measurement and left wide discretion to the government officer. *Id.* at 86, 832 A.2d at 188-89. The dissent would have upheld the ordinance and tailored those sections that dealt with the government's discretion. *Id.* at 88, 832 A.2d at 190.

The Court of Appeals of Maryland held a zoning ordinance placing burdensome restrictions on the location and operation of adult businesses violated Article 40 of the Maryland Declaration of Rights and the First Amendment of the United States Constitution. The decision in *Pack Shack v. Howard County* impacts Maryland law by prohibiting local governments from creating broad legislation that imposes onerous burdens on adult businesses. Despite public opposition to these businesses and possibly other unwanted businesses, the court protects Maryland constitutional law by upholding both the adult business' rights and the freedom of speech.

Remsburg v. Montgomery:

A Leader of a Hunting Party Has No Duty to Protect a Victim of an Accident Resulting from the Negligence of a Hunting Party Member

By: Matthew F. Penater

The Court of Appeals of Maryland held, in a case of first impression, the leader of a hunting party has no duty to protect a victim of an accident resulting from the negligence of a hunting party member. *Remsburg v. Montgomery*, 376 Md. 568, 603, 831 A.2d 18, 38 (2003). The court found no special relationship existed creating a special duty to protect a victim from third-party negligence. *Id.* at 599, 831 A.2d at 36.

On November 28, 1998, Charles and Brian Montgomery (“Montgomerys”) hid at the edge of their property to hunt deer. Shortly thereafter, James Remsburg, Sr.’s (“James, Sr.”) hunting party, which included his son James Remsburg, Jr. (“James, Jr.”), positioned themselves near the Montgomerys. As the Montgomerys moved to a new location, a shotgun slug grazed Brian Montgomery’s neck and passed through Charles Montgomery’s right shoulder. James, Jr., believing he aimed at a deer, shot from a tree stand located near the Montgomerys’ position.

The Montgomerys filed suit in the Circuit Court for Frederick County against James, Jr. and James, Sr. alleging negligence and trespass. James, Sr. filed a Motion

for Summary Judgment claiming the Montgomerys failed to assert a legally cognizable duty on James, Sr. to protect them from third-party actions. The circuit court granted the motions. The Court of Special Appeals of Maryland vacated the decision with respect to the negligence claim, holding factual disputes existed that could establish James, Sr. had a duty to protect the Montgomerys from James, Jr.’s negligent acts. The Court of Appeals of Maryland granted certiorari.

The court of appeals began by discussing whether an individual owed a duty to protect a victim from third-party negligent acts. *Id.* at 583, 831 A.2d at 27. Generally, absent a special duty, there is no duty to protect someone from the actions of a third party. *Id.* The court identified three ways that create a special duty to protect another from a negligent third party: (1) by statute or rule, (2) by a contractual or other private relationship, or (3) by virtue of a special relationship. *Id.* at 583-84, 831 A. 2d at 27. The court briefly analyzed the first two methods and found they did not apply to the facts of this case. *Id.* at 585, 589-90, 831 A.2d at 28, 30.

There is no duty to control a third person’s conduct unless a special relationship exists between certain parties. *Id.* at 583, 831 A.2d at 27. The Restatement (Second) of Torts § 315 (1965) identifies: (1) relationships between the actor and third party giving rise to a duty to control third-party conduct and (2) relationships between actor and other giving the other a right to protection. *Id.* at 590, 831 A.2d at 31.

Addressing the first prong of this analysis, the court examined the nature of the relationship between James, Sr. and James, Jr. *Id.* To create a special relationship giving rise to a legal duty, the actor must have control over the third party and special knowledge of the risk a third party poses to others. *Id.* at 591, 831 A.2d at 31. Cases in which such a relationship existed involved such extreme circumstances as the negligent release of a contagious patient from a hospital and the escape of a homicidal maniac from a private sanitarium due to negligence. *Id.* at 591, 831 A.2d at 32. These cases suggest the requirement of a custodial relationship to establish a duty to protect. *Id.* at 592, 831 A.2d at 32. The court held James, Sr.’s

status as the hunting party's leader did not constitute custodial control over James, Jr. and did not establish that duty. *Id.*

Under the Restatement (Second) of Torts § 314A (1965), a duty to protect may also be established by virtue of the relationship between James, Sr. and the Montgomerys. *Id.* at 594, 831 A.2d at 32. The court previously recognized such a relationship existed between an innkeeper and his guests and a common carrier and its passengers. *Id.* In each case, victims were dependant on the actor by virtue of their situational relationship. *Id.*, 831 A.2d at 33. The court determined the Montgomerys controlled their own land and did not depend on anyone for protection. *Id.* The court also noted although both parties interacted in the past regarding hunting rights, those interactions did not create a dependent relationship. *Id.* The court concluded the Montgomerys did not depend on James, Sr. for protection from James, Jr. and no special relationship existed. *Id.*

In addition to the Restatement, a special relationship may also be established by "virtue of a party's actions." *Id.* at 595, 831 A.2d at 33. In determining whether such a relationship existed, the court of appeals applied the standard formulated in *Ashburn v. Anne Arundel County*. *Id.* at 595, 831 A.2d at 34 (citing *Ashburn*, 306 Md. 617, 510 A.2d 1078 (1986)). Originally applied to a police officer, the *Ashburn* test requires an actor to affirmatively act "to protect the

specific victim . . . thereby inducing the victim's specific reliance" upon the protection. *Id.* at 596, 831 A.2d at 34. The *Ashburn* test requires both affirmative action to protect a specific victim and specific reliance by the victim on that action. *Id.* James, Sr.'s previous dealings with the Montgomerys regarding hunting rights did not constitute affirmative actions to protect the Montgomerys. *Id.* at 599, 831 A.2d at 36. Furthermore, the court concluded the Montgomerys did not specifically rely on James, Sr.'s actions for protection. *Id.* The court held no special relationship existed. *Id.* at 599, 376 Md. at 599, 831 A.2d at 36.

