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ARTICLES

RECENT DEVELOPMENTS

VOLUME FORTY FALL 2009 NUMBER ONE

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LETTER FROM THE EDITOR-IN-CHIEF

To the Maryland Legal Community:

The editorial board of the *University of Baltimore Law Forum* proudly presents the first issue of the 2009-2010 academic year. Every year, the *Law Forum* aims to provide our readers with thought-provoking articles and recent developments covering a wide array of legal issues. The *Law Forum* staff has dedicated countless hours to ensure that our fall issue carries on this tradition.

In this, *Law Forum*'s fortieth year as a journal, we fittingly begin with an article written by the Honorable Arrie W. Davis, Senior Judge on the Court of Special Appeals of Maryland. An alumnus of our law school, his Honor recently celebrated a fortieth anniversary of his own—as a member of the Maryland Bar. In his article, Judge Davis draws from the recent confirmation hearings for Justice Sonia Sotomayor and discusses the role that empathy and life experience should play in a judge's decision-making process. In doing so, he weaves in his own life experience, as well as those of jurists on the Supreme Court and the appellate courts of Maryland to create a truly informative and inspiring piece.

The next article, authored by another esteemed alumnus of our law school, the Honorable Dana M. Levitz and his former law clerk, Ephraim Siff, makes a compelling argument for a complete overhaul of the current selection and election process for circuit court judges in Maryland. Judge Levitz and Mr. Siff leave no stone unturned as they methodically point out the current system's inadequacies and present numerous proposals for reform.

In the third article, Professor Darrell VanDeusen and Donna Glover provide an excellent analysis of the recently amended Maryland Flexible Leave Act. Their article posits that, despite improvements to the Act, confusion regarding its application still exists. As a result, the authors warn that employers and employees may have to wait several years for clarification from the judiciary if interpretive regulations are not issued.

With the fourth and final article, Joshua Friedman and Gary Norman address the current status of Maryland's domestic violence protection laws. Their article urges the Maryland Legislature to follow the lead of several states that have recognized the unmistakable correlation between domestic violence and animal abuse. Accordingly, the authors recommend amending the scope of Maryland's protective and peace order statutes to include protection for family pets and service animals.

Finally, our Recent Development pieces examine eleven of the most interesting cases decided by the Court of Appeals of Maryland in the last year. Written by *Law Forum*'s staff editors, these selections cover a wide range of emerging issues in the state, including the scope of the Boulevard Rule as it relates to unfavored drivers' liability in traffic accidents, the gravamen of an informed consent claim in Maryland, and the proper standard for determining when the twelve-year statute of limitations for specialty actions is applicable.

The editorial board would like to acknowledge the entire staff of the *Law Forum* for their outstanding contributions to this issue. Additionally, we owe an enormous debt of gratitude to last year's editorial board for their guidance as we settled into our new positions. Finally, we thank you, our readers, for your continued input and support. We hope you enjoy our latest installment.

Best regards,

N. Tucker Meneely

Member, National Conference of Law Reviews

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ARTICLE

THE RICHNESS OF EXPERIENCE, EMPATHY, AND THE ROLE OF A JUDGE: THE SENATE CONFIRMATION HEARINGS FOR JUDGE SONIA SOTOMAYOR

By: The Honorable Arrie W. Davis*

Since the Senate confirmation hearings of Judge Robert Bork, Supreme Court nominees have rarely been forthcoming in answering questions about their personal views on controversial topics, including how expansive a judge's role is in deciding cases.[1] In recent years, the now

* Senior Judge, Maryland Court of Special Appeals, author of approximately 1,900 opinions, of which 275 are published opinions of the Court since 1990; trial judge on the District Court for Baltimore City and Circuit Court for Baltimore City from March, 1981 to December, 1990; Faculty Member, Maryland Judicial Institute. Many of the themes developed in this article have been lifted from a course that I teach annually to Maryland judges appointed within the preceding year. My thanks go out to my former law clerk, Ranya Ghuma, for her invaluable assistance in the preparation of this article. I also wish to acknowledge two colleagues and special friends, Chief Judge of the Court of Appeals, Robert M. Bell and former Chief Judge of the Court of Special Appeals, Joseph F. Murphy, who, by their careers, have provided inspiration for many of the perspectives provided herein and who will celebrate with me our fortieth anniversary as members of the Maryland Bar on December 19, 2009.

[1] Robert Bork, a United States Court of Appeals judge for the District of Columbia Circuit, was nominated by President Ronald Reagan for Supreme Court Justice Lewis Powell's seat on July 1, 1987. Manuel Miranda, *The Original Borking*: *Lessons from a Supreme Court Nominee's Defeat*, WALL ST. J., Aug. 24, 2005, http://www.opinionjournal.com/nextjustice/?id=110007149. Within forty-five minutes of Bork's nomination to the Court, Senator Ted Kennedy lambasted Bork on the floor of the Senate in a nationally televised speech, declaring:

> Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of the Government, and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is—and is often the only—protector of the individual rights that are the heart of our democracy.

Id.; Kevin McMahon, *Presidents, Political Regimes, and Contentious Supreme Court Nominations: A Historical Institutional Model*, 32 LAW & SOC. INQUIRY 919, 936-37 (2007).

The Reagan White House, stunned by the rapid response to Kennedy's "Robert Bork's America" speech, did not respond for two and a half months. Miranda, *supra*. The Senate confirmation hearings began on September 15, 1987 and Bork's nomination was ultimately defeated after a hotly contested debate in the United States Senate. *Id.*; *see also* James Reston, *WASHINGTON; Kennedy and Bork*, N.Y. TIMES, Jul. 5, 1987, § 4, at 15 (discussing contentious nature of the Judge Bork's nomination proceedings).

The first use of the term "Borked" as a verb was possibly by the Atlanta Journal-Constitution on August 20, 1987, when it "referred to the way Democrats savaged Ronald

familiar "kabuki dance"[2] of Supreme Court nominees could be best characterized by scholars who spoke of Thomas Jefferson as never being in a state of "verbal undress."[3] Supreme Court nominees appearing for confirmation before the Senate Judiciary Committee are understandably circumspect in responding to questions designed to uncover their political and ideological perspectives because, to do so, exposes them to the charge that their decision-making will be based on such perspectives. That such a concern is warranted is borne out by the statement of Senator Lindsey Graham of South Carolina in addressing Judge Sotomayor during the confirmation hearing:

> The reason these speeches [made to groups of law students] matter and the reasons elections matter is because people now understand the role of the court in modern society when it comes to social change. That's why we fight so hard to put on the court people who see the world like us. That's true from the left, and that's true from the right.[4]

Senator Graham's statement is emblematic of the respective positions of warring political and cultural factions whose goal is nothing less than a Supreme Court constituted by nine justices, all reflective of the point of view of the respective factions.

President Barack Obama's public announcement that his ideal nominee for the Supreme Court should possess empathy[5] provided the opportunity for those who opposed the appointment of Judge Sonia

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Reagan's nominee, the Appeals Court judge Robert H. Bork, the year before." William Safire, *The Way We Live Now: 5-27-01: On Language; Judge Fights*, N.Y. TIMES, May 27, 2001, http://www.nytimes.com/2001/05/27/magazine/the-way-we-live-now-5-27-01-on-language-judge-fights.html?scp=1&sq=william%20safire%20may%2027,%202001&st=cse.

[2] A "Kabuki" dance is a "traditional Japanese popular drama performed with highly stylized singing and dancing." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 680 (11th ed. 2004). It has been used at times to refer to what is perceived to be a highly-scripted and politicized confirmation process. *See*, *e.g.*, David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1066 (2008) (reviewing BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES (2006) and JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2007)).

[3] In an August 11, 2006, interview conducted by David Brancaccio of PBS, when asked about the language of politicians, actress and playright, Anna Deveare Smith responded: "It was a Jefferson scholar who told me that Jefferson could never be found in verbal undress." *NOW: Show 232* (PBS television broadcast Aug. 11, 2006) (transcript available at http://www.pbs.org/now/transcript/232.html).

[4] *Sen. Graham Questions Judge Sotomayor at Supreme Court Nomination Hearings*, WASH. POST, July 16, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/07/16/AR2009071601659.html.

[5] Jerry Markon, *Obama's Empathy Standard Drawing Heat*, WASH. POST, May 21, 2009, http://voices.washingtonpost.com/supreme-court/2009/05/obamas_empathy_standard_drawin.html.

Sotomayor to the Supreme Court to question whether Judge Sotomayor could be dispassionate in her decision-making. The process surrounding Judge Sotomayor's confirmation reflects the perennial debate as to whether, and to what extent, a judge's personal experiences should influence his or her adjudication of disputes. The questions posed by the members of the Senate Judiciary Committee and Judge Sotomayor's responses provide the framework for the instant analysis of the proper role of a judge. Rather than an examination of Judge Sotomayor's judicial philosophy, as reflected in her seventeen-year career as a judge on the United States District Court for the Southern District of New York and the Second Circuit Court of Appeals,[6] the focus of this article is on where we are in the public conversation regarding the role of a judge.

As background, Part I consists of an explication of various theories of judicial philosophy, *i.e.*, whether a judge's role is restricted solely to applying the letter of the law or whether, under certain circumstances, judges may rely on policy factors to ensure that the application of the law reflects and serves important societal interests. In Part II, the article considers the extent to which a judge's personal experiences, ideology, identity, and world view should influence his or her decision-making. The role of empathy and collegiality in judicial decision-making is also addressed. Part III anchors the discussion with a reminder of the importance of precedent and the rule of law. Finally, the conclusion makes the case for why it is important that there be justices or judges with divergent views on the Supreme Court (or any appellate court) facilitating a crucible of robust debate, out of which emerge decisions properly tested by perspectives representative of the broad societal spectrum.

I. FORMALISM, REALISM, AND WHAT LIES IN BETWEEN: THE REALITIES OF JUDICIAL DECISION-MAKING

During her confirmation hearing, Judge Sotomayor was roundly criticized by various members of the Senate Judiciary Committee for what they perceived to be indicia of Judge Sotomayor's bias and inability to be impartial and the prospect that her decisions would be rooted in "identity politics."[7] Particular emphasis was placed on comments made

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[6] For general biographical information about Judge Sotomayor, see Alan Wirzbicki, *Sonia Sotomayor*, BOSTON GLOBE, May 27, 2009, http://www.boston.com/news/nation/washington/articles/2009/05/27/sonia_sotomayor/.

[7] *See*, *e.g.*, Sarah Lovenheim, *Key Excerpt: Graham and Sotomayor on Identity Politics and "Wise Latina" Comment*, WASH. POST, July 16, 2009, http://voices.washingtonpost.com/supreme-court/2009/07/key_excerpt_graham_and_sotomay_3.html. The Stanford Encyclopedia of Philosophy describes the term "identity politics" as follows:

by the judge in a 2001 lecture for a symposium entitled *Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation*, during which she stated that she "would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."[8] Senator Jon Kyl, a Republican from Arizona, further asked the

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> [A] wide range of political activity and theorizing founded in the shared experiences of injustice of members of certain social groups. Rather than organizing solely around belief systems, programmatic manifestoes, or party affiliation, identity political formations typically aim to secure the political freedom of a specific constituency marginalized within its larger context.

CRESSIDA HEYES, IDENTITY POLITICS, STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta ed.) (2009), http://plato.stanford.edu/archives/spr2009/entries/identity-politics/ (last visited Nov. 24, 2009).

[8] Hon. Sonia Sotomayor, *Judge Mario G. Olmos Memorial Lecture: Latina Judge's Voice*, 13 LA RAZA L.J. 87, 92 (2002). It is helpful, for purposes of context, to reproduce here the statements made by Sonia Sotomayor that preceded and followed the now infamous "wise Latina" comment:

> Whether born from experience or inherent physiological or cultural differences, a possibility I abhor less or discount less than my colleague Judge Cedarbaum, our gender and national origins may and will make a difference in our judging. Justice O'Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. I am not so sure Justice O'Connor is the author of that line since Professor Resnik attributes that line to Supreme Court Justice Coyle. I am also not so sure that I agree with the statement. First, as Professor Martha Minnow has noted, there can never be a universal definition of wise. Second, I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.
>
> Let us not forget that wise men like Oliver Wendell Holmes and Justice Cardozo voted on cases which upheld both sex and race discrimination in our society. Until 1972, no Supreme Court case ever upheld the claim of a woman in a gender discrimination case. I, like Professor Carter, believe that we should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group. Many are so capable. As Judge Cedarbaum pointed out to me, nine white men on the Supreme Court in the past have done so on many occasions and on many issues including *Brown*.
>
> However, to understand takes time and effort, something that not all people are willing to give. For others, their experiences limit their ability to understand the experiences of others. Others simply do not care. Hence, one must accept the proposition that a difference there will be by the presence of women and people of color on the bench. Personal experiences affect the facts that judges choose to see. My hope is that I will take the good from my experiences and extrapolate them further into areas with which I am unfamiliar. I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.

Id. *See also Profile: Sonia Sotomayor*, BBC NEWS, Aug. 7, 2009, http://news.bbc.co.uk/2/hi/americas/8068637.stm.

nominee to account for additional comments made in that same lecture, in which she remarked:

> [B]ecause I accept the proposition that, as Judge Resnik describes it, "to judge is an exercise of power" and because as, another former law school classmate, Professor Martha Minnow of Harvard Law School, states "there is no objective stance but only a series of perspectives—no neutrality, no escape from choice in judging," I further accept that our experiences as women and people of color affect our decisions. The aspiration to impartiality is just that--it's an aspiration because it denies the fact that we are by our experiences making different choices than others.[9]

In his opening comments, Senator Kyl attacked President Barack Obama's comments, made during the confirmation hearing for Chief Justice John Roberts, where then-Senator Obama articulated that adherence to legal precedent would dispose of ninety-five percent of the cases but that, in those five percent of truly difficult cases before the Supreme Court, where constitutional text does not directly govern, what matters in a nominee is "what is in the judge's heart."[10] In Senator Kyl's opinion, the foregoing comments by Judge Sotomayor suggested that she adhered to this "new model of judging," rather than one emphasizing impartiality and the application of the law, placing her and President Obama, in Senator Kyl's view, "outside the mainstream."[11] Senator Kyl was not alone in pursuing this line of questioning.[12] Conservative senators on the Judiciary Committee premised their questions on the assumption that, notwithstanding Judge Sotomayor's professed "fidelity to the law," her prior speeches and public statements reflected the view that it was a proper function of federal circuit court judges to "make" law.[13] The views expressed by many of the senators manifested their

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[9] Sotomayor, *supra* note 8, at 91.