The Court of Appeals of Maryland stated it previously applied the *Ashburn* test only to matters involving public officials. *Id.* The court acknowledged the expansion of the *Ashburn* test; however, special relationships will be analyzed on a case-by-case basis. *Id.* The *Ashburn* test must focus primarily on a party's conduct that may induce reliance by another party. *Id.*

This case firmly establishes application of the *Ashburn* test to private matters and will no doubt generate more litigation in the area of liability for third-party negligence. Although the applicability of the *Ashburn* test appears clear, the court's requirement for a case-by-case analysis will only serve to confuse the question of when a special relationship does or does not exist. The Court of Appeals of Maryland has opened the floodgates

to third-party actions, which may well only be closed by clear, restrictive future holdings.

**THE
LAURENCE M. KATZ
COMMERCIAL LAW
COLLECTION**

A fund honoring Dean Katz has been created to support a permanent Commercial Law Collection in the University of Baltimore Law Library. Your contributions to assist in the establishment of this \$10,000 Endowment Fund are most welcome.

Please make checks payable to:

**University of Baltimore
Educational Foundation**

Please send to:

**Laurence M. Katz
Commercial Law Collection
University of Baltimore
Educational Foundation
1130 N. Charles St.
Baltimore, Maryland
21202**

410-837-6148

***Gifts to the Laurence M. Katz
Commercial Law Collection
are tax deductible as allowed
by law.***

Richard Roeser Professional Builder v. Anne Arundel County:
**Purchase of Property with Zoning Restriction is Not a Self-Created
Hardship**

By: Allisan Pyer

The Court of Appeals of Maryland held purchasing property with knowledge of land restrictions is not a self-created hardship. *Richard Roeser Prof'l Builder, Inc. v. Anne Arundel County*, 368 Md. 294, 295, 793 A.2d 545, 546 (2002). Moreover, the court concluded the landowner did nothing to create a hardship situation other than to purchase the property. *Id.*

Richard Roeser Professional Builder, Inc. ("Roeser") purchased two lots near Annapolis in Anne Arundel County, Maryland. One lot was located in a critical area and "buffer" zone as it was adjacent to wetlands. Roeser was aware of the zoning restrictions when he purchased the property. Variances from the critical area along with a change in Anne Arundel County zoning provisions were required for Roeser to build a house of the desired size on the property. Variance is defined as a change in a portion of a zoning requirement without changing the entire zoning requirement. Two types of variances exist: use and area variances. Roeser required an area variance, which is a variance from area, height, density, setback, or sideline restrictions. Accordingly, Roeser applied to the Anne Arundel County

Board of Appeals ("Board") for the variances. The Board denied Roeser's variance request because it found Roeser's need for a variance had been self-created. The Board came to this determination because when Roeser purchased the land both the seller and buyer were aware of potential development issues.

Roeser appealed to the Circuit Court for Anne Arundel County. The circuit court reversed because it was unconvinced the hardship described by the Board was self-created. The court found "hardships of this type are normally those which are created by the owners of the property and not by the property itself." The court went on to explain that the topography and placement of the property was not self-inflicted or a self-created hardship; thus no evidence existed to support the Board's finding that Roeser had created the hardship. The court determined the Board's decision was not fairly debatable based on evidence the Board had before it. Therefore, the decision was arbitrary and capricious and the Board erred as a matter of law.

The Court of Special Appeals of Maryland reversed. The court determined when a person purchases property with the intention

of applying to the Board of Appeals for a variance of existing land restrictions, he cannot later contend these restrictions cause pecuniary hardship that entitle him to special privileges.

Roeser presented the following questions to the Court of Appeals of Maryland: 1) Did the Circuit Court correctly determine the Board's decision to deny critical area variances was based on application of an erroneous legal standard, which has been specifically overruled by the Court of Appeals, and was reversible error as a matter of law? 2) Did the Circuit Court correctly determine the Board's finding of self-created hardship was reversible error as a matter of law? 3) Did the court of special appeals' err as a matter of law in reversing the circuit court and ruling the acquisition of title to land knowing a critical area buffer variance will be applied for constituted a self-created hardship?

The Court of Appeals of Maryland answered affirmatively to the second and third questions. The court began its analysis by examining the general rule "that one who purchases property with actual or constructive knowledge of zoning ordinance restrictions is barred from securing a variance." *Id.* at

303, 793 A.2d at 551. The court concluded the general rule has either been abandoned or made obsolete by modification in most jurisdictions. *Id.*

The general rule had two major faults. *Id.* First, hardship caused by the restriction cannot be measured either in terms of the property's cost or differences in the property's value with or without the variance. *Id.* Therefore, no danger exists that a knowledgeable purchaser could create evidence of hardship by paying an excessive price for the property. *Id.* Second, the general rule failed because the prior owner would have been entitled to a variance and the right is not lost to a purchaser simply because he bought the property with knowledge of the regulation. *Id.*

The modern rule provides that a purchase with knowledge of a restriction does not preclude the granting of a variance and is considered a nondeterminative factor in consideration of a variance. *Id.* at 303, 793 A.2d at 551. The court, quoting from *The Law of Zoning and Planning*, determined it should not be within the discretion of a board of appeals to deny a variance solely because a purchaser bought the property with knowledge of zoning restrictions. *Id.* The court further noted, quoting from *In re Gregor*, the right to develop a nonconforming lot runs with the land, and a purchaser's knowledge of zoning restrictions alone is not sufficient to preclude the grant of a variance unless the purchaser gave

rise to the hardship. *Id.* at 304, 793 A.2d at 552 (citing *In re Gregor*, 156 Pa. Commw. 418, 426, 627 A.2d 308, 312 (1993)).