[10] *Transcript: Sen. Jon Kyl (R-Ariz.) Opening Statement*, WASH. POST, July 13, 2009, http://www.washingtonpost.com/wp-srv/politics/documents/kyl_openingstatement_sotomayor.html.

[11] *Transcript: Sen. Jon Kyl (R-Ariz.) Opening Statement*, *supra* note 10.

[12] *Sen. Lindsey Graham Holds a Hearing on the Nomination of Judge Sonia Sotomayor to Be an Associate Justice of the U.S. Supreme Court*, WASH. POST, July 14, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/07/14/AR2009071402782.html.

[13] Another public statement for which Judge Sotomayor was roundly criticized was her comment, during remarks made in 2005 at Duke University Law School, that federal circuit courts make policy. *See* Jake Tapper, *White House Officials Dismiss Criticisms of Sotomayor, Say She was Likely Pick from Beginning*, ABC NEWS, May 26, 2009, http://blogs.abcnews.com/politicalpunch/2009/05/white-house-off.html. After the "policy" comment, Judge Sotomayor subsequently remarked, "I know, and I know, that this is on tape, and I should never say that. Because we don't 'make law,' I know," and added, after the audience laughed: "I'm not promoting it, and I'm not advocating it . . . . Having said that, the

concerns regarding whether Judge Sotomayor's view of her role as a judge was more expansive than appropriate and whether, as a member of the Court, she would propagate an ideology culturally unacceptable to them.[14]

Judge Sotomayor, for her part, emphatically rejected any attempt to paint her as a judge motivated by bias rather than guided by impartiality. During her opening comments, Judge Sotomayor characterized her judicial philosophy as simply "fidelity to the law . . . . The task of a judge is not to make law. It is to apply the law."[15] In response to questioning by Senator Kyl, Judge Sotomayor disagreed with comments made by then-Senator Obama regarding "what is in the judge's heart" as the "critical ingredient" in determining hard cases.[16] According to Judge Sotomayor, "[i]t's not the heart that compels conclusions in cases, it's the law."[17] As for the "wise Latina" comment, Judge Sotomayor argued that "[t]he context of the words that I spoke have created a misunderstanding," adding:

> To give everyone assurances, I want to state upfront, unequivocally and without doubt, I do not believe that any ethnic, racial or gender group has an advantage in sound judging. I do believe that every person has equal opportunity to become a good and wise judge, regardless of their background or life experiences.[18]

When asked whom she considered worthy of emulation, Judge Sotomayor cited Benjamin Cardozo, who served on the Supreme Court

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Court of Appeals is where, before the Supreme Court makes the final decision, the law is percolating. It's interpretation, it's application." *Id*.

[14] *See*, *e.g.*, *Sen. Grassley Questions Judge Sotomayor at Supreme Court Nomination Hearings*, WASH. POST, July 16, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/07/16/AR2009071602214.html (questioning Judge Sotomayor about her commitment to applying precedent and whether she believes the Supreme Court should fill vacuums in the law left by Congress); *Sen. Graham Questions Judge Sotomayor at Supreme Court Nomination Hearings*, *supra* note 4 ("The reason these speeches matter and the reasons elections matter is because people now understand the role of the court in modern society when it comes to social change. That's why we fight so hard to put on the court people who see the world like us. That's true from the left, and that's true from the right."); *Chairman's Opening Statements, Cornyn Questions Sotomayor at Supreme Court Nomination Hearings*, WASH. POST, July 15, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/07/15/AR2009071501255.html.

[15] Robert Barnes, Amy Goldstein & Paul Kane, *Sotomayor Pledges "Fidelity to the Law,"* WASH. POST, July 14, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/07/13/AR2009071301154.html.

[16] Ari Shapiro, *Sotomayor Differs with Obama on 'Empathy' Issue*, NAT'L PUB. RADIO, July 14, 2009, http://www.npr.org/templates/story/story.php?storyId=106569335.

[17] *Id.*

[18] *Id.*

from 1932 to 1938,[19] for his "great respect for precedent . . . and deference to the Legislative Branch."[20]

Despite Judge Sotomayor's attempts to establish her *bona fides* as an impartial judge committed to deciding cases fairly and promoting the rule of law, Senator Jeff Sessions, the senior Republican on the Senate Judiciary Committee, concluded that, "[i]n speech after speech, year after year, Judge Sotomayor set forth a fully formed . . . judicial philosophy that conflicts with the great American tradition of blind justice and fidelity to the law as written."[21] Senator Sessions joined five other Republican senators in voting against Judge Sotomayor's confirmation.[22] Thirteen members of the Senate Judiciary Committee, including twelve Democrats and Republican Senator Lindsey Graham, voted in favor of confirmation.[23]

Certainly, the picture of how a judge approaches his or her role is more complicated than either the questions or the responses articulated at Judge Sotomayor's confirmation hearings represent. Is it credible, as Senator Sessions suggested at the confirmation hearings, that the ability to empathize with victims of injustice or to identify with marginalized groups "conflicts" with "blind justice" and the rule of law?[24] Or, does

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[19] Columbia University, Justice Cardozo's alma mater, writes:

> Considered one of the great legal thinkers in American history, Benjamin Cardozo was especially known as a spokesman on sociological jurisprudence and the relationship between law and social change. He exerted his wide influence from two prominent positions: first as a judge, and later chief judge, of the New York State Court of Appeals; then, from 1932 until his death, as an associate justice of the U.S. Supreme Court. There he joined with Louis D. Brandeis and Harlan Fiske Stone (1898 Law) to uphold early New Deal legislation. Cardozo expounded his philosophy of law and the judicial process in three classics of jurisprudence: *The Nature of the Judicial Process* (1921), *The Growth of the Law (*1924), and *The Paradoxes of Legal Science* (1928).

C250 Celebrates Columbians Ahead of their Time: Benjamin Cardozo, http://c250.columbia.edu/c250_celebrates/remarkable_columbians/benjamin_cardozo.html (last visited Nov. 24, 2009). *See also* Howard J. Vogel, *The "Ordered Liberty" of Substantive Due Process and the Future of Constitutional Law as Rhetorical Art: Variations on a Theme From Justice Cardozo in the United States Supreme Court*, 70 ALB. L. REV. 1473, 1473-76 (2007) (and sources cited therein).

[20] *See* Jeffrey Rosen, *What's Wrong with Judges Legislating from the Bench?*, TIME, July 16, 2009, http://www.time.com/time/politics/article/0,8599,1910714,00.html. As Rosen points out, ironically, it was Justice Cardozo who wrote that judges, like legislators, must get their experience from life and, in cases where the law is unclear, that a judge must sometimes "'pronounce judgment . . . according to the rules which he [or she] would establish if he [or she] were to assume the part of a legislator.'" *Id*.

[21] *Senate Panel Approves Sotomayor*, BBC NEWS, July 28, 2009, http://news.bbc.co.uk/2/hi/americas/8173036.stm.

[22] Deborah Charles, *Obama Supreme Court Pick Sotomayor Clears Panel*, REUTERS, July 28, 2009, http://www.reuters.com/article/topNews/idUSTRE56R49O20090728.

[23] *Id.*

[24] *Id.*

justice require that the judiciary include judges who can empathize with those subject to their dispensation? More to the point, is it possible for a judge, tasked with the role of applying the law in a wide range of discretionary contexts, to act without regard to the perspectives and experiences informing that judge's background? If not, what personal qualities, training, and ideological perspective render one best suited to the process of adjudication?

In his keynote address to a Boston University School of Law symposium on the *Role of the Judge in the Twenty-First Century*, Judge Richard Posner described three categorical conceptions of a judge's approach to the judicial process.[25] These categories, which constituted, in Posner's view, three "points of an equilateral triangle," were identified by Posner as "formalism, politics, and pragmatism."[26] Others addressing the subject of methodological approaches to legal reasoning have similarly identified three "discrete forms of legal analysis," described at different times as "deduction," "analogy," and "practical reasoning,"[27] or "formalism," "analogy," and "realism."[28] In other instances, judicial decision-making has been organized in terms of the "legal" model, the "political" model, the "strategic" model, and the "litigant-driven" model.[29]

Volumes have been written about the nuances contained within each of these approaches and their relative strengths and weaknesses.[30] No matter the characterization, two key strands emerge from the literature. These involve the degree to which a judge regards the law as the sole source from which the "truth" emerges versus the degree to which a judge integrates his or her ideological, social, or political preferences into decision-making. The contradistinction between reliance solely on literal law and integration of the judge's personal perspective, in the preceding statement, intimates that, for many commentators, these two approaches, which, respectively, are often associated with a "formalist" or "realist" approach to legal decision-making, are viewed as mutually exclusive.

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[25] Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1051 (2006).

[26] *Id*.

[27] Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy and Realism*, 48 VILL. L. REV. 305, 308 (2003) (citing Vincent Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45 (1985)).

[28] Huhn, *supra* note 27, at 308.

[29] Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1460-62 (2003).

[30] *See*, *e.g.*, Edward S. Adams & Daniel A. Farber, *Beyond the Formalism Debate: Expert Reasoning, Fuzzy Logic, and Complex Statutes*, 52 VAND. L. REV. 1243 (1999); Richard Warner, *The Three Theories of Legal Reasoning*, 62 S. CAL. L. REV. 1523, 1551-70 (1989); Vincent Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45 (1985).

This article embraces the thesis that a judge, in reality, often applies both approaches. As support for that proposition, and to apply it to the following examination of Judge Sotomayor's confirmation hearings, a brief explanation of both formalism and realism is required.

Neither formalism nor realism is susceptible to uniform definition.[31] Formalism, for example, has been used to describe both the classical roots of the doctrine along with its modern variants.[32] Rather than provide a definitive synopsis of the literature and theory defining these two doctrines, it suffices for purposes of this article to set forth broad distinctions between what has become generally known as "formalism" and the countervailing "realist" approach.

Classical formalism, at its core, is generally understood as the "traditional" or "conventional" conceptualization of appropriate judicial decision-making.[33] Sometimes described as a "Langdellian" approach to legal reasoning, formalism treats the law as a set of scientific formulae or principles that are derived from the study of case law.[34] These principles

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[31] *See*, *e.g.*, Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 564-65 & n.32 (1996). Judge Posner explains:

> The terms "legal formalism" and "legal realism" have a long history in legal thought. Over the years they have accreted so many meanings and valences that each has become an all-purpose term both of approbation and of disapprobation, surpassing in this respect even "judicial self-restraint" and "judicial activism." "Formalist" can mean narrow, conservative, hypocritical, resistant to change, casuistic, descriptively inaccurate (that is, "unrealistic" in the ordinary-language sense of the word), ivory-towered, fallacious, callow, authoritarian—but also rigorous, modest, reasoned, faithful, self-denying, restrained. "Realist" can mean cynical, reductionist, manipulative, hostile to law, political, left-wing, epistemologically naive—but also progressive, humane, candid, mature, clear-eyed. These usages reflect the polemical character of so much writing about law. Legal realism is also used to refer to the work of particular academic lawyers, mainly on the Yale and Columbia faculties during the 1920's and 1930's, and to specific (and diverse) ideas held by those men. Legal formalism refers to the work of judges and academic lawyers whom the legal realists attacked and who attacked the realists in turn.

Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 180-81 (1987).

[32] *See*, *e.g.*, Richard H. Pildes, *Roots of Formalism: Forms of Formalism*, 66 U. CHI. L. REV. 607 (1999). Professor Pildes emphasizes that modern formalisms differ sharply in structure and in underlying justifications, rendering it difficult to view them as forming part of a coherent or unified vision of modern legal formalism. *See id.*

[33] *See* Posner, *The Role of the Judge in the Twenty-First Century*, *supra* note 25, at 1051.

[34] *See* Pildes, *supra* note 32, at 608-09. Pildes explains that modern American legal formalism manifests in various modes and that classical formalism represented a "scientific system of thought" that "meant more than legal decisionmaking as rule-applying and deductive reasoning"—concepts applicable to any system of law—but rather envisioned

> a scientific system of rules and institutions that were complete in that the system made right answers available in all cases; formal in that right answers could be

create an internal analytical framework which, when applied to a set of facts, leads the decision-maker, through logical deduction, to the correct outcome in a case.[35] Defenders of formalism posit that it "proffer[s] the possibility of an 'immanent moral rationality'"[36] based on careful study of the law:

> In the formalist conception, law has a content that is not imported from without but elaborated from within. Law is not so much an instrument in the service of foreign ideals as an end in itself constituting, as it were, its own ideal. Rather than being an exclusively positivist transformation of the non-legal into the juridical, law can involve the recognition of that which already has an inchoate juridical significance. The paradigmatic legal function is not the manufacturing of legal norms but the understanding of what is intimated by juridical arrangements and relationships. Legal creativity here is essentially cognitive, and it is most naturally expressed in adjudication conceived more as the discovery than as the making of law.[37]

In light of the foregoing discussion, it should come as no surprise that Supreme Court Justice Antonin Scalia adopts, on many issues, a formalist approach.[38] For example, Justice Scalia is a staunch proponent of "originalism"[39] and "textualism."[40] For obvious reasons, a formalist approach lends itself prophetically to an emphasis on textual analysis that strives to discover the objective or "plain meaning" of the "legal text."[41] For Justice Scalia, when judges stray from the application of "rules" and engage in policymaking or when they apply discretionary authority, they sacrifice predictability and fairness in the legal process and threaten

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> derived from the autonomous, logical working out of the system; conceptually ordered in that ground-level rules could all be derived from a few fundamental principles; and socially acceptable in that the legal system generated normative allegiance.

Id. at 607-09. *See also* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983) (cited in Pildes, *supra* note 32, at 608 n.1).

[35] *See* Richard Delgado, *Rodrigo's Thirteenth Chronicle: Legal Formalism and Law's Discontents*, 95 MICH. L. REV. 1105, 1109 n.13 (1997); Huhn, *supra* note 27, at 309-10.

[36] *See* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of the Law*, 97 YALE L.J. 949, 950, 953-54 (1988) (citations omitted).

[37] *Id.* at 956.

[38] *See* Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 530-31 (1997) (reviewing ANTONIN SCALIA, ET AL., A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997)).

[39] *Id.* at 531, 537 (explaining that Justice Scalia's "basic argument is that the Constitution's meaning is set not by the original intention but by the original meaning of its text").

[40] *Id.* at 534-35.

[41] Huhn, *supra* note 27, at 309-11.

democratic values by imposing judge-made law.[42] It is thus that Justice Scalia proclaimed: "Of all the criticisms leveled against textualism, the most mindless is that it is 'formalistic.' The answer to that is, of course it's formalistic! The rule of law is about form. . . . Long live formalism. It is what makes a government a government of laws and not of men."[43]

The formalist approach has been criticized by many legal thinkers, including those who are proponents of the doctrine of legal realism.[44] Legal realism surfaced in the early twentieth century as a counterweight to formalism.[45] Generally, legal realism "implores the recognition of the use of social condition as a variable in decision making, in lieu of mere reliance on legal rules which may advance outdated or dysfunctional policies."[46] Legal realists did not reject the application of rules *in toto*.[47] Professor Joseph William Singer explains that, for the legal realists, a reliance on legal rules *alone* was misplaced, because rules often contained concepts such as "reasonableness" that were subject to varied interpretations.[48] Moreover, to the realist, a case "could be read in at least two ways: it could be read broadly to establish a general rule applicable to a wide range of situations, or it could be read narrowly to apply only to the specific facts of the case."[49] Legal realists recognized that, given the abstract nature of many legal concepts, legal precedent could be appealed to in "competing" and "contradictory" ways to resolve, in one way or another, a particular legal dispute.[50] Thus, a judge's ideology could sway or influence that judge's view of what facts or law were pertinent to the

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[42] *See* Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175, 1186-87 (1989); Sunstein, *supra* note 38, at 530-31.

[43] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION, *supra* note 38, at 25 (as quoted by Sunstein, *supra* note 38, at 531).

[44] Richard A. Posner, *What has Pragmatism to Offer Law? in* PHILOSOPHY OF LAW AND LEGAL THEORY: AN ANTHOLOGY, 180-83 (Dennis Patterson, ed., 2003) (identifying Oliver Wendell Holmes, Benjamin Cardozo, and Jerome Frank as three of the leading proponents of legal realism).

[45] *See* Huhn, *supra* note 27, at 309-18.

[46] Blake D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63, 71 n.39 (1998) (citing G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L.J. 819, 821 (1986)).

[47] *Id.*

[48] Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 470-71 (1988) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986)). *See also* Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1070 (2006) ("Reasonableness issues arise in countless areas of constitutional law, from Fourth Amendment to Equal Protection, and . . . require judgment calls that inescapably are influenced by—if not based on—a judge's own views and experiences.").

[49] Singer, *supra* note 48, at 470 (citing Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 208 (1986)).

[50] *Id.* (citing Altman, *supra* note 49, at 209).

resolution of the dispute or, more to the point, how to interpret the pertinent facts or law.[51] Professor Singer further explains:

> The realists did not believe, however, that the indeterminacy of legal rules meant that all generalizations are meaningless and that decisions are controlled only by the psychological make-up of the judge. Social context, the facts of the case, judges' ideologies, and professional consensus critically influence individual judgments and patterns of decisions over time. The realists felt that study of such factors could improve predictability of decisions. Moreover, they sought to develop new kinds of general rules that would be useful in predicting legal outcomes and in shaping the law better to serve the needs of society. One goal of realism was to make rules more specific, for example, by creating different rules for contracts between merchants and contracts with consumers. Another way was to replace formalistic deduction of consequences from abstract concepts with explicit policy, moral, and institutional analysis. The realists thought that restructuring law and legal reasoning along these lines would both make the legal system more predictable and make the rules better conform to social needs.[52]

Whether informed by realism or not, it is worth noting that the Supreme Court has repeatedly rejected the idea that judges are "mere machines," mechanically applying legal doctrines.[53]

The idea that a judge must necessarily be all formalist or all realist in approach, relying on "just the law" or being guided solely by personal ideology, does not reflect the day-to-day reality of judicial decision-making, nor does it represent the desired approach. For Judge Posner, the judicial approach most descriptive of appellate judges in the American judiciary is the "pragmatic" approach, which compels the judge to "decide cases with reasonable dispatch, as best one can . . . ."[54] In many

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[51] *See*, *e.g.*, Sylvia R. Lazos Vargas, Essay, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 58 MD. L. REV. 150, 197, 199 (1999) (explaining that the realist or Critical Legal Studies approach recognizes that judges' "ideologies," or the "unstated assumptions of their common sense of the world, will shape which context judges find relevant in difficult cases") (citations omitted).

[52] Singer, *supra* note 48, at 470-71 (internal citations omitted).

[53] *See* Lee Anne Fennell, *Between Monster and Machine: Rethinking the Judicial Function*, 51 S.C. L. REV. 183, 195 & n.45 (1999) (citing to several Supreme Court opinions and various dissents using language critical of mechanical considerations or approaches).

[54] Posner, *The Role of the Judge in the Twenty-First Century*, *supra* note 25, at 1053. Posner has also written about "pragmatism" in other venues. *See*, *e.g.*, Richard Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1 (1996); Richard Posner, *What Has Pragmatism to Offer Law*, 63 S. CAL. L. REV. 1653 (1990). In this article, I do not wish to express an opinion, one way or the other, as to whether "pragmatism" is the philosophy by

cases, a judge's political leanings as a "conservative" or a "liberal" is a predictor in that judge's resolution of a dispute.[55] In other cases, a judge rules inconsistent with his or her "politics"—a reality underlined by unanimous decisions on politically charged issues.[56] In other words, a judge may, in some instances, apply "formalistic" approaches while, in other instances (or even, at times, simultaneously), be guided by ideological preferences relevant to what the judge believes will advance a particular societal interest.[57] Professor Wilson Huhn argues that formalism, analogy (or reasoning by example), and realism should not be viewed as isolated doctrines but, rather, as "stages of legal reasoning."[58] Professor Huhn further posits that "examination of judicial opinions in hard cases reveals that courts progress from formalism, to analogy, to realism, in resolving difficult questions of law."[59]

Moreover, Professor Chemerinsky rightly denounces the "false allure of formalism" as promising "largely discretion-free judging," when the exercise of judicial discretion is a crucial part of a judge's role.[60] The myth of "discretion-free judging" does not, in Chemerinsky's view, take into account the fact that judges are often called upon to balance competing interests, *e.g.*, a criminal defendant's right to a fair trial against the freedom of the press, or the President's interest in executive privilege and secrecy against the need for evidence at a criminal trial, in order to render a decision.[61] Similarly, the concept of originalism, which espouses

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which judges should ideally guide their decision-making. Rather, I cite to Posner's discussion to demonstrate that there are models that recognize the interplay between formalistic and realistic approaches in the dispatch of a judge's duties.

[55] Posner, *The Role of the Judge in the Twenty-First Century*, *supra* note 25, at 1052 (citing, *inter alia*, Cross, *supra* note 29, at 1479-82). Cross discusses how judicial self-reporting "provides persuasive support for the political model of . . . decisionmaking," a model which is based on the principle that "judges are dedicated to advancing their own personal ideological preferences, which generally fall along a conventional liberal-to-conservative continuum." Cross, *supra* note 29, at 1471, 1479.

[56] *See also* Cross, *supra* note 29, at 1482 (explaining that "while the empirical evidence on the political model may conflict with the legal model, it is not so strong as to demonstrate that the legal model has no practical importance").

[57] *See* Posner, *The Role of the Judge in the Twenty-First Century*, *supra* note 25, at 1053. *See also* Fennell, *supra* note 53.

> [D]iscretionary and rules-based approaches to judging can each be dangerous in isolation. Yet both approaches are indispensable to judging, and are not mutually exclusive. Instead of quibbling over the relative merits of the worldviews and philosophical positions that each approach suggests, legal theorists should focus their efforts on arriving at a workable synthesis.

Id. at 209.

[58] Huhn, *supra* note 27, at 305.

[59] *Id.* Huhn is careful to assert that these "stages" do not reflect a hierarchy, such that any one "stage" is superior to another. *Id*. at 306.

[60] Chemerinsky, *supra* note 48, at 1070-72.

[61] *Id.* at 1071-72.

constitutional interpretation "divorced from the value of individual judges," is, in Chemerinsky's view, flawed, because the original intent of the framers of the Constitution cannot be divined without resort to discretion by judges in deciding that intent.[62] Citing as an example, the Ninth Circuit's decision in *Silveira v. Lockyer*[63] and the Fifth Circuit's decision in *United States v. Emerson*,[64] which arrived at opposing conclusions as to whether the original meaning of the Second Amendment was to protect an individual's right to possess and bear arms, Professor Chemerinsky points out that historical quotations may be found in support of either side of almost any argument regarding constitutional construction.[65]

The argument that "discretion-free" judging, devoid of the influence of one's identity or experiences, is implausible in a profession populated by human beings, and not machines, is compelling and shared by many others who have had occasion to pontificate on the matter, including this author. Judge Shirley S. Abrahamson, Chief Justice of the Wisconsin Supreme Court, aptly stated:

> Judging requires more than such a mechanical application of pure reason to legal problems. To be sure, legal principles and logic necessarily influence the outcome of every case. But though they alone will determine many cases, in other cases they will not suffice. Principles may admit of more than one interpretation, conflicting principles may apply, or the application of principles to the facts may be unclear. In cases such as these, the blindfolded judge who is blind to the real world in which the parties live is blind indeed, bereft of a basis on which to make an intelligent, let alone fair, decision.[66]

Notably, Supreme Court justices, on numerous occasions, have expressed how social identification is *relevant* to their consideration of a case. During his confirmation hearings, in response to a comment by Republican Senator Tom Coburn that Justice Alito had, during the hearings, been "unfairly criticized" as not caring about the "less fortunate," the "little guy," or the "weak or the innocent,"[67] Justice Alito, in a poignant expression of empathy, stated:

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[62] *Id.* at 1072-73.

[63] 312 F.3d 1052 (9th Cir. 2002).

[64] 270 F.3d 203 (5th Cir. 2001).

[65] Chemerinsky, *supra* note 48, at 1072-73.

[66] Shirley S. Abrahamson, *Commentary on Jeffrey M. Shaman's The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 633, 641 (1996) (citations omitted).

[67] *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 475 (2006).

> [W]hen a case comes before me involving, let's say, someone who is an immigrant, and we get an awful lot of immigration cases and naturalization cases, I can't help but think of my own ancestors, because it wasn't that long ago when they were in that position. And so it's my job to apply the law. It's not my job to change the law or to bend the law to achieve any result. But when I look at those cases, I have to say to myself, and I do say to myself, this could be your grandfather. This could be your grandmother. They were not citizens at one time, and they were people who came to this country.
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> When I have cases involving children, I can't help but think of my own children and think about my children being treated in the way that children may be treated in the case that's before me. And that goes down the line. When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender, and I do take that into account. When I have a case involving someone who's been subjected to discrimination because of disability, I have to think of people who I've known and admired very greatly who had disabilities and I've watched them struggle to overcome the barriers that society puts up often just because it doesn't think of what it's doing, the barriers that it puts up to them.
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> So those are some of the experiences that have shaped me as a person.[68]

Justice O'Connor also recognized that the "revolution in the legal profession," in terms of the representation of women as law school graduates, lawyers and judges, was "due in large part to the explosion of the myth of the 'True Woman' through the efforts of real women and the insights of real men."[69] According to Justice O'Connor, "[t]his change in perspective has been reflected, as most social change eventually is, in the Supreme Court's jurisprudence."[70] Even Justice O'Connor's statement that a "wise old man" and a "wise old woman" may reach the same conclusion, as articulated, reflected her understanding that wisdom may be attained through the diversity of struggles that face people of various backgrounds:

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[68] *Id.*

[69] Sandra Day O'Connor, *Madison Lecture: Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1548-49 (1991).

[70] *Id.* at 1549.

> Do women judges decide cases differently by virtue of being women? I would echo the answer of my colleague, Justice Jeanne Coyne of the Supreme Court of [Minnesota],[71] who responded that "a wise old man and a wise old woman reach the same conclusion." This should be our aspiration: that, whatever our gender or background, we all may become wise—*wise through our different struggles and different victories*, wise through work and play, profession and family.[72]

Justice Ginsburg adds:

> Judge Jeanne Coyne, who was on the Supreme Court of Minnesota, which I think was the first state Supreme Court to have a majority of women, once said, "A wise old man and a wise old woman will reach the same judgment." I think that is true. But we also bring to the table our life's experience, which is different. A very important difference: Are you male? Are you female? Are you a girl from the golden west? Or are you a kid who grew up in Brooklyn? All of those differences, I think, make the Supreme Court bench, make all the benches in the country, ever so much better than they were when only one kind of person sat in the seat of judgment.[73]

II. WHY PERSONAL EXPERIENCES MATTER: THE ROLE OF EMPATHY AND COLLEGIALITY IN JUDICIAL DECISION-MAKING

As the foregoing discussion demonstrates, the purported aversion to the incorporation of Judge Sotomayor's background and experience into her decision-making, as expressed by those who opposed Judge Sotomayor's confirmation, reveals a view of the judge's role that is disproportionately influenced by principles often associated with strict formalism. Because a judge will typically apply approaches identified both with formalism and realism, it follows that the denigration of relying exclusively on one's personal experiences in judicial decision-making is not borne out by what actually takes place. Simply put, it represents a point of view that does not comport with the reality of being a judge.

More importantly, this author postulates that the ability to tune into one's personal background and life experiences and the associated ability

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[71] Justice Mary Jeanne Coyne was an associate justice of the Minnesota Supreme Court. Minnesota State Law Library, Docket Series: Biographies of Justices and Judges of the Minnesota Appellate Courts, http://www.lawlibrary.state.mn.us/judgebio.html#coyne (last visited Nov. 24, 2009).

[72] O'Connor, *supra* note 69, at 1558 (emphasis added).