In its analysis, the court relied on previous decisions concerning variances, making specific reference to a rule laid out by the Supreme Court of New Jersey. The rule provides "[w]here an original owner would be entitled to a variance under a specific set of facts, any successor in title is ordinarily also entitled to such a variance, providing that no owner in the chain of title since the adoption of the zoning restrictions has done anything to create the condition for which relief by variance is sought." *Id.*

The Court of Appeals of Maryland determined the variance sought in the present case was an area variance and not a use variance. *Id.* at 318, 793 A.2d at 560. The court recognized the Maryland Declaration of Rights and the Fifth Amendment of the United States Constitution guarantee certain rights to property owners. *Id.* The court further stated property owners begin with the unrestricted right to use their land as they choose and under the common law those rights are only limited by restrictions against creating nuisances. *Id.* at 318, 793 A.2d at 560.

Maryland law states that when property is transferred, the property takes with it all the encumbrances and burdens that do and may potentially attach to the property. *Id.* The property also takes with it

all the benefits and rights of property ownership when transferred. *Id.* at 318, 793 A.2d at 561.

The decision by the Court of Appeals of Maryland will allow buyers to purchase property without fear of later not being provided the same opportunities as the prior owner to apply for variances. The court's decision gives the same rights to the present owner to apply for variances as the prior owner. This case will encourage builders like Roeser to purchase property for development and increase development in Maryland.

Sell v. United States:

Fifth Amendment Due Process Clause Does Not Allow Involuntary Administration of Antipsychotic Drugs to Render a Mentally Ill Defendant Competent to Stand Trial Where it is Unknown Whether the Side Effects are Likely to Undermine the Trial's Fairness

By: Larna Cutter

The United States Supreme Court held the Fifth Amendment Due Process Clause does not allow involuntary administration of antipsychotic drugs to render a mentally ill defendant competent to stand trial where it is unknown whether the side effects are likely to undermine the trial's fairness. *Sell v. United States*, 123 S.Ct. 2174 (2003). The Court ruled antipsychotic drug treatment can only be administered if it is medically appropriate, substantially unlikely to have side effects that may undermine the defendant's right to a fair trial, and necessary to significantly further important governmental trial-related interests while taking into account less intrusive alternatives. *Id.* at 2184-85.

Charles Sell ("Sell") was a practicing dentist with an extensive history of mental illness. In May 1997, Sell was charged with submitting fictitious insurance claims, mail fraud, Medicaid fraud, and money laundering. A federal magistrate judge ordered Sell to undergo a psychiatric examination and eventually concluded Sell was competent, even if he could experience a future psychotic episode. In April 1998, Sell was charged with

the attempted murder of the FBI agent who had arrested him and a witness who was to testify against him. Sell requested a reconsideration of his competency and the magistrate sent him to the United States Medical Center for Federal Prisoners ("Center"). The Center determined Sell was mentally incompetent to stand trial. He was ordered to remain at the Center for four months. The Center recommended antipsychotic drug treatment, which Sell refused.

Subsequently, the magistrate held a hearing regarding treatment and issued a pretrial order, which stated the only way to keep Sell from being dangerous to himself and others was to involuntarily administer antipsychotic drugs. The magistrate stayed the order, however, so Sell could appeal. The United States District Court for the Eastern District of Missouri affirmed. The government and Sell appealed to the United States Court of Appeals for the Eighth Circuit, which affirmed. The United States Supreme Court granted certiorari to determine whether involuntarily administering antipsychotic drugs to render Sell competent to stand trial unconstitutionally deprived Sell of his liberty to reject such treatment.

The Court first considered whether

the court of appeals had jurisdiction over Sell's appeal. *Id.* at 2181-83. The general rule, pursuant to 28 U.S.C. § 1291, permits federal courts of appeals to review final decisions of district courts. *Id.* at 2181. However, in this case there was no final decision, just the magistrate's order. Thus, the Court reviewed the "collateral order" exception, which allows appellate review when an order (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. *Id.* at 2182. The Court held the court of appeals did have jurisdiction because the order conclusively determined the disputed question of "whether Sell ha[d] a legal right to avoid forced medication." *Id.* at 2182. The second element was satisfied because "involuntary medical treatment raises questions of clear constitutional importance." *Id.* Finally, since Sell would have undergone forced medication before his trial began, the issue was "effectively unreviewable on appeal from a final judgment." *Id.*

The Court acknowledged the standard for involuntarily administering antipsychotic drugs applied

by *Washington v. Harper*, 494 U.S. 210 (1990) and *Riggins v. Nevada*, 504 U.S. 127 (1992). *Id.* at 2183-85. This standard suggests forced administration of anti-psychotic drugs is appropriate to render a mentally ill defendant competent to stand trial if the treatment is medically appropriate, substantially unlikely to have side effects that may undermine the trial's fairness, and while taking account of less intrusive alternatives, is necessary to significantly further important governmental trial-related interests. *Id.* The Court pointed out this standard may only be applied in rare circumstances because it implies an important governmental interest is being threatened. *Id.* at 2184. The Court noted special circumstances may undermine the governmental interest of timely prosecutions. *Id.* For instance, a defendant who refuses treatment, ultimately securing a more lengthy confinement in an institution, affects a case's efficiency because of faded memories and lost evidence. *Id.* Such circumstances, the Court suggested, may also jeopardize a defendant's right to a fair trial. *Id.* Additionally, the Court recognized this standard is applied only to determine whether forced administration of antipsychotic drugs renders a defendant competent to stand trial, and if a court wants to order such involuntary administration on other grounds, such as the defendant's dangerousness, this standard may become moot. *Id.* at 2185. Before a court uses competency grounds, it should

consider all grounds set forth in *Harper* and *Riggins*. *Id.* The Court rationalized that other grounds, such as dangerousness, are more objective and manageable because experts can determine if drugs are medically appropriate and necessary to control a defendant's dangerousness. *Id.* Moreover, the process of balancing harms and benefits of forced administration is less troublesome when applying other grounds in comparison to trial fairness and competency. *Id.* at 2185.