[73] *Justice Ruth Bader Ginsburg Distinguished Lecture on Women and the Law: A Conversation with Justice Ruth Bader Ginsburg*, 56 REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 9, 16-17 (2001).

to empathize with the circumstances and world-view of others is, indeed, integral to a judge's ability to reach an appropriate conclusion in a given case. In the context of judicial decision-making, empathy, which, at its core, involves the ability to understand the life experiences or emotions of another person,[74] need not mean "intuition" nor should it be perceived as injecting the "mystical" into the ordered resolution of disputes.[75] Rather, as Professor Lynne Henderson explains, "empathy enables the decisionmaker to have an appreciation of the human meanings of a given legal situation," ultimately aiding the judge both in the process of reaching a legal conclusion and in justifying that conclusion "in a way that disembodied reason simply cannot."[76] Moreover, the fact that a judge has the ability to empathize with human beings involved in a legal dispute does not mean that the judge is, thus, unable to decide the case in a fair and impartial manner. Professor Catherine Gage O'Grady explains:

> Although empathy is sometimes used interchangeably with compassion, sympathy, and pity, empathy as a component of judicial decisionmaking does not mean experiencing sympathy or pity for another and allowing that sympathy to shape an outcome. Empathy in judging is not predictive of outcome—it is part of a process, but it does not carry the day. When a judge proceeds to apply the law and judicially assess a case that is empathically understood, the fact that the judge has achieved empathic understandings may or may not affect the eventual outcome of the case. With respect to judicial decisionmaking, empathy is an important part of the process, not because it may have an impact on the result, but because the incorporation of empathy in judicial

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[74] Professor Lynne Henderson, describes the word "empathy" as encompassing three basic phenomena:

> (1) feeling the emotion of another; (2) understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other; and (3) action brought about by experiencing the distress of another (hence the confusion of empathy with sympathy and compassion). The first two forms are ways of knowing, the third form a catalyst for action.

Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (1987). Merriam-Webster's Collegiate Dictionary defines "empathy," in part, as "the action of understanding, being aware of, being sensitive to, and vicariously experiencing the feelings, thoughts, and experience of another of either the past or present without having the feelings, thoughts, and experience fully communicated in an objectively explicit manner." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 408 (11th ed. 2004).

[75] Henderson, *supra* note 74, at 1576.

[76] *Id.*

> decisionmaking will provide a judge with new understandings and enhanced knowledge of context with which to assess a case.[77]

That we all perceive through the prism of our own unique experiences is beyond cavil. The proper exercise of empathy, for those who exercise authority and wield power over others, in no sense diminishes their ability to make provident, even harsh, decisions. On the other hand, the inability of judges to empathize with individuals subject to their judgment, may, in some instances, result in decisions that reflect only the cloistered perspective of a jurist, disconnected from the everyday experiences of the less fortunate.

A. The Power of Dissent: Experiences with Poverty and Discrimination

The dissents of distinguished Supreme Court Justice Thurgood Marshall reflect a judge's ability to impart to his or her colleagues an understanding of the disparate realities of litigants before the Court, thereby fostering decisions more sensitive to the realities of the litigants and, at times, resulting in outcomes altered by the dissenting view. For example, in *United States v. Kras*,[78] Justice Marshall challenged the majority's denial of an indigent bankruptcy petitioner's argument that the imposition of filing fees violated his due process rights.[79] Kras, beset by poverty and misfortune, resided in a two and one-half bedroom apartment with his wife, two children, his mother, and his mother's child.[80] His eight-month old child was undergoing medical treatment for cystic fibrosis.[81] He was unemployed, after having been discharged by a life insurance company when the premiums collected by him were stolen from his home.[82] He and his family survived on $366 in monthly public assistance, all of which was expended for rent and basic necessities.[83] Among his assets, which were of negligible value, Kras owned a couch in storage, for which a six-dollar payment was due monthly.[84] Kras sought a discharge from his debts in bankruptcy and asked for a waiver of the

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[77] Catherine Gage O'Grady, *Empathy and Perspective in Judging: The Honorable William C. Canby, Jr.*, 33 ARIZ. ST. L.J. 4, 10-11 (2001) (internal citations omitted).

[78] 409 U.S. 434 (1973).

[79] *Id.* at 458-63 (Marshall, J., dissenting). For a general discussion of the *Kras* decision and Justice Marshall's dissent, see Karen Gross, *In Forma Pauperis in Bankruptcy: Reflecting On and Beyond* United States v. Kras, 2 AM. BANKR. INST. L. REV. 57, 58-61 (1994). For a perspective on how Justice Marshall's dissent may have had an impact on subsequent opinions by Justice Blackmun, see Gay Gellhorn, *Justice Thurgood Marshall's Jurisprudence of Equal Protection of the Laws and the Poor*, 26 ARIZ. ST. L.J. 429, 453-56 (1994).

[80] *Kras*, 409 U.S. at 437-38.

[81] *Id.* at 437.

[82] *Id.*

[83] *Id.* at 438.

[84] *Id.*

$50 bankruptcy filing fee, which the United States District Court for the Eastern District of New York granted, in part, on the grounds that the imposition of such a fee violated his due process rights.[85] Five justices of the Supreme Court disagreed with Kras, in an opinion authored by Justice Blackmun.[86] In his dissent, Justice Marshall cited census figures pertaining to the annual incomes of the poor and derided the majority for the ease with which they assumed a person in Kras' position could obtain additional income:

> It may be easy for some people to think that weekly savings of less than $2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. A sudden illness, for example, may destroy whatever savings they may have accumulated, and by eliminating a sense of security may destroy the incentive to save in the future. A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have—like attempting to provide some comforts for a gravely ill child, as Kras must do.
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> It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.[87]

Justice Marshall was undoubtedly motivated by his personal background and experiences with the poor to remind a majority of the Court of the disconnect between the Court's tone and the realities of those in Kras' position.

So, too, was Justice Stevens motivated in his dissenting opinion in *California v. Hodari D.*,[88] a dissent joined by Justice Marshall, to question the majority's "gratuitous quotation" to Proverbs 28:1 ("The wicked flee when no man pursueth"), when the majority, notwithstanding the government's concession that an officer in that case lacked reasonable suspicion to stop Hodari, stated, without deciding the point: "That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and

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[85] *Id*. at 435-36, 440-41.
[86] *Kras*, 409 U.S. at 435-50.
[87] *Id.* at 460 (Marshall, J., dissenting).
[88] 499 U.S. 621 (1991).

arguably contradicts proverbial common sense."[89] According to the dissent, the majority's assumption that an innocent person would not run upon sight of a police officer represented an "ivory-towered analysis of the real world" that failed to take into account the experience of many people, particularly minorities.[90]

The foregoing is indicative of how the presence of those with perspectives informed by direct or indirect experiences with poverty or racial discrimination, and the ability to empathize with litigants as a result of those experiences, are critical to a robust debate on the Court.[91] Indeed, "racial homogeneity on the bench may limit the depth and scope of judicial decision-making."[92] Justice Marshall's ability to empathize and to remind his colleagues on the Court when their failure to do so rendered their decisions less sound, was invaluable. In recognition of the impact that Justice Marshall's moral clarity had on the court, Justice O'Connor proclaimed:

> Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice.
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> At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.[93]

According to Justice White, Justice Marshall "brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match," such that he would "tell us things that we knew but would rather forget; and he told us much that we did not know due to the limitations of

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[89] *Id.* at 621 n.1,

[90] *Id.* at 630 n.4 (Stevens, J., dissenting).

[91] *See* Julian Abele Cook, Jr., *Dream Makers: Black Judges on Justice*, 94 MICH. L. REV. 1479, 1483-84 (1996) (reviewing LINN WASHINGTON, BLACK JUDGES ON JUSTICE (1994)); Gellhorn, *supra* note 79, at 430-31.

[92] Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 434 (2000).

[93] Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992).

our own experience."[94] Other colleagues on the Court shared these perspectives.[95]

On a more personal note relevant to the importance of experience and empathy in the role of a judge, the prism through which African-Americans have peered over the years, notwithstanding gains never thought to be possible just a few years ago, is one which is certainly different from those of the majority society, African-Americans being the only citizens subjected to racial discrimination sanctioned by the so called "Jim Crow" laws.[96] Although I am aware of no studies of the influence of the life experiences of African-American judges on their decision-making and I would never presume to have an insight as to any such relationship,[97] examples from the experiences of Justice Marshall, my experiences, and the experiences of two former members of my Court provide support, I submit, for the proposition that such experiences serve to sensitize minority judges to issues growing out of their personal experiences without compromising their ability to decide cases in a fair and impartial manner, anchored by the rule of law.

David T. Mason, the first African-American judge appointed to the Maryland Court of Special Appeals,[98] while an attorney, refused to submit to a "frisk" by a Baltimore City police officer as he, two male, and two female friends sat at a table in a local nightclub on Sunday, February 15, 1953, at 1:30 in the morning.[99] Complying with an order by a Baltimore City police sergeant to stand, Mason reiterated his refusal to be searched, but was frisked over his objection.[100] After a Baltimore City trial judge entered judgment in favor of the police sergeant on Mason's claims of assault and battery and false imprisonment, the Maryland Court of Appeals reversed the judgment of the lower court, mandating, however, only nominal damages.[101] On another occasion, in clearly a triumphant moment, Judge Mason returned as the head of the Maryland Employment Security Administration, an agency that had just a few years before, because of the racial policies of the agency, ordered that he not, as an employee, have contact with the public.[102]

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[94] Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992).

[95] *See* Gellhorn, *supra* note 79, at 452 nn.164-65, 453 n.166.

[96] C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 7 (Oxford Univ. Press, Inc. 2002).

[97] *But see* Cook, *supra* note 91.

[98] Frederick N. Rasmussen, *David Mason, 88, Cabinet Secretary, First Black Appellate Judge in Md*., BALT. SUN, Nov. 18, 2003, at 7B.

[99] Mason v. Wrightson, 205 Md. 481, 485, 109 A.2d 128, 129 (1954).

[100] *Id.*

[101] *Id.* at 489, 109 A.2d at 132.

[102] At a memorial service held by the Court of Special Appeals on January 27, 2004, on the occasion of Judge Mason's death, over which the writer of this article presided, former

In 1961, at the age of sixteen, Robert M. Bell, currently the Chief Judge of Maryland's highest Court, the Court of Appeals, was arrested, along with eleven other protesters, for trespass on private property as a result of engaging in a sit-in demonstration at Hooper's Restaurant in downtown Baltimore, Maryland.[103] The defendants were fined ten dollars by the Criminal Court of Baltimore.[104] After appeals filed by Tucker R. Dearing and civil rights attorney Juanita Jackson Mitchell, who were joined by Thurgood Marshall and Jack Greenberg on the brief, the Court of Appeals rejected the appellants' contention that, once an owner has opened his or her property to the general public, resort to the Maryland Criminal Trespass Statute, constitutional on its face, was an unconstitutional application of the law.[105] These events were the impetus for the Equal Accommodations Law enacted by the Maryland General Assembly in 1964.[106] Because of the new statute, which was enacted prior to the deliberations on this case, the Supreme Court of the United States, which had granted *certiorari*, ultimately declined to consider the petitioners' constitutional arguments and vacated the judgments, remanding to the Court of Appeals of Maryland for reconsideration of the convictions in light of the new law.[107] Although the protagonists in *Bell v. State* did not prevail in the Court of Appeals' second consideration of their case,[108] their efforts were more than pyrrhic. While the Court of Appeals' second consideration of *Bell v. State* affirmed the judgments against the protestors, the protestors' petition for rehearing, filed approximately one month after the Court affirmed the judgments on remand, was granted.[109] On April 9, 1965, the Court reversed the

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Governor Marvin Mandel recounted how Judge Mason had endured the ignominy of being told that, because of racial policies of the agency, he was not to have contact with the public, including processing applications or taking complaints over the phone, as an employee of the Maryland Employment Security Administration, and how he returned triumphantly, as the head of that agency, having been appointed by Governor Mandel.

[103] Bell v. State, 227 Md. 302, 303-04, 176 A.2d 771 (1962); *see also* Bell v. Maryland, 378 U.S. 226, 227-28 (1964); Bell v. State, 236 Md. 356, 358, 204 A.2d 54, 55 (1964). For a thorough discussion of this particular case, see William L. Reynolds, *Foreward: The Legal History of the Great Sit-In Case of* Bell v. Maryland, 61 MD. L. REV. 761 (2002), and see also John Carroll Byrnes, *Commemorative Histories of the Bench and Bar: In Celebration of the Bicentennial of Baltimore City 1797-1997*, 27 U. BALT. L.F. 5, 17-19, 17 n.140 (1997).

[104] *Bell*, 227 Md. at 303-04, 176 A.2d at 771.

[105] *Id.* at 303-05, 176 A.2d at 771-72.

[106] *See* Act of Apr. 7, 1964, ch. 29, 1964 Md. Laws 50-51 (codified as amended at MD. CODE ANN., STATE GOV'T § 20-304 (2009)).

[107] *Bell*, 378 U.S. at 239-40, 242; *see also Bell*, 236 Md. at 358, 204 A.2d at 55.

[108] *Bell*, 236 Md. at 369, 204 A.2d at 61.

[109] Reynolds, *supra* note 103, at 793.

> When I got this far in my reading for this Article, I realized that I had missed something. The decision by the Court of Appeals discussed in the proceeding paragraphs had affirmed the convictions. But I knew that the convictions had been

judgments.[110]

Justice Marshall, long before his elevation to the Supreme Court in 1967, represented a young 1934 graduate of Amherst College, Donald G. Murray, who had sought—but was denied—admission to the University of Maryland School of Law.[111] The Law School appealed from an order by the Baltimore City Court, directing the issuance of a writ of mandamus and ordering the Law School to admit Murray.[112] Citing the State's legal obligation to offer equal treatment in the discharge of its function of educating its citizens, the Court of Appeals ordered that Murray be admitted.[113] Ironically, a few years earlier, because the University of Maryland School of Law did not admit African-American applicants, Justice Marshall himself had not sought admission.[114] Over forty years later, still vexed by the Law School's refusal to admit African-Americans, Justice Marshall would decline an invitation to a dedication ceremony, in which the newly constructed University of Maryland School of Law Library was named after him.[115]

> overturned; or, at least, so went local lore. Obviously, my research assistant, a very able student, I might add, had not pulled all of the cases. So, I Shepardized the case myself. To my astonishment, there was no further decision by the Court of Appeals, no reversal following a petition for rehearing.
>
> Eventually, I read the official report of the decision in the *Maryland Reporter*. (I had been using an online printout of the case from the *Atlantic Reporter*.) Still nothing. Finally, however, a meticulous re-reading discovered the following. In the *Maryland Reporter*, the report of the decision on remand lists, as it always does, counsel for the parties; that listing is followed by the date of the decision and the opinions themselves. But if the reader looks very carefully at the report of *Bell v. Maryland*, she will find the following unusual if not unique entry (reprinted in full):
>
> > Decided October 22, 1964
> >
> > Petition for rehearing filed November 23, 1964, granted December 7, 1964, and reversed April 9, 1965.
>
> This entry is missing from the report of the remand in the *Atlantic Reporter*. A researcher, in other words, would know of the reversal only from a very careful reading of the *Maryland Reporter*, an event most unlikely to happen.