The Court concluded the court of appeals erred by approving the involuntary administration of anti-psychotic drugs to Sell solely to render him competent to stand trial. *Id.* at 2186. The Court reasoned the magistrate did not find forced medication legally justified on trial competency grounds alone because experts who testified at the initial hearing focused primarily on Sell's dangerousness. *Id.* The failure to focus on trial competence was significant because it was ambiguous whether any side effects were likely to undermine the fairness of Sell's trial, which was not necessarily a relevant question when dangerousness was the primary issue. *Id.* at 2187. Also, the lower courts did not consider whether Sell's long confinement at the Center or his refusal to be medicated would result in further institutionalization. *Id.*

In *Sell v. United States*, the Supreme Court's decision to allow a pretrial order to receive immediate review may open courts to

an expansive range of appellate jurisdiction. Any defendant who appeals on the basis of a trial court order, which will, if implemented, cause an immediate violation of his constitutional rights could seriously impede the efficiency of judicial proceedings. On the other hand, the Court's decision reiterates a growing concern regarding the judicial system's treatment of mentally ill defendants. The Court recognized the difficult task mentally ill defendants face in understanding legal proceedings, let alone comprehending they have rights that cannot be violated without strict review. The standard applied impacts both courts and lawyers by mandating they pinpoint the most appropriate means for a mentally ill defendant to receive a fair trial. This includes forcing courts to consider several subjective factors before ordering antipsychotic drugs to mentally ill defendants who do not desire such treatment. Thus, *Sell v. United States* puts Maryland courts on notice that if they fail to take into account these factors, they are blatantly violating the Constitution.

State v. Lee:
**Application of the Inevitable Discovery Exclusion Exception Cannot Make
Evidence Obtained Through an Improperly Executed Narcotics Search
Warrant Admissible**

By: Carlin La Bar

The Court of Appeals of Maryland, in a case of first impression, held application of the inevitable discovery exclusion exception cannot make evidence obtained through an improperly executed narcotics search warrant admissible. *State v. Lee*, 374 Md. 275, 821 A.2d 922 (2003). The court held failure of police to knock and announce their presence while executing a search warrant that did not contain a no-knock clause violated the Fourth Amendment. *Id.* The court further stated, to admit evidence obtained in such an illegally executed search negates Fourth Amendment knock and announce protections and allows officers to use forcible entry under any valid search warrant. *Id.*

In September 1998, a Harford County district court judge issued a warrant for police to search the home of Kai Ruchell Lee (“Lee”) on suspected narcotics charges. The warrant did not contain a no-knock clause permitting surprise entry. In executing the warrant, law enforcement officials entered Lee’s home without knocking or announcing their presence, searched, and then seized, *inter alia*, over twenty-six grams of cocaine. Subsequently, Lee was charged with

possession with intent to distribute a controlled, dangerous substance.

Prior to trial, Lee filed a Motion to Suppress the cocaine, contending the no-knock search was invalid because it violated his Fourth Amendment rights. The Circuit Court for Harford County denied his motion holding the easy destructibility of evidence was an exigent circumstance justifying the officers’ surprise tactics. Lee appealed to the court of special appeals, which reversed and stated no exigent circumstances existed and the failure of police to knock and announce rendered the search unreasonable. The Court of Appeals of Maryland granted certiorari to determine if evidence obtained pursuant to a valid warrant under which police failed to knock and announce prior to entry was admissible under the inevitable discovery exception to the exclusionary rule.

The court first discussed the knock and announce rule. *Id.* at 282-91, 821 A.2d at 926-31. Then the court reviewed the inevitable discovery exception to the exclusionary rule, including a discussion of its companion argument, the independent source doctrine. *Id.* at 291-316, 821 A.2d at 931-

45.

The court in *Henson v. State* established Maryland’s requirement that an officer “give proper notice of his purpose and authority and be denied admittance before using force to break and enter.” *Id.* at 282, 821 A.2d at 926 (*Henson*, 236 Md. 518, 521-22, 204 A.2d 516, 518-19 (1964)). Some courts have carved out exceptions to this general rule in cases where it was evident that the officer’s purpose was known, or where announcement would frustrate arrest, increase peril to the arresting officer, or permit destruction of evidence. *Id.* at 285, 821 A.2d at 927. The *Henson* court expressly stated narcotics searches require an element of surprise entry because, with opportunity, evidence may be easily destroyed. *Id.* The court emphasized that *Henson’s* blanket exception to the knock and announce requirement was contrary to subsequent Supreme Court decisions and was no longer good law. *Id.* at 316, 821 A.2d at 930.

The Supreme Court addressed the issue of surprise entry in narcotics cases and a *per se* rule allowing surprise entry in *Richards v. Wisconsin*, and concluded

police entry requires an element of reasonableness under the Fourth Amendment, leaving it to lower courts to determine reasonableness on a case-by-case basis. *Id.* at 286-87, 821 A.2d at 929 (citing *Richards*, 520 U.S. 385 (1995)). The court of appeals reviewed this reasonableness standard as applied by other jurisdictions, noting the Supreme Court had overturned a blanket exception to the knock and announce requirement in narcotics cases. *Id.* at 286-87, 821 A.2d at 928-29.

The court went on to address the State's contention that the search warrant was an independent source for the seizure, separate from the entry, and the cocaine would have inevitably been discovered through execution of the valid search warrant. *Id.* at 291, 821 A.2d at 931. The court noted one purpose of the general rule, preventing admission of evidence obtained through the improper execution of a valid search warrant, is to reduce police misconduct. *Id.* at 297, 821 A.2d at 935. Conversely, a purpose of the inevitable discovery exclusionary rule admitting illegally obtained evidence is to prevent the prosecution from being placed in a worse position than it would have occupied had the search warrant been properly executed, while precluding the prosecution from profiting from improper activity. *Id.* at 297, 821 A.2d at 933-35. For evidence to be admissible despite a knock and announce violation, the prosecution must show it possesses a source,

both independent and free of constitutional violation, which would have inevitably led to the discovery of the evidence. *Id.*

The court cited Maryland cases that reviewed the inevitable discovery and independent source exclusion exceptions, noting admission of evidence discoverable by means independent of the violation. *Id.* at 305, 821 A.2d at 939. The court then reviewed other jurisdictions' decisions and agreed when "execution of the warrant is illegal, the State cannot invoke that very warrant as an independent source of the illegal entry." *Id.* at 313, 821 A.2d at 944. The court agreed with the reasoning in *United States v. Marts*, that with the application of the independent source exception in cases of failure to knock and announce "an officer could obviate illegal entry in every instance simply by looking to the information used to obtain the warrant [and] in executing a valid search warrant, could break in doors of private homes without sanction." *Id.* at 304, 821 A.2d at 939 (citing *Marts*, 986 F.2d 1216 (8th Cir. 1993)).

Contrary to the court's comment in *Henson*, the Court of Appeals of Maryland noted a blanket exception to the knock and announce requirement in narcotics cases directly opposes the Supreme Court rejection of a *per se* rule and its requirement for a case-by-case analysis. *Id.* at 308-09, 821 A.2d at 941. The court of appeals stated that applying inevitable discovery and independent source exceptions removed the knock and announce

requirement from Fourth Amendment protection, permitting unannounced entry under any valid search warrant. *Id.* at 316, 821 A.2d at 945. Therefore, evidence obtained in the search should have been suppressed. *Id.*

Prior to this decision, Maryland was among a minority of states, as illustrated by the *Henson* decision. *Henson* supported a *per se* rule in narcotics cases, which suggested the mere acquirement of a search warrant justified any means necessary for entry. Under *Henson*, society's protection from criminal activity was paramount to a private individual's rights. There is a balance weighed by some states in favor of government privileges, but the court of appeals stressed that in Maryland, rights of the individual are not secondary. This decision may affect not only the manner in which police officers execute search warrants, but it may also impact other methods of evidence acquisition. Some long-standing accepted methods of investigation, such as witness or suspect interrogation, may be viewed more critically in light of this decision, where the end result does not justify the means.

State v. Rucker:

**A Brief Investigatory Stop is Not a Restraint on Freedom of Movement
Characteristic of a Formal Arrest and Does Not Require *Miranda* Warnings**

By: Ruthie Linzer

The Court of Appeals of Maryland held a brief investigatory stop is not a restraint on freedom of movement characteristic of a formal arrest and does not require *Miranda* warnings. *State v. Rucker*, 374 Md. 199, 821 A.2d 439 (2003). The court of appeals followed the recent trend of Supreme Court rulings, which require formal custody or restraint on freedom characteristic of a formal arrest as the ultimate inquiry in determining whether a suspect is in custody for *Miranda* purposes. *Id.*

On December 31, 2000, a confidential informant tipped police that Terrance Rucker (“Rucker”) was among a number of individuals involved in narcotics trafficking. A few days later, the informant accompanied Detectives Powell and Piazza to a shopping mall parking lot where Rucker was indentified as he went to his car. Powell immediately instructed Corporal Grimes to stop Rucker until they arrived at the scene. Grimes’ patrol car pulled up behind Rucker’s parked car, leaving space in front of Rucker’s car. Grimes asked Rucker for his license and registration. Meanwhile, the two detectives arrived. Detective

Powell asked Rucker, “[d]o you have anything you are not supposed to have?” Rucker replied, “[y]es, I do, it’s in my pocket.” Powell asked what it was and Rucker replied cocaine, at which point Rucker was arrested.

The trial court held Rucker was in custody, had not been read his *Miranda* rights, and suppressed the confession. The State filed an interlocutory appeal. The court of special appeals affirmed, holding although the stop was valid, what occurred after the stop changed the character of the event and the stop became the functional equivalent of a *de facto* arrest requiring *Miranda* warnings. The court of appeals granted certiorari.

The court of appeals began its analysis by noting the first step in determining whether a *Miranda* warning is required is to determine if the defendant was in custody. *Id.* at 208, 821 A.2d at 444. The court reviewed *Miranda*’s history and subsequent case law concerning custodial questioning. *Id.* Custodial questioning is “initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Id.* (quoting *Miranda v. Arizona*, 384

U.S. 436,444 (1966)).

The court of appeals uses a two-part test to determine whether a defendant was in custody. *Id.* at 210, 821 A.2d at 446. First, the court considers circumstances surrounding the interrogation. *Id.* Second, given those circumstances, the court considers whether a reasonable person would believe he or she was at liberty to terminate the interrogation and leave. *Id.* Since *Miranda*, Supreme Court rulings added a third and final step to the inquiry: whether there was a “formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.” *Id.* at 211, 821 A.2d 439, 446.