Id.

[110] *Id*. at 794.

[111] Pearson v. Murray, 169 Md. 478, 480, 182 A. 590, 590 (1936).

[112] *Id.*, 182 A. at 590-91.

[113] *Id.* at 489, 182 A. at 594.

[114] *See* U.W. Clemon & Bryan K. Fair, *Lawyers, Civil Disobedience, and Equality in the Twenty-First Century: Lessons from Two American Heroes*, 54 ALA. L. REV. 959, 973 (2003).

[115] *See* BRENDA HAUGEN, THURGOOD MARSHALL: CIVIL RIGHTS LAWYER AND SUPREME COURT JUSTICE 33-34 (Mari Bolte ed., Compass Point Books 2007).

> The University of Maryland Law School was just a few blocks from Marshall's home in Baltimore. Tuition rates were low, and it had a good reputation as a public

The above accounts of notable African-American judges are illustrations of resort to the legal process occasioned by violations of civil rights disproportionately experienced by African-Americans and other minorities, in light of the history of segregation and institutionalized racism in this country. Who better to be an umpire than contestants who have zealously competed within the framework of the rules and have changed those very rules? The most prominent example of such contestants, who demonstrated remarkable skill in utilizing the rules of the game, *i.e.*, the legal system, thereby becoming eminently qualified to be decision-makers, was the legal team assembled by Charles Hamilton Houston, including former President and Dean of the Howard University School of Law, James Nabrit, Spotsworth Robinson and Robert Carter. Notably, the team, which ultimately produced such noted jurists as Justice Marshall, A. Leon Higginbotham, and William Hastie, of course, devised the groundbreaking strategy in the presentation of the petitioners' case in *Brown v. Board of Education*. Aside from the need to resort to the legal process, virtually every person of color can recount dozens of instances in which he or she has been stereotyped by strangers according to the degree of exposure to and familiarity within their communities. Other experiences rooted in one's socioeconomic status may also impact the experiences of African-Americans more severely. African-American judges will, accordingly, bring these experiences to the bench.[116] As Professor Sherillyn Ifill has observed, the notion that the rest of society is subject to cultural and ideological influences regarding race while judges are passed by is an anomaly.[117] For example, while the African-American community is by no means monolithic,[118] African-American judges are arguably more likely to have been "exposed to more varied experiences across race and class lines than their white counterparts," as

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> school that educated its students well. Marshall very much wanted to go there, but he didn't bother to apply. The school made turning away blacks a common practice.

Id. He was accepted at Howard University Law School, where he matriculated, although he felt that a degree from Maryland would do more to advance his legal career. *Id.* Still peeved decades later that he was unable to attend the University of Maryland Law School, Marshall declined an invitation to the ceremony in 1980 naming the law library after him. JUAN WILLIAMS, THURGOOD MARSHALL: AN AMERICAN REVOLUTIONARY 371-72 (Times Books 1998). When school officials invited other members of the Court to attend the ceremonies, Marshall, in writing a memo to the justices urging them not to go, stated "'I will not be there and I have made this clear to them from the beginning' . . . . 'I am very certain that Maryland is trying to salve its conscience for excluding the Negroes from the University of Maryland for such a long period of time.'" *Id.* at 372 (citing Memorandum from Thurgood Marshall to Conference, Marshall Papers, Supreme Court (July 31, 1980) (on file with the Library of Congress)).

[116] Ifill, *supra* note 92, at 434-36.

[117] *Id.* at 431-32.

[118] *Id.* at 414, 420-21.

African-American communities are disproportionately impacted by poverty.[119] As such, the chances are that the African-American judge has a greater familiarity with litigants in distressed economic circumstances and persons living in single-parent households.[120]

This is not to suggest that sensitivity to issues of race and class is the exclusive province of African-Americans or other traditionally marginalized groups. For members of the majority community, however, predisposition to serve the interests of that community and one's own interests may, if not otherwise tempered by competing viewpoints, interfere with the proclivity to be sensitive to issues that affect others. The comments of Justice Marshall's colleagues on the Supreme Court, which are quoted *supra*, illustrate this point.[121] More recently, Justice Ginsburg was motivated to publicly state that, during the course of the deliberations in *Safford Unified School District #1 v. Redding*,[122] some of her male colleagues on the bench, in the view of Justice Ginsburg, seemed unable to appreciate the sensitivity of a thirteen-year-old girl who was strip-searched by school authorities on suspicion that she was hiding ibuprofen in her underwear.[123] In an eight-to-one decision, the Court ultimately held that the search violated the Fourth Amendment.[124] Apropos, Justice Ginsburg expressed her preference that a woman be appointed to the seat vacated by retiring Justice Souter.[125]

Nor does the foregoing discussion suggest that those sensitive to these experiences are unable to judge cases fairly and impartially, a point made

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[119] *Id.* at 429-32, 469.

[120] Professor Ifill references a survey of black and white federal judges, where "83% of white judges surveyed believe that black litigants are treated fairly in the justice system, while only 18% of black judges share that belief." *Id.* at 436 (citing KEVIN L. LYLES, THE GATEKEEPERS: FEDERAL DISTRICT COURTS IN THE POLITICAL PROCESS 21, 237 (1997)).

[121] *See supra* Part II.A.

[122] 129 S. Ct. 2633 (2009).

[123] Robert Barnes, *Student Strip Search Illegal*: *School Violated Teen Girl's Rights, Supreme Court Rules*, WASH. POST, June 26, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/06/25/AR2009062501690.html.

[124] *Safford Unified School District #1*, 129 S. Ct. at 2644. One wonders whether the matter of the justices' sensitivity to the humiliation of a thirteen-year old girl in these circumstances would ever have become public if Justice Ginsburg's colleagues had demonstrated, from the outset, what, in Justice Ginsburg's view, was the appropriate degree of sensitivity to the issue. Ultimately, the Court determined that the search of the thirteen-year-old did constitute a violation of her Fourth Amendment rights. Without having been within those hallowed walls, we cannot know the effect of Justice Ginsburg's public expression of concern on the Court's final outcome.

[125] *See* Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA TODAY, May 5, 2009, http://www.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg_N.htm; Joan Biskupic, *Ginsburg 'lonely' without O'Connor: The remaining female justice fears message sent by court composition*, USA TODAY, Jan. 25, 2007, at 1A, http://www.usatoday.com/news/washington/2007-01-25-ginsburg-court_x.htm.

by Professor Ifill in her discussion of diversity and impartiality.[126] In the interest of full disclosure, Judge Mason was a mentor and close friend until his passing at eighty-seven years of age and my association with Chief Judge Bell extends over a period in excess of forty years. Nevertheless, an examination of the decisions that Judge Mason authored reveals that his decisions are all grounded on settled law and do not reflect any tendency, in the absence of a sound legal basis, to favor defendants in criminal appeals, notwithstanding what he referred to, in submissions to the Court of Appeals in *Mason v. Wrightson*,[127] as an "humiliating" experience.[128] The same may be said of Chief Judge Bell, whose opinions, while often in dissent, are a model of clarity and supported by sound legal authority.[129] The salient point is that their personal experiences and their experiences as lawyers in employing the very legal system that had proven to be a barrier to realizing justice rendered them more sensitive than most to other points of view. Their personal experiences, like those of Justice Marshall, indeed served to

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[126] *See* Ifill, *supra* note 92, at 458-62.

[127] 205 Md. 481, 109 A.2d 128 (1954).

[128] *Id.* at 489, 109 A.2d at 132.

[129] *See*, *e.g.*, Chief Judge Bell's dissenting opinions in: Conaway v. Deane, 401 Md. 219, 932 A.2d 571 (2007) (dissent challenging the application of rational basis review to the State's marriage statute pointing out that the court had previously held that sex-based classifications are entitled to the same review as race-based classifications and that it has been determined that marriage is a fundamental right that should not be denied based on the historical denial of the right to certain groups); Suessmann v. Lamone, 383 Md. 697, 862 A.2d 1 (2004) (rejecting the majority's conclusion that "the procedure for electing [circuit court] judges remains [in Maryland] a partisan one in form and in substance" and thus voters unaffiliated with established political parties are not permitted to vote in primary elections for judicial candidates, the dissenting opinion posits that, to preserve the integrity judicial elections, such selections are nonpartisan and, had the argument been made that Article I, Section 1 precludes the exclusion of unaffiliated registered voters from primary elections for circuit court judges, it would have been "persuasive."); Langston v. Riffe, 359 Md. 396, 754 A.2d 389 (2000) (dissent challenging the majority's departure from the legislative history of the statute and the Court's past position of protecting the finality of declarations of paternity and serving the best interest of the child in holding that a legislative amendment entitles all with an order declaring paternity prior to October 1, 1995 without a genetic test to reopen proceedings and demand a blood test to determine paternity); Ayers v. State, 335 Md. 602, 645 A.2d 22 (1994) (In a hate crime case, the Court of Appeals affirmed the convictions and Chief Judge Bell dissented, challenging the majority's decision upholding the admission of "other crimes evidence" of defendant's exchange of racial epithets with a group of African-American men several days before the crime. In dissent, Chief Judge Bell challenged the admissibility of the evidence, explaining that the hate crimes statute proscribes selection of a victim on the basis of race and not bigotry itself. Although the testimony regarding the earlier incident may have been probative of the defendant's bigotry, its probative value was not outweighed by its prejudicial effect because the evidence was not offered to prove motive, but rather, to prove defendant's bigotry, which is not an element of the crime. Moreover, the dissent challenged the admissibility of the other crimes evidence rebuttal evidence as it did not explain, directly apply to or contradict any new matter material to the issue before the trial court.).

enhance perspectives particularly suited to employment of the established judicial process in "making" law and in keeping with contemporary societal norms.

For most African-Americans, the repeated occurrences of such incidents over a lifetime are troubling. Nonetheless, tempering and balancing the inevitable and justifiable feelings of injustice and resentment are the positive relations borne out of familiarity with members of other ethnic, religious and professional backgrounds, and socioeconomic strata, including, of course, particularly, in the case of African-American judges, other judges and law enforcement officials. More importantly, as will be developed more thoroughly in Part III of this article, a judge's personal experiences and the ability to empathize based on experiences of discrimination or injustice shared by those whose cases they judge must be anchored by adherence to, and respect for, the rule of law. It is imperative that the rule of law, in the final analysis, have relevance to all who must be governed by it.

B. Judge Sonia Sotomayor's Record and Ricci v. DeStefano

The impetus of this article is the degree to which Judge Sonia Sotomayor was maligned by some for her previous comments reflecting her identification with the Latino experience of discrimination based on ethnic and class background and the criticism of President Obama's pronouncement that he would appoint a Supreme Court Justice who would employ the quality of "empathy" in his or her judicial decision-making.[130] The preceding section is an explication of how a judge brings to the process of adjudication his or her personal experiences and the ability to empathize; and that introduction into judicial deliberations provides a perspective that encourages colleagues to give consideration to views at odds with their own. As Justice Marshall's jurisprudence demonstrates, we may learn as much about the merits of a decision by the majority opinion as we may by the dissent.[131] We may also learn about the motivations behind our own decisions or the soundness of our own legal reasoning by testing it against competing viewpoints.

No one has suggested, during Judge Sotomayor's confirmation or the aftermath, that she is not eminently qualified, by scholarship, legal training, and judicial experience, to be a Supreme Court Justice. Moreover, the efforts to make the case for how Judge Sotomayor's socioeconomic background and previous comments as to the role of a judge affect her ability to be impartial are unsustainable. In fact, those

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[130] Jerry Markon, *Obama's Empathy Standard Drawing Heat*, WASH. POST, May 21, 2009, http://voices.washingtonpost.com/supreme-court/2009/05/obamas_empathy_standard_drawin.html.

[131] *See supra* Part II.A.

who opposed Judge Sotomayor's confirmation may be affected by what Professor Chemerinsky argues to be the false allure of formalism,[132] so much so that they incorrectly attributed the Second Circuit's decision in *Ricci v. DeStefano*[133] to what they perceived to be Judge Sotomayor's lack of impartiality, concluding incorrectly that the panel decision demonstrated her bias. I offer the following amplification.

In questioning Judge Sotomayor regarding her seventeen-year judicial record, the decision which received the greatest scrutiny was *Ricci v. DeStefano*, termed by some in the media as a "reverse discrimination" case.[134] The focus of the scrutiny was not only on her participation in the decision of the panel of the United States Second Circuit Court of Appeals in ruling against the eighteen firefighter protagonists (seventeen of whom were white and one of whom was Latino), but also what some of the members of the Judiciary Committee deemed the dismissive manner in which the panel simply adopted the decision of the District Court and then voted to deny plaintiffs' motion for a rehearing of the circuit court's opinion.[135]

The genesis of the *Ricci* case was a promotional test administered to firefighters.[136] After the test at issue was administered, City of New Haven officials invalidated the test, believing it to have had a disparate racial impact since none of the African-American firefighters who took the test scored high enough to qualify for promotions.[137] The City argued that it would be in violation of Title VII of the Civil Rights Act[138] to certify these test results because of their disparate impact[139] on minority firefighters.[140] The eighteen firefighters described above challenged this action on the grounds that they were improperly denied promotions on the basis of race, in violation of the disparate treatment provisions in Title VII of the Civil Rights Act and their Equal Protection rights under the

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[132] Chemerisnky, *supra* note 48, at 1070-73.

[133] 530 F.3d 87 (2d Cir. 2008), *reh'g denied en banc*, 530 F.3d 88 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009).

[134] *See*, *e.g.*, Warren Richey, *U.S. Supreme Court Takes Up 'Reverse Discrimination' Case*, CHRISTIAN SCI. MONITOR, Jan. 9, 2009, http://www.csmonitor.com/2009/0109/p25s30-usju.html.

[135] *See*, *e.g.*, *Chairman's Opening Statements, Kyl Questions Sotomayor at Supreme Court Nomination Hearings*, WASH. POST, July 16, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/07/16/AR2009071601510.html.

[136] *Ricci*, 129 S. Ct. at 2664.

[137] *Id.*

[138] Title VII of the Civil Rights Act of 1964, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. 2000e (2006)).

[139] The Court explained in *Ricci*: "Title VII prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')." *Ricci*, 129 S. Ct. at 2672.