In the case at bar, the court of appeals held the circumstances of Rucker’s stop brief and investigatory and they remained so when Rucker told police he had cocaine. *Id.* at 212, 821 A.2d at 446. Rucker was not in custody for *Miranda* purposes because he was not restrained to a degree associated with formal arrest. *Id.* Rucker was asked a single question in a public parking lot, the stop took less than one hour, and no law enforcement officer drew a weapon. *Id.* at 221, 821 A.2d at 452. Accordingly, *Miranda* warnings

Recent Developments

were not required before police asked Rucker whether he had anything illegal. *Id.*

The court of appeals concluded this particular stop was not a *de facto* arrest. *Id.* at 221, 821 A.2d at 452. The court cited *Berkemer v. McCarty*, which considered questioning during a brief investigatory stop on a public street, where potential eyewitnesses could be drawn to the scene, not custodial for *Miranda* purposes. *Id.* (citing *Berkemer*, 468 U.S. 420 (1984)). Such a stop is only considered custodial if it is of a degree associated with formal arrest or if it develops into a formal arrest. *Id.* at 218-19, 821 A.2d at 450.

In addition, the court cited two Maryland cases that held coercive circumstances similar to the instant case were not custodial for *Miranda* purposes. In *McAvoy v. State*, a suspect's car was pulled over by police and he was asked to perform a lengthy field sobriety test, which he failed. *Id.* at 220, 821 A.2d at 451 (citing *McAvoy*, 314 Md. 509, 551 A.2d 875 (1989)). Next, in *In re David S.*, a suspect was thrown down and handcuffed when he appeared to reach for a gun. *Id.* at 216, 821 A.2d at 449 (citing *In re David*, 367 Md. 523, 789 A.2d 607 (2002)). As in Rucker's situation, each stop was conducted in public, was brief, and did not lead to formal arrests for *Miranda* purposes, despite their seemingly coercive nature.

The *Rucker* decision sends a strong message that despite the authoritative nature of a brief

investigatory stop by law enforcement officers, the standard remains that these types of stops will not require *Miranda* warnings unless the suspect is restrained to a degree associated with formal arrest or placed under formal arrest. If a suspect is restrained to such a degree, the constitutional right against being compelled to make self-incriminating statements comes into play. This ruling preserves the rights of law enforcement officers to investigate illegal activity without *Miranda* warnings and signals defense attorneys to be aware that this standard must be met before a motion to suppress a defendant's statements will be granted.

UNIVERSITY OF BALTIMORE SCHOOL OF LAW

CENTER FOR INTERNATIONAL & COMPARATIVE LAW

The Center has been established as the only academic research center at the University of Baltimore School of Law.

The Center's objective is to promote the study and understanding of international and comparative law, and of the political and economic institutions that support international legal order.

Programs and Activities include:

Public Forums in International and Comparative Law

Baltimore Colloquium on International and Comparative Law

Lectures on International and Comparative Law

Faculty Seminar Series

Student Conversation Series

Baltimore Studies in Nationalism and Internationalism

Visiting Fellows Program

**For More Information Contact:
Professor Mortimer Sellers,
Director**

Telephone: (410) 837-4532

Fax: (410) 837-4396

Todd v. Mass Transit Administration:
**Common Carriers Have a Duty to Prevent Foreseeable Assaults upon Passengers
and to Aid Passengers in Danger**

By: Brian Casto

The Court of Appeals of Maryland held common carriers have a duty to prevent foreseeable assaults upon passengers and to aid passengers in danger. *Todd v. Mass Transit Admin.*, 373 Md. 149, 816 A.2d 930 (2003). The court, in holding a duty to come to the aid of a passenger in danger, gave legal effect to dicta in a case decided ten years prior. *Id.* at 166, 816 A.2d at 939.

Kenneth Todd (“Todd”) was a passenger on a Mass Transit Administration (“MTA”) bus on the evening of July 4, 2000, when a group of fifteen-to-twenty juveniles boarded the bus. As the juveniles made their way to the rear of the bus where Todd was seated, they harassed other passengers with crass and threatening language. After approximately five minutes, one of the juveniles struck Todd in the head. Todd confronted the juvenile and was attacked by the entire group. During the attack, another passenger alerted the bus driver to the altercation. The bus driver took no action, electing to drive the bus over a bridge before pulling to the side of the road and engaging the panic button to alert police. The juveniles quickly fled the bus after it came to a stop. The attack left Todd with numerous

bruises, cuts, and abrasions.

Todd filed a negligence claim against MTA in the Circuit Court for Baltimore City. His claim alleged MTA was negligent in failing to prevent the attack and failing to come to his aid after the driver learned of the attack. The circuit court granted MTA’s motion for summary judgment. Todd appealed to the court of special appeals. However, before that court could hear the case the court of appeals granted certiorari.

The court first addressed whether the MTA had a duty to take affirmative steps to prevent the assault. *Id.* at 159, 816 A.2d at 935. The court relied on a long-established rule requiring common carriers to protect their passengers from assault when it is known, or should be known, that an assault is imminent and the knowledge of such assault is acquired in time for the carrier to take preventative action. *Id.* (discussing *Tall v. Balt. Steam Packet Co.*, 90 Md. 248, 44 A. 1007 (1899)). The court stated whether facts in this case established that the two conditions of the rule were met was a question for the jury. *Id.* at 159, 816 A.2d at 936.

The court held the requirement of knowledge was satisfied when the carrier knew, or should have known, of the assailants’ reckless,

violent, and disorderly behavior prior to the attack. *Id.* at 162, 816 A.2d at 937. The court concluded the facts of this case, including the size of the group and its behavior toward other passengers, should have alerted the bus driver of the possibility of an assault. *Id.* The court further held the five minutes from the time the juveniles entered the bus until the assault on Todd was a sufficient length of time in which the bus driver could have taken preventative measures. *Id.* at 163, 816 A.2d at 938.