[140] *Id.*

Fourteenth Amendment.[141] The United States District Court granted summary judgment against the firefighters[142] and a three-judge panel of the Second Circuit Court of Appeals, which included Judge Sotomayor, affirmed this ruling in a summary order, without issuing a separate opinion.[143] After a judge on the Circuit requested an *en banc* hearing for the case, the panel withdrew its summary order and issued a one-paragraph, *per curiam* opinion affirming the District Court.[144] A few days later, the Court of Appeals, in a seven-to-six vote, denied a rehearing *en banc*.[145] That decision was opposed in a dissent authored by Chief Judge Cabranes.[146]

The United States Supreme Court, in a five-to-four decision authored by Justice Kennedy, concluded that the City of New Haven violated Title VII of the Civil Rights Act.[147] According to the Court, a "race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."[148] While the District Court and the Second Circuit held that the City's invalidation of the test results could not be found to have violated the disparate treatment provisions of Title VII because the City was motivated to do so by its belief that the test had a racially disparate impact, the Supreme Court held that the City's actions would violate the disparate treatment provisions absent a valid defense.[149] In so ruling, the Court announced a "strong-basis-in-evidence" standard related to resolving what the majority determined to be competing disparate-impact and disparate-treatment provisions, allowing violation of the latter in order to avoid the former only in "certain, narrow circumstances."[150]

The dissent by four of the justices, authored by Justice Ginsburg, (1) outlined the history of racial discrimination and the decades of efforts under Title VII to "open firefighting posts to members of racial minorities,"[151] (2) challenged the majority's determination that there was a conflict between the disparate-impact and disparate-treatment provisions,[152] (3) asserted that both provisions aimed to "end[] workplace

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141 *Id.* at 2671.
142 Ricci v. Destefano, 554 F. Supp. 2d 142 (D. Conn. 2006).
143 Ricci v. Destefano, 530 F.3d 87 (2d Cir. 2008).
144 *Ricci*, 129 S. Ct. at 2672.
145 *Id.*
146 *Ricci*, 530 F.3d at 93 (en banc) (Cabranes, C.J., dissenting). Chief Judge Cabranes was joined by Judge Raggi, Judge Wesley, Judge Hall, and Judge Livingston in the dissent. *Id.*
147 *Ricci*, 129 S. Ct. at 2664-81.
148 *Id.* at 2664.
149 *Id.* at 2673-74.
150 *Id.* at 2676.
151 *Id.* at 2689-90.
152 *Id.* at 2690.

discrimination and promot[e] genuinely equal opportunity," and (4) characterized the majority's ruling, that an employer changing an employment practice in an effort to comply with Title VII disparate impact provisions acted because of race, as paying little attention to the purpose behind the Act.[153] The dissent further criticized the "newly announced" standard for drawing upon inapposite Equal Protection precedents.[154]

An in-depth analysis of the factual and legal complexities of this case is beyond the scope of this article. Suffice it to say that Judge Sotomayor's decision, as part of a three-judge panel in the *Ricci* case, affirming the decision of the District Court, was supported by a number of distinguished jurists.[155] I take no position as to whether the position taken by Judge Sotomayor reveals that she was influenced by anything other than the facts of the case; she, for her part, denied any partiality.[156] Other colleagues on the Second Circuit, in voting to deny a rehearing, argued that the District Court's decision, and the Second Circuit's summary affirmance, was consistent with well-established precedent in the circuit.[157] More importantly, even if her vote in the *Ricci* case reflected Judge Sotomayor's world view, there is no indication that her decision in *Ricci*, shared by her other panel members, or that Justice Ginsburg's dissent, shared by three other distinguished justices of the Court, were the product of a lack of impartiality or fell outside the realm of reasoned and thoughtful jurisprudence based on the applicable precedent and the rule of law. Rather, reasonable minds differed as to the interpretation of applicable law; that the Supreme Court announced a new standard, as a result of the case, is undisputed.[158] The process illustrated the contest of diverse viewpoints which were challenged and ultimately resolved by the Supreme Court. Thus, the insistence of Judge Sotomayor's opponents on ascribing to the *Ricci* case evidence of her lack of impartiality was, in light of her seventeen-year record, nebulous at best.

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153 *Ricci*, 129 S. Ct. at 2699.

154 *Id.* at 2700-01.

155 *Ricci*, 530 F.3d at 87. Judge Pooler and Judge Sack joined Judge Sotomayor on the panel, affirming the decision of the District Court. *Id.*

156 *See* Shapiro, *supra* note 16.

157 *Ricci*, 530 F.3d at 88-90 (2d Cir. 2008) (Barrington, J., concurring) (referring to Second Circuit precedent for the proposition that: (1) "a public employer, faced with a prima facie case of disparate-impact liability under Title VII, does not violate Title VII or the Equal Protection Clause by taking facially neutral, albeit race-conscious, actions to avoid such liability"; (2) "[b]ecause there was no racial classification, the plaintiffs bore the burden of persuasion on the issue of discriminatory purpose"; and (3) it was appropriate for the panel to have adopted the reasoning set forth in the District Court opinion).

158 *See supra* note 149 and accompanying text.

C. Collegiality and the Diversity of Opinion

As a final note to this section, it should not be assumed that the diversity of perspectives of judges with diverse backgrounds, and the extent to which the soundness of a decision is tested by such diversity by exposing it to competing points of view, will ultimately lead to chaos and confrontation on the courts. That the perspectives gained by Judge Sotomayor's unique experiences with poverty or discrimination would inevitably lead to a result based, not on the facts of the case, but on such experiences, cannot be divined from her responses to questioning before the Senate.

The existence of competing viewpoints need not be manifested through adversarial relations on the court. Judge Harry T. Edwards, in an essay focusing on the importance of collegiality to decision-making in the federal circuit courts, makes the point that collegiality does not mean "friendship," "homogeneity," or "conformity" amongst the members of a court, but rather, that "judges have a common interest, as members of the judiciary, in getting the law right, and that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect."[159] In fact, it is through collegiality that diverse viewpoints—which I posit is one characteristic of a healthy and robust judiciary—may be voiced and considered.[160] In short, "because of collegiality, judges can admit and recognize their own and other judges' fallibility and intellectual vulnerabilities."[161]

My own experience as an appellate judge over the past nineteen years has driven home the importance of a diverse bench, our production and efficiency enhanced by a spirit of collegiality. The Maryland Court of Special Appeals, the State's intermediate appellate court, was created in 1966; its jurisdiction, at its inception, limited only to criminal appeals.[162]

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[159] Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1644-45 (2003) (internal citation omitted).

[160] *Id.* at 1645.

[161] *Id.* at 1650.

[162] The Maryland State Archives provides a detailed account of the progression of the Court of Special Appeals of Maryland, from its inception to its current composition:

> The Court of Special Appeals was created in 1966 by constitutional amendment (Acts of 1966, ch. 11, 12). Originally, five judges served on the court. Each was elected from a special appellate circuit. In 1970, special appellate circuits were abolished and one judge then was elected from each of the first five appellate judicial circuits, two from the Sixth Appellate Judicial Circuit representing Baltimore City, and two from the state at large (Acts of 1970, ch. 99).
>
> The number of judges on the Court of Special Appeals has increased several times: from five to nine in 1970, from nine to ten in 1972 (Acts of 1972, ch. 361), from ten to twelve in 1974 (Acts of 1974, ch. 706), and from twelve to thirteen in 1977 (Acts

The first female was appointed to the Court of Special Appeals in 1972[163] and the first African-American was appointed to the Court in 1974.[164] Currently, there are three women and two African-American judges on the thirteen-member Court.[165] The legal backgrounds of the judges are diverse: six members, including myself, have come to the Court having served as trial court judges;[166] two members were formerly government lawyers;[167] and five judges were formerly private practitioners.[168] In addition, judges retired from the Court, including a nationally renowned constitutional scholar, currently sit on panels with the thirteen active members of the Court and are available with their wealth of appellate experience to provide additional points of view and legal counsel on complex issues.[169] Collaboration between these judges who have

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of 1977, ch. 252). Currently, six of the thirteen judges are elected from the state at large.

The chief judge of the Court of Special Appeals is chosen by the governor from among those judges elected to the Court (Acts of 1966, ch. 11, 12).

Md. State Archives, Historical List, Court of Special Appeals (1967-), http://www.msa.md.gov/msa/speccol/sc2600/sc2685/html/ctspapp.html (last visited Nov. 24, 2009).

[163] Rita C. Davidson was the first female judge appointed to the Court.

[164] The first African-American appointed to the Court was David T. Mason. Rasmussen, *supra* note 98 and accompanying text.

[165] The three women currently serving on the Court are the Honorable Ellen Lipton Hollander, the Honorable Deborah S. Eyler, and the Honorable Kathryn Grill Graeff. The two African-American judges currently serving are the Honorable Alexander Wright, Jr. and myself, Arrie Wilson Davis.

[166] The former trial judges on the Court are the Honorable Ellen Hollander, the Honorable James P. Salmon, the Honorable Patrick L. Woodward, the Honorable Alexander Wright, Jr., and the Honorable Albert J. Matricciani.

[167] Former government lawyers currently on the Court include the Honorable Robert A. Zarnoch and the Honorable Kathryn Grill Graeff.

[168] The Honorable James R. Eyler, the Honorable Deborah S. Eyler, the Honorable Timothy E. Meredith, the Honorable Christopher B. Kehoe, and the Honorable Peter Krauser.

[169] The Honorable Charles E. Moylan, Jr., the longest-serving member of the Court from July 1, 1970 until his retirement on December 14, 2000, has been nationally recognized as the eminently renown scholar in criminal law and constitutional law dating back to his tenure as the Baltimore City State's Attorney in the 1960's. Renowned for his expertise in insurance and property law, the Honorable Lawrence F. Rodowsky, currently shares chambers with Judge Moylan, after distinguished service on the Court of Appeals from January 25, 1980 until his retirement on November 10, 2000. The Court is indebted to Judges Moylan and Rodowsky, who combined, as retired judges, author opinions, annually, equal to the number of opinions authored by a full-time member of the Court. Other retired members of the Court include the Honorable Paul E. Alpert, the Honorable James A. Kenney, III, the Honorable J. Frederick Sharer, the Honorable Raymond G. Thieme, Jr., the Honorable James S. Getty and, until the last moments of his life, our beloved nit picker, whose labor of love in spotting split infinitives and assorted errors befell Judge Hollander upon his retirement, the Honorable Theodore G. Bloom. The number of appeals having exploded exponentially during the past twenty years, these retired judges perform an invaluable service in facilitating the issuance of thorough and well-reasoned decisions with dispatch.

backgrounds in different areas of expertise has been beneficial to the Court. Indeed, oft times, members of the Court decide cases in a manner that one would not consider compatible with their cultural or socioeconomic moorings. It is noteworthy that, with the exception of the Honorable Lynne Battaglia, who was appointed to the Court of Appeals on December 21, 2000, the remaining six judges currently serving on the Court of Appeals were formerly members of the Court of Special Appeals.[170] The result is that, while the High Court has preserved its most revered traditions and formalities, the alumni of the Intermediate Appellate Court, many of whom had previously served together, have merely continued their collegial working relations.

As noted earlier, the benefits to be derived from a diverse court cannot be realized without collegiality and open lines of communication between its members, which has been a central focus of Maryland's appellate courts. From its inception, the policy of the first chief judges of the Court—Chief Judges Robert Murphy, Charles Orth, Jr., and Richard Gilbert—was that associate judges, as constitutional officers, were to remain duty bound and render their best independent judgments as to issues before them, but that, just as trial judges admonish jurors during their deliberations to consider opposing views, so too should members of the Court be open to giving serious consideration to the views of their colleagues. The late Chief Judge Gilbert, my predecessor, instituted a tradition that judges have lunch together after hearing oral argument and, as a reminder, mounted a poster on the wall of the conference room to the effect that it is difficult to remain disagreeable with those with whom we break bread. During our monthly conferences, each successive chief judge, for the most part, has continued the tradition of reigning above the fray, reserving until our robust discussion and debate in controversial cases ebb, to interject the imprimatur of his considered judgment; all of these deliberations are carried out in a spirit of congeniality. And, of course, once the final vote is cast as to the ultimate decision or on any issue, the Chief Judge, in the tradition of the Court, graciously accepts the will of the majority, exacting no manner of vindictiveness against members holding opposing views. Collegiality is also fostered by attendance at formal ceremonies and interaction in social settings. In sum, the mix of judges with the divergent perspectives of former practitioners, former government attorneys, former trial judges, and

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[170] The remaining six judges on the Court of Appeals, in order of seniority, are Chief Judge Robert M. Bell, appointed May 5, 1991, the Honorable Glenn T. Harrell, Jr., appointed on September 10, 1999, the Honorable Clayton Greene, Jr., appointed on January 7, 2004, the Honorable Joseph F. Murphy, Jr., appointed on December 4, 2007, the Honorable Sally D. Adkins, appointed on May 27, 2008, and the Honorable Mary Ellen Barbera, appointed on August 7, 2008.

judges who have retired from the Court provides an invaluable resource of experience in the different areas of expertise.

III. The Rule of Law and the Continued Applicability of the "Umpire" Analogy

As noted in the previous section, the focus of this article should not be read as supporting the notion that a judge should render decisions based solely on his or her own ideological bend. The influence of a judge's personal experiences on his or her approach to the resolution of legal issues exists, as it must, within a well-established model and in the construct of the rule of law and precedent; *i.e.*, reference to the prior application of common law to similar or identical facts and the interpretation of statutes and Constitutional provisions in like manner to previous constructions. A consideration of the role of the judge begins with the relationship between the judiciary and the other two branches of government. Unlike a member of the executive and legislative branch who proposes and implements governmental actions, the role of a judge is reactive. A statute is enacted or a cause of action accrues and it is the judiciary which must construe or determine the constitutionality of the statute or adjudicate the merits of the cause of action. Thus, notwithstanding the debate as to whether judges should render decisions according to the letter of the law, there is no debate that the role of a judge is restricted, at least in the sense that judges do not initiate legal proceedings.

Moreover, although the debate as to the proper role of a judge, most recently typified by Judge Sotomayor's confirmation hearings, has been often framed, ideologically and politically, in terms of conservative versus liberal judges, that the "rule of law"—whatever we determine it to be—is the anchor of a stable society, has not been a subject of that debate. The bedrock of the rule of law are the principles of *stare decisis* and precedent which provide, *inter alia*, the guideposts as to the outer limits of conduct that is legally permissible and establishes legal relationships and the rights and obligations attendant thereto. Without reference to the body of law established by prior decisions and deference to the legal reasoning undergirding those decisions, there can be no continuity in the evolvement of the law, even in instances in which legal precedent is deemed to be unsustainable in light of changes in social, political or other circumstances. In other words, abandonment of precedential authority is justified only where the reasons therefore are sound and enduring.

With this in mind, there is continued vitality in what has been termed the "umpire" analogy.[171] This analogy was espoused by Chief Justice Roberts during his confirmation hearings:

> Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of the umpire and a judge is critical. They make sure everyone plays by the rules but it is a limited role. Nobody ever went to a ball game to see the umpire.[172]

The "umpire" analogy has been viewed favorably by some and criticized by others.[173] No single theory can adequately capture the role of the judge in democratic government and, in that sense, the analogy between the roles of judges and umpires is imperfect.[174] The comparison is flawed, in the first instance, because, contrary to the proposition that the role of an umpire is purely mechanical, the conception of the role of an umpire breaks down in light of the broad discretion exercised every time an umpire renders a decision as to what constitutes the strike zone, a judgment that varies, often widely, from one umpire to the next and may even vary from one pitch to the next.[175] Is the outcome of a baseball game affected by whether the strike zone is expansive or limited in a contest between a team whose batters constitute the proverbial Murderer's Row and another team of mediocre hitters? Of course it is. Nonetheless, for purposes of this article, the analogy offers a compelling reminder that judges are not the "stars" of the show. They are the arbiters of the law. Given the universal precepts of equal justice under the law and of the symbol of blindfolded Lady Justice, analogizing the role of a judge to an umpire, while imperfect, provides a vibrant way of conceptualizing an important consideration as to the proper role of judges, provided that this analogy is tempered by an understanding that judges often must render discretionary decisions that require a judge to do much more than merely "call balls and strikes."

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[171] Michael P. Allen, *A Limited Defense of (at Least Some of) the Umpire Analogy*, 32 SEATTLE U. L. REV. 525, 525-26 (2009) (quoting *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005)).

[172] *Id.*

[173] *Id.* at 530.

[174] *Id.* at 527.

[175] *Id.* Chemerinsky goes further than finding the analogy "flawed"; in his view, it is "disingenuous" and "tremendously arrogant," in light of the discretionary decisions inherent to the role of a judge. Chemerinsky, *supra* note 48, at 1069-70, 1077.

IV. CONCLUSION

Judge Sotomayor, who was ultimately confirmed by a Senate vote of sixty-eight to thirty-one to join the Supreme Court of the United States as its first Latina justice[176] and was subsequently sworn in at an August 8, 2009, ceremony in the Supreme Court conference room, may confound the prognosticators who believe that she will be a mainstay of the liberal bloc of Justices Stevens, Breyer and Ginsburg. Or, she may rule in a manner consistent with commentators who have analyzed her opinions and suggest that she will not join the conservative bloc on decisions involving cultural or civil rights. The future of her role on the Court remains to be seen. From her confirmation process, however, and based on the foregoing, the following is what I distill.

First, contrary to the view of strict formalists and proponents of a discretion-free role for judges, the ability to empathize is integral to the deliberative process in fostering a better understanding of the context and societal impact of the issue under review and facilitates a mindset that allows for due consideration of points of view of the judge's colleagues, framed by an environment respecting difference and promoting collegiality. The basis and the *raison d'etre* of the controversy before the court, in the first instance, is informed, not only as to the party who should prevail, but also as to the course to be pursued in fashioning the appropriate remedy.

Second, the literal definition of "empathy" denotes no consequential manifestation of "the capacity to experience feelings of another"[177] on the judge's ultimate decision. Having empathized with one or more parties or a particular situation or point of view, the judge must then conclude that, in the overwhelming majority of cases in which there is no rationale that would justify disregarding precedent, empathy should play no role. With respect to the ultimate decision, empathy, in the proper case, plays a role where an overriding societal interest is at stake. The pillar, however, always has been and remains the rule of law—the product of precedent and well-reasoned legal analysis. A judge, accordingly, functions essentially within the framework of an "umpire," fastidiously examining the law and applying the relevant law to the facts before the judge in order to arrive at just, well-reasoned and well-supported decisions.

Finally, the judicial selection process must begin with the sober reality that not everyone possesses the personal qualities, particularly the temperament, to be a judge. Few professions, positions, or callings demand a higher personal fidelity to serve the best interest of society in a

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[176] *Sotomayor approved by US Senate*, BBC NEWS, Aug. 6, 2009, http://news.bbc.co.uk/2/hi/americas/8188485.stm.

[177] *See supra* note 74.

manner that is unimpeachable and beyond reproach. The most important quality is the ability to engage in introspection and constant self-analysis, and a corresponding ability to set aside, not only biases and prejudices, but deeply entrenched preconceived views that prevent fair and objective consideration of opposing views, irrespective of whether the judge actually adopts those views. At the same time, the awesome authority that a judge—especially a trial judge—wields over the fate of his or her fellow citizens demands no less than that he or she be ever mindful of the maxim: "There but for the grace of God go I." And, as difficult as it may be to empathize with one who has visited great harm on his or her fellow citizens, empathy, in the sense that a judge should vicariously inculcate the intimidating experience of standing before the Bar of Justice,[178] whether the outcome is likely to be life altering or less serious, is critical in order to accord the parties—and more importantly the Court—the proper solemnity, even in cases which call for the ultimate penalty as the appropriate judgment.

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[178] The Supreme Court of Florida expressed this point of view best in *In re Eastmoore*:

> Socrates is reported to have expressed the same proposition (edicts of the Florida Code of Judicial Conduct) in his day as follows: Four things belong to a judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially.
>
> As this Court said in *State ex rel. Davis v. Parks*, 141 Fla. 516, 520, 194 So. 613, 615 (1939):
>
> > It is not enough for a judge to assert that he is free from prejudice. His mien and the reflex from his court room speak louder than he can declaim on this point. If he fails through these avenues to reflect justice and square dealing, his usefulness is destroyed. The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.
>
> The public can have little confidence in the impartiality of a decision when the litigant is cut short in the presentation of her case and the decision maker's demeanor bears all the indicia of prejudice and a closed mind.
>
> We take this opportunity to remind ourselves as judges that tyranny is nothing more than ill-used power. We recognize that it is easy, especially under the stress of handling many marital matters, to lose one's judicial temper, but judges must recognize the gross unfairness of becoming a combatant with a party. A litigant, already nervous, emotionally charged, and perhaps fearful, not only risks losing the case but also contempt and a jail sentence by responding to a judge's rudeness in kind. *The disparity in power between a judge and a litigant requires that a judge treat a litigant with courtesy, patience, and understanding*. Conduct reminiscent of the playground bully of our childhood is improper and unnecessary.

504 So. 2d 756, 757-58 (Fla. 1987) (emphasis added).

It is this quality that separates the manner in which judges perform their roles from every other profession or calling, *i.e.*, the ability to render an appropriate, even the most severe judgment, while treating the object of that judgment in the manner that the judge would wish to be treated were the positions reversed. While such a view may seem lofty, altruistic, and naive, particularly when dealing with those whose acts may be deemed depraved or despicable, it is precisely what is demanded of us.

ARTICLE

THE SELECTION AND ELECTION OF CIRCUIT JUDGES IN MARYLAND: A TIME FOR CHANGE

By: The Honorable Dana M. Levitz* and Ephraim R. Siff**

I. INTRODUCTION

Imagine the following: A bright lawyer with a stellar reputation is appointed to the bench. He began his career as a prosecutor, and then spent a few years in the public defender's office before founding a small civil litigation practice. He has an impeccable reputation for judgment, temperament, integrity, and intellect. He is well liked by members of the bar, as well as the judges before whom he regularly appears. He has excellent knowledge of the law and is always prepared. Soon after his investiture, this new judge begins an interesting routine. He starts attending breakfasts, luncheons, dinners, and assorted socials with an odd request. He asks his friends, associates, and anyone he meets to contribute to a fund to furnish his chambers. He asks for monetary contributions to buy a hardwood desk, a leather chair, a computer station, some bookshelves, a conference table with a few chairs, and a simple couch. He does not intend on using the couch but thinks it would look nice in the office. He has his own pictures to hang on the wall, so he does not ask for any; however, he would accept some artwork, above and beyond what he initially solicited.

An unintentional consequence of having been a trial lawyer is that most of his friends are trial lawyers as well. So, he goes about seeking out these friends for donations to his chamber fund. He knows that these friends will appear before him in criminal cases and civil matters. He knows that they will present him with motions to grant, while others will ask that he deny the presented motions. He knows that he is seeking donations from lawyers who will certainly appear before him in the near

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** Ephraim R. Siff, Esquire received his law degree from the University of Baltimore School of Law and served as judicial law clerk to Judge Levitz. Mr. Siff is a member of the Maryland Bar.

future. But he also knows that if he doesn't raise enough money to furnish his chambers, an unusual provision in the state constitution will require him to step down.

So, this otherwise competent and qualified judge finds himself in a compromising position where he must solicit contributions. He resents it, but knows that he must do it. He knows that after fifteen years on the bench, another odd provision in the state constitution will require him to refurbish his office again, with brand new furniture.

The judge has no intention of accepting these donations as bribes, but the state does not supply him with furnishings, and the constitution requires that a judge must step down if he or she cannot furnish his or her chambers in a satisfactory manner within two years. As uncomfortable with the process as he is, the judge knows that it will be worse the next time. For the next fifteen years, he will see these same friends as they practice before him. Many times, he knows that his rulings will upset them. He will meet other lawyers along the way; he can only hope that perhaps he will be able to reach out to them when he has to go through the process again.

II. THE REALITY OF CIRCUIT COURT ELECTIONS

It goes without saying that no constitution requires a judge to furnish an office with contributions from lawyers. If this were to occur in any western society, there would be an uproar for reform. As a matter of fact, if this were to occur in the American judiciary, the judge would probably be immediately sanctioned, removed from office, and possibly face criminal charges. Yet in Maryland, something almost as outrageous as this occurs every time a circuit court judge is appointed. The Constitution of Maryland requires it. Few lay people know about it, hardly any lawyers are outraged by it, and state legislators have decided, up until now, to leave it the way it is.

The rigors of today's judicial elections have proven that open, contested elections do not produce the benign intentions of the process. Rather, they equate with the hypothetical that enticed you into reading this article thus far. By any standard, our system of electing circuit court judges in Maryland is seriously flawed and in desperate need of reform. To require judges to raise large sums of money from the very lawyers who will appear before them in contested trials is just not right. Yet, that is what currently happens every time a circuit court judge is appointed.

III. THE APPOINTMENT AND ELECTION PROCESS

Judges of the circuit courts in Maryland must be elected by popular vote in open and possibly, contested elections in order to remain on the bench.[1] These elections take place after the Governor appoints someone to fill a vacancy on the court.[2] Unlike appellate judges, the appointee is not approved by the Senate or any other legislative body.[3] An appointee may be challenged in a contested election by any lawyer who resides in the county. This challenger does not have to have any particular experience as a trial lawyer or any experience in a courtroom at all.[4] A law degree, being thirty years of age, residency in the county where the position is sought, and the payment of a small filing fee[5] are the only requirements for any lawyer to challenge the appointed judge.[6] The challenger is not vetted by anyone or any group before appearing on the ballot.[7] If the challenger receives more votes in the election than the appointee, that challenger becomes the county's circuit court judge for the next fifteen years.[8]

Unlike legislators and executive branch officers, who choose a career in the political arena, most appointees to the circuit court have no interest in being politicians and fundraisers. They are interested in the law, not in the kinds of things that necessarily occupy the thoughts of politicians. Circuit court judges, like butterflies, begin their lives in one form, but then are transformed into something entirely different, bearing no resemblance to their former selves. They morph into creatures who are forbidden from having anything to do with politics and fundraising until their fifteen-year term is about to expire.[9] Then, for one year prior to their election, they must transform into consummate politicians and successful fundraisers.[10] If elected, however, they are forbidden to have anything to do with those activities.[11] It is truly a schizophrenic existence.

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1 *See* MD. CODE ANN., CONST. art. IV, § 3 (2003).

2 *See* MD. CODE ANN., CONST. art. IV, § 5 (2003).

3 *Id.*

4 *See* MD. CODE ANN., CONST. art. IV, § 2 (2003).

5 The current filing fee for a lawyer to run for Judge of the Circuit Court is $300 in Baltimore City and $50 in all other counties in the State. Maryland State Board of Elections, Requirements for Filing Candidacy, http://www.elections.state.md.us/candidacy/requirements.html (last visited Nov. 24, 2009).

6 *See* MD. CODE ANN., CONST. art. IV, § 2 (2003).

7 *Id.*

8 *See* MD. CODE ANN., CONST. art. IV, § 3 (2003).

9 *See* Md. Rule 16-813 (2009) (Md. Code of Judicial Conduct Canon 5(a)).

10 *See Id.* (Md. Code of Judicial Conduct Canon 5(b)).

11 Maryland Code of Judicial Conduct Canon 5 states, in relevant part: "A judge who is not a candidate for election or re-election to or retention in a judicial office shall not engage in

After his or her election, the judge serves a fifteen-year term.[12] If a judge dies during his or her term, resigns, or reaches the age of seventy, the Governor appoints a qualified individual as a seatholder until the next general election, at which time a successor is elected to complete a full fifteen-year term.[13]

At one time, judges on all Maryland courts were chosen in this manner.[14] The Maryland Constitution anticipated these judicial elections to be contested.[15] The appointee certainly was permitted to run for a full term in his or her own right, but the election was open to any lawyer.[16] The winner of the election was deemed the "successor" to the last elected judge and then served a fifteen-year term.[17] At a time when there were far fewer lawyers, and citizens actually knew the lawyers in their communities, this outdated system of electing judges was arguably appropriate.

These contested judicial elections, however, have clearly fallen out of favor given the realities of our modern legal system and the number of lawyers in our society.[18] Today, the only manner of initial appointment

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any partisan political activity." Md. Rule 16-813 (2009) (Md. Code of Judicial Conduct Canon 5(a)(1)).

[12] *See* MD. CODE ANN., CONST. art. IV, § 3 (2003).