The court next considered the question of whether a common carrier owes a duty to aid a passenger under attack. *Id.* at 164, 816 A.2d at 939. The court began its analysis by recognizing the general principle that “a person has no legal duty to come to the aid of another in distress.” *Id.* (quoting *Southland Corp. v. Griffith*, 332 Md. 704, 716, 633 A.2d 84, 90 (1993)). An exception to that rule was created by the *Southland* court, where a shopkeeper breached his duty of care to a customer when he failed to call the police after learning the customer was under attack. *Id.* at 164-65, 816 A.2d at 939. In reaching its holding, the *Southland* court adopted Section 314A of the Restatement (Second) of Torts (1965), which states, “an employee

Recent Developments

of a business has a legal duty to take affirmative action for the aid or protection of a business invitee.” *Id.* at 165, 816 A.2d at 939 (citing *Southland*, 332 Md. at 719, 633 A.2d at 91). *Southland* also commented, in dicta, that a common carrier has a duty to render aid to a passenger under attack. *Id.*

In the instant case, the court noted Section 314A of the Restatement, from which *Southland* was derived, expressly includes the relationship between common carriers and passengers as one creating a duty to render aid when a passenger is in peril. *Id.* Therefore, the court concluded it reasonable to extend the “business owner’s duty” announced in *Southland* to common carriers. *Id.* If the carrier had knowledge of the danger and aid could have been provided without placing the carrier’s employee in the path of harm, then the carrier had a legal duty to take affirmative action to protect its passengers. *Id.* at 166, 816 A.2d at 939.

Whether MTA breached this duty to Todd was a question for a jury. *Id.* at 169, 816 A.2d at 941. The court concluded a reasonable jury could find the bus driver failed to take action that could have protected Todd. *Id.* at 168, 816 A.2d at 941. Thus, the trial court’s grant of summary judgment in favor of MTA was inappropriate. *Id.* at 169, 816 A.2d at 941.

Common carriers have a duty to prevent foreseeable assaults upon passengers and to aid passengers in danger. Common carriers

doing business in Maryland must now modify their operating procedures and train their employees on when and how to aid a passenger in danger. The holding mandates that common carriers have a duty to protect passengers provided an employee is not called upon to put himself or herself in the path of danger. This standard will require common carriers to walk a fine line between discouraging their employees from intervening, in the interest of their own welfare, and encouraging intervention to avoid liability for any harm to passengers in peril. Attorneys advising common carriers doing business in Maryland must assist their clients in drawing this line.

JUDGE BASIL A. THOMAS INTERNATIONAL LAW LIBRARY

A fund honoring Judge Basil A. Thomas has been created to support an International Law Section in the University of Baltimore Law Library. Your contributions to assist in the establishment of this library are most welcome.

Please make checks payable to: University of Baltimore Educational Fund

Please send to:

**Judge Basil A. Thomas
Law Library**

**University of Baltimore
Educational Foundation
1130 N. Charles St.
Baltimore, Maryland 21202**

410-837-6148

***Gifts to the Judge Basil A.
Thomas Law Library are tax
deductible as allowed by law.***

United States v. Mason:
**The Fourth Circuit Clarified the Career Criminal Classification of the
Federal Sentencing Guidelines**

By : Katherine Kiemle

In *United States v. Mason*, the Court of Appeals for the Fourth Circuit clarified the career criminal classification of the federal sentencing guidelines. *United States v. Mason*, 284 F.3d 555 (4th Cir. 2002). The court held a prior state conviction for unarmed robbery committed when Mason was a juvenile cannot be counted as a predicate offense for purposes of career offender sentencing. *Id.* at 562.

In April 2000, James Anthony Mason (“Mason”) pleaded guilty to illegal distribution of cocaine base. Mason’s probation officer, on whom the court relied for a sentencing determination, assigned Mason a total offense level of twenty-nine, placing him in criminal history category VI. The probation officer’s recommendation relied entirely on Section 4B1.1 of the federal sentencing guidelines, which stipulates among other qualifications that a defendant have at least two prior felony convictions of either a crime of violence or a controlled substance offense. In Mason’s case, the probation officer’s recommendation relied on a 1990 federal conviction for a controlled substance committed when Mason was twenty-six and a conviction for unarmed robbery

committed when Mason was a juvenile.

Mason was sentenced to 151 months in federal prison and three years of supervised release as a result of his category IV criminal history. Prior to sentencing, Mason objected to the court’s reliance on the juvenile conviction in determining career criminal classification. The district court overruled Mason’s objection. Mason appealed. The Fourth Circuit reviewed the case *de novo* and vacated and remanded for new sentencing.

In its evaluation, the Court of Appeals for the Fourth Circuit dissected Sections 4B1.1 and 4B1.2 of the federal sentencing guidelines. *Id.* at 558. The court began with Section 4B1, which sets forth requirements for the career criminal offender classification. The issue with regard to Mason lay with the third and final element of the classification, which states a “defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.” *Id.* The court agreed with Mason that the first felony conviction relied upon by the court was questionable because, although convicted as an adult, he received a juvenile sentence. *Id.* at 559.

The court, however, did not find the statute necessarily determinative. *Id.* For further analysis, the court reviewed commentary to Rule 4B1.2, which defines prior felony conviction as a prior adult federal or state conviction. *Id.* at 559. As such, a juvenile conviction cannot be counted in determining whether a defendant was a career offender. *Id.*

The court acknowledged in its reading of Section 4B1.1 that the appropriate elements of criminal sentencing have typically been determined with reference to Section 4B1.2. *Id.* at 559. However, the court found Section 4A1.2(d) provided potentially determinative information in this case. *Id.* Section 4A1.2(d) deals with whether offenses committed prior to age eighteen are included in the criminal history calculation. *Id.* The commentary clarifies that such offenses are counted only if the adult sentence exceeds one year and one month. *Id.* at 560. Therefore, the court reasoned if the commentary was followed, Mason’s juvenile robbery conviction counted for purposes of career offender classification only if he was both convicted and sentenced as an adult. *Id.* at 560.

The court examined whether

the commentary was inconsistent with the guidelines and, by relying on the rule's plain language, determined it was not. *Id.* at 560. The Commission used the word "imprisonment" in Section 4A1.1 (1), which refers to adult convictions and sentencing. *Id.* The Commission then used the word "confinement" in Section 4A1.1 (2), which covers both juvenile and adult dispositions. *Id.* The court reasoned the Commission was deliberate in its wording of the rule. *Id.* The Commission used the harsher term "imprisonment" to refer to adult adjudication. It used the less harsh term "confinement" to refer to juvenile adjudication. *Id.* These terms were, therefore, intentionally used to indicate different criminal dispositions. *Id.* For Mason's juvenile conviction to count toward career offender purposes, he must have received an adult conviction and an adult sentence. *Id.*

The court then analyzed whether Mason was both convicted and sentenced as an adult for his juvenile robbery offense. *Id.* at 560. In making a determination, the court must, according to the rule, examine the sentencing and conviction guidelines of the particular jurisdiction where the defendant was adjudicated. *Id.* Mason had been adjudicated in West Virginia. *Id.*

The court assumed for purposes of its evaluation that Mason received an adult conviction. *Id.* A juvenile convicted under adult jurisdiction in West Virginia is not automatically sentenced as an adult. *Id.* at 561. Under West Virginia

code, a circuit court may remand a minor offender to juvenile jurisdiction after adjudication as an adult by sentencing the offender as a juvenile. *Id.* Mason was sentenced as a juvenile under these guidelines since the judge sentenced him to placement in a rehabilitation center for youthful offenders. *Id.* Therefore, the court concluded Mason was sentenced as a juvenile. *Id.*

Mason's 1981 juvenile sentence meant, therefore, his conviction could not serve as a predicate felony under Section 4B1.1. *Id.* at 562. As such, Mason did not qualify for career offender status under the federal sentencing guidelines. *Id.*

As a footnote to its holding, the Fourth Circuit recognized its decision was not necessarily consistent with decisions in other circuits. *Id.* at 562. The court's holding, in this case, may be read as a liberal interpretation of the federal sentencing guidelines. The court did permit a three-time felon to avoid the strict career offender classification based on, what some might read as, a technicality. However, the Fourth Circuit followed the strictest reading of the rule. Federal sentencing guidelines do not permit courts to rely on juvenile felony offenses as predicate offenses for purposes of career offender sentencing. With its *Mason* decision, the Fourth Circuit made a bold statement. If the Legislature desires a different interpretation, it must change the rule accordingly.

**MAILING LIST
INFORMATION
UPDATE**

ATTENTION

**JUDICIARY AND
LAW LIBRARIES**

**If you wish to make
changes to your mailing
list information or need
back issues of
the *Law Forum*
please contact:**

**University of Baltimore
Law Forum
1420 North Charles Street
Baltimore, Maryland
21201
(410) 837-4493**

**e-mail:
lawforum@ubalt.edu**

www.ubalt.edu/lawforum

***My address is incorrect.
Please update your mailing
list as follows:***

Professor Jane Murphy is undoubtedly the backbone of the University of Baltimore Family Law program. She started her legal career in New York where her interest in public policy guided her to the field of law. Professor Murphy's experiences include working at small firms, legal aid programs, and the federal government. Early in her legal career she had the opportunity to litigate and represent the Department of Energy in federal appellate cases. Later she decided to round out her legal experiences and work closer with clients in need of representation. Throughout her career she has sought to improve standards in the practice of law and to perform work of value.

While living in Washington, D.C., she taught at Georgetown University. During this time her life changed greatly. While managing a legal career, she married her college sweetheart, Dr. Chris Kearney. As Professor Murphy's husband worked in Baltimore, they moved to ease the commute and Professor Murphy applied for a faculty position at the University of Baltimore School of Law, where she has been ever since.

Professor Murphy's accomplishments at the School of Law include the 1988 expansion of the Law School's clinical program, which she considers the job of her dreams. Her position at the School of Law allows her to be with her children, to be part of the community, to perform socially valuable pro bono work, to write, and to practice law. Most importantly, her position allows Professor Murphy to mentor many law students. While her job is no less demanding than private practice, she admits that it provides more flexibility.

Flexibility is very important to Professor Murphy, who is very devoted to her husband and children. She proudly speaks of her children, Brendan (20), Margaret (17), Catherine (12) and Grace (9), and their many accomplishments. Education is one of Professor Murphy's priorities and her children are successful students. As Professor Murphy stated, "they make us look good."

Her mentorship and academic standards extend to Professor Murphy's students as well. Professor Murphy thinks very highly of UB law students. She feels UB students have a vested interest in their education, which pushes the school and faculty to offer the best education possible. For example, several years ago Family Law Clinic students performed public policy research on family law



cases, which was used to reform the family court system. More recently, students pushed the Law School to offer more opportunities and training in family mediation, which led to a pilot program in coordination with the Circuit Court for Baltimore City. Clinic students work with mediators to offer on-site mediation in family cases. While Professor Murphy credits students for their enthusiasm, undoubtedly her support made such an opportunity possible.

In addition to her roles as professor and Director of the nationally renowned UB Family Law Clinic, Professor Murphy is the academic advisor for the UB Family Law Association. Professor Murphy is very active with the local and national bar associations and with the circuit court, developing programs and policies to enhance the efficiency and effectiveness of the family law system while helping the under-represented in family law cases. Professor Murphy recently worked with Family Law Clinic students in the "Civil Gideon" case heard before the Court of Appeals of Maryland.

The *Law Forum* Editorial Board recognizes the Law School is privileged to have Professor Murphy as a member of our faculty. Professor Murphy is also an asset to Maryland's legal community. On April 16, 2004, Professor Murphy received the 2004 USM Regent's Faculty Award for Excellence in Public Service.