[13] If the appointment is to fill a vacancy caused by the expiration of a fifteen-year term, the appointee must run in the first election after the vacancy occurs. *See* MD. CODE ANN., CONST. art. IV, § 5 (2003). If the vacancy occurs by death, resignation or removal of the judge, the appointee runs in the first election following the one-year anniversary of the vacancy. *Id.*

[14] An amendment to the Maryland Constitution of 1867 was ratified on Nov. 2, 1976, removing contested elections of appellate judges in favor of continuance elections. *See* Act of May 15, 1975, ch. 551, 1975 Md. Laws 2638 (ratified Nov. 2, 1976) (codified as amended at MD. CODE ANN., CONST. art. IV, § 5A (2003)).

[15] Article 4, Section 12 of the Maryland Constitution of 1867 stated, in pertinent part: "If in any case of election or judges . . . the opposing candidates shall have an equal number of votes, it shall be the duty of the Governor to order a new election." MD. CONST. of 1867 art. IV, § 21. Article 4, Section 21 of the 1867 Maryland Constitution stated, in relevant part: "If two or more persons shall be candidates for associate judge in the same county . . . that one only in said county shall be declared elected who has the highest number of votes in the circuit." MD. CONST. of 1867 art. IV, § 21.

[16] *See* MD. CONST. of 1867 art. IV, § 2.

[17] *See* MD. CONST. of 1867 art. IV, § 5.

[18] The Constitutional Convention of 1967-68 and its proposed constitution did away with judicial elections in favor of a simpler scheme. *See* CONSTITUTIONAL CONVENTION OF MARYLAND OF 1967-1968, COMPARISON OF PRESENT CONSTITUTION PROPOSED BY CONVENTION 174-79, §§ 5.13-.22 (Constitutional Convention of Md. 1968) (hereinafter "PROPOSED CONSTITUTION"). The Proposed Constitution failed but the legislature implemented many of its suggestions. Governor Marvin Mandel tried especially hard to implement such suggestions and was successful with the passage of a constitutional amendment creating the District Court. *See* Act of May 24, 1969, ch. 789, 1969 Md. Laws 1696, 1697 (ratified Nov. 3, 1970) (codified as amended at MD. CODE ANN., CONST. art. IV, §§ 1, 2, 4A, 4B, 18, 41A-I (2003)). By Executive Order, he implemented the proposed Judicial Nominating Committee, suggested by the convention. Exec. Order No.

to an appellate court is by gubernatorial appointment with advice and consent of the Senate.[19] Judges of the district courts of Maryland are also appointed by the Governor with the advice and consent of the Senate, but unlike circuit court judges, they are not subjected to contested elections.[20] The election and appointment process of Maryland's circuit court judges is the last vestige of the contested elections of the past. There is no rational explanation for having a different system for selecting circuit court judges than for every other level in the Maryland Court System.

Although the Maryland Constitution implies that an appointee filling a vacant seat is a mere seatholder,[21] the practical result of this anomalous scheme is that judges of all the courts are appointed by the Governor, but circuit court judges have to run in open, popular, and sometimes, contested elections to retain their seats.[22]

IV. THE COSTS OF JUDICIAL ELECTIONS: FINANCIAL AND OTHERWISE

The very few benefits of contested judicial elections in the past should be acknowledged; however, I submit that, now, the arguments against such elections far outweigh any salutary effect of subjecting judges to an expensive political election.

A. Qualifications and Integrity

The Maryland Constitution mandates that judges must be "most distinguished for integrity, wisdom and sound legal knowledge."[23] Although one might also expect that legislators and executives should be distinguished for their integrity and wisdom, the Maryland Constitution makes no such requirement.[24] Although legislators are called upon to write laws, as citizen lawmakers, it would be unreasonable to require them to possess "sound legal knowledge."[25] This is because legislators

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01.01.1974.23, 2 Md. Reg. 45 (1975). For a more complete discussion of successful amendments and implemented legislation originally suggested by the Convention, see Dan Friedman, *Magnificent Failure Revisited*, 58 MD. L. REV. 528 (1999).

[19] *See* MD. CODE ANN., CONST. art. IV, § 5A(a)-(b) (2003).

[20] When the District Court was formed in 1971, it was formed with the plan of the constitutional convention. *See* Act of May 24, 1969, ch. 789, 1969 Md. Laws 1696, 1697 (ratified Nov. 3, 1970). Thus, judges on the District Court are appointed by advice and consent, and upon confirmation, serve for a term of ten years. *See* MD. CODE ANN., CONST. art. IV, § 41D (2003). The voters have no mechanism to accept or reject them.

[21] *See* MD. CODE ANN., CONST. art. IV, § 5 (2003).

[22] *See* MD. CODE ANN., CONST. art. IV, § 3 (2003).

[23] MD. CODE ANN., CONST. art. IV, § 2 (2003).

[24] Aside from residency, the only qualifications for delegates and senators are that they be of age: twenty-one years old for delegates and twenty-five years old for senators. *See* MD. CODE ANN., CONST. art. III, § 9 (2003). Likewise, a candidate for Governor must satisfy the residency requirement and be thirty years of age. *See* MD. CODE ANN., CONST. art. II, § 5 (2003).

[25] *See* MD. CODE ANN., CONST. art. IV, § 3 (2003).

come from diverse backgrounds. They may be farmers, utility workers, medical doctors, or teachers—many have no formal legal training at all. The reason judges must have higher qualifications is obvious: Judges are required to rule on the constitutional propriety of the laws passed by the legislature and the enforcement techniques of the executive branch. In addition, settling disputes requires legal knowledge, wisdom, impartiality, high moral values, and keen intellect.

This high standard to which judges are held is trivialized by the judicial election process, which most often results in the public voting for people with whom they have no familiarity. Certainly, most have no idea as to the relevant qualifications of the candidate for whom they vote. Perhaps at a time in our history when there were fewer lawyers, and the citizens of a county were familiar with the potential judicial candidates, the present system might have assured that only the most qualified candidates would be elected.

While it is theoretically possible for the lay citizen to perceive wisdom and character, the voter is not expected to be educated as to what makes a candidate a qualified judge insofar as legal knowledge, judicial temperament, intellect, trial experience, or other subjective qualifications. These are characteristics that are specific to the legal profession.[26] It is analogous to people being asked to vote for the chief surgeon at the county hospital; the individual who will operate on their family should the need arise. How can ordinary citizens possibly know who would be the most skilled surgeon in a particular specialty?

The reality is that most people have absolutely no understanding of the qualifications of the judges for whom they vote. Even very educated and informed people often know little about a judicial candidate's qualifications. Gender, name familiarity, perceived race of the candidate, and position on the ballot are much more influential than qualifications.[27] It is argued that an elementary principle in democracy is that the people should appoint and be able to recall someone who sits in judgment of the people. On a daily basis, based on a strict construct of facts and law before them, judges make decisions that are unfavorable to one or another

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[26] Recognizing the unique qualifications of judges, and the high stakes of incompetent judges, the Constitutional Convention of 1967-68 recommended a judicial nominating committee to recommend appointments to the Governor. *See* Friedman, *supra* note 18, at 574-75. When that proposed constitution failed, Governor Marvin Mandel signed an executive order binding creating such a commission and binding himself to make appointments based on their recommendations. *See id.* at 575. Every governor since Mandel has signed such an order, although the composition of the nominating committees have been changed and, in some ways, weakened. *See id.*

[27] For examples of other authors arguing this point, see Rebecca Wiseman, *So You Want to Stay a Judge: Name and Politics of the Moment May Decide Your Future*, 18 J.L. & POL. 643, 644 (2002); Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. 53, 96 (1986).

party. Circuit court judges are not generally called upon to mediate a dispute in a fashion favorable to all parties, and quite often this is an impossible task.

Popularity, charisma, flamboyance, and overall political connections contribute to the election of local officials, legislators, and executives. Many qualified judges are not necessarily electable by these criteria; nor should they be. Judges should be selected solely based on their "integrity, wisdom and sound legal knowledge."[28]

B. Just or Popular

Contested elections allow a dissatisfied party to wage a campaign against a judge for the most unjust of reasons; that is, the judge's correct interpretation and application of the law. Judges who make correct, albeit unpopular, decisions are the very judges who most benefit the public. Likewise, judges are often called upon to render a verdict or ruling that is not in accordance with the judge's own view of what a particular law ought to be. Unlike legislators, who can and need only defend their own actions and not the actions of others, judges are called upon to defend the actions of the legislature in non-constitutional matters, and higher courts, whose interpretation of the law they are bound to apply. Few voters would be persuaded, in the face of a sensational ruling, by the challenged judge's explanation that he was bound by an archaic principle or loophole in sloppy legislation that even members of the bar would not understand. To put judges in the position that they need to defend their unpopular rulings in order to keep their jobs, especially their decisions based upon laws with which they personally disagree, is detrimental to an independent and dignified judiciary.[29] In addition, it is simply not fair.

C. Recall Elections Do Not Serve to Recall Judges

An argument that contested elections provide a mechanism for recall is equally weak. After initial appointment, a judge runs either in the next election or the first election after completing one year on the bench.[30] Thus, at a judge's first election, he could have been on the bench for as short as one day or as long as two years. After this initial election, the next opportunity to recall the judge comes when, perhaps, he or she stands for election after completion of a fifteen-year term.[31]

Practically, the length of the judicial term makes recall a weak argument for judicial elections. Is recall by failing to re-elect a judge an

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[28] MD. CODE ANN., CONST. art. IV, § 2 (2003).

[29] The Maryland Judicial Canons state: "A judge shall not be swayed by partisan interests, public clamor, or fear of criticism." Md. Rule 16-813 (2009) (Md. Code of Judicial Conduct Canon 3(B)(2)).

[30] *See* MD. CODE ANN., CONST. art. IV, § 5 (2003).

[31] *See id.*

effective mechanism to redress an unpopular decision made more than a decade earlier? If an individual or group feels that an appointee is unfit, the initial yes/no election after appointment would allow a challenge to be made. When a particular judge is the subject of a contested election, however, his highly qualified colleagues on the ballot become targets as well.[32]

D. Fundraising

The fundraising efforts required to compete successfully in a contested election are improper by any standard. The most fundamental qualities that a judge must possess and maintain are integrity and neutrality.[33] It is, therefore, incumbent upon a judge to actively avoid impropriety and avoid even the mere appearance of impropriety.[34] The vast majority of the commentary and case law interpreting judicial canons are spent spelling out how a judge should avoid the appearance of impropriety.[35] The most basic impropriety, beyond any mere appearance, is the receipt of financial gifts to a judge and to causes that he or she supports. It is impossible for any rational, thoughtful, and intellectually honest person to believe that receiving gifts, without which the judge would lose his or her job, is anything but improper, and certainly a perfect instance of the appearance of impropriety. Such monetary gifts to judges for financing their campaigns are much more significant than contributions to a judge's furniture fund.[36]

A district court judge raised nearly $60,000 to finance his successful election to the circuit court in 2000.[37] In 2002, a respected attorney raised over $55,000 to finance his successful bid,[38] and in 2006, a challenger to

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[32] Because the voter is instructed to vote for the same number of candidates as vacancies that exist, all candidates are competing for votes. Unlike a single vacancy, challengers can cost votes to not only the intended target but to all who appear on the ballot with them.

[33] The Preamble to the Maryland Code of Judicial Conduct reads, in relevant part: "It is fundamental to our legal system that our laws be interpreted by a competent, fair, honorable, and independent judiciary. Such a judiciary is essential to the American concept of justice." Md. Rule 16-813 (2009) (Md. Code of Judicial Conduct Canon, Preamble).

[34] "A judge shall avoid impropriety and the appearance of impropriety." Md. Rule 16-813 (2009) (Md. Code of Judicial Conduct Canon 2).

[35] *See*, *e.g.*, Md. Rule 16-813 (2009) (Md. Code of Judicial Conduct Canon 2) and accompanying commentary; In re Lamdin, 404 Md. 631, 651-52, 948 A.2d 54, 66 (2008) (finding that a judge's use of vulgar language in the courtroom undermined the public perception of the judiciary).

[36] *See supra* Part I.

[37] University of Maryland, Maryland Elections Center, Campaign Finance, 2000 Campaign of Judge Robert N. Dugan, http://www.mdelections.org/campaign-finance/advanced-search/contributions?acctno=A1550 (last visited Nov. 24, 2009).

[38] University of Maryland, Maryland Elections Center, Campaign Finance, 2002 Campaign of Judge Patrick Cavanaugh, http://www.mdelections.org/campaign-finance/advanced-search/contributions?acctno=A2312 (last visited Nov. 24, 2009).

the incumbent judges, raised nearly $111,000 in an unsuccessful bid to gain election to the bench.[39]

Obviously, the sitting judges had to raise comparable funds to help them retain their seats. Between February 2006 and May 2008, the Campaign Finance Account for the incumbent judges of the Circuit Court for Baltimore County raised nearly $400,000.[40] Comparable amounts were raised in the preceding election cycle.[41] The campaign committee spent close to that amount in their successful elections.[42] A review of the election reports showed that a vast majority of these donations came from attorneys who regularly appeared before the judges seeking election.[43]

E. Abbreviated Honeymoons

Judicial elections serve as discouragement to would-be judges. Appointees who are focused on beginning successful judicial careers are at the same time facing elections. It can be argued that the first few years of experience are most important to the judge's evolution from advocate to arbiter. Having to campaign during the first few years—or even months—of appointment creates a rocky beginning for new judges. Instead of studying the new areas of the law with which they must become familiar, a new appointee is out most nights and weekends shaking hands and kissing babies at political clubs, community association meetings, bull roasts, charity events, or anywhere groups of people assemble. This schedule hampers a judge's ability to study and prepare for the cases over which he or she will preside. Quite frankly, in many cases, it affects the judge's personal life and relationships with his or her family.

There are many lawyers and judges on the District Court who would, by all accounts, make terrific circuit court judges, but decline to seek appointment because of the arduous election process. Not only is there campaigning and fundraising to worry about, but, in a lawyer's case, if the appointee loses the election, he or she is without a job, having given

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[39] University of Maryland, Maryland Elections Center, Campaign Finance, 2006 Campaign of Attorney Arthur Frank, http://www.mdelections.org/campaign-finance/advanced-search/contributions?acctno=A4253 (last visited Nov. 24, 2009).

[40] University of Maryland, Maryland Elections Center, Campaign Finance, Baltimore County Sitting Judges Campaign Between February 2006 and May 2008, http://www.mdelections.org/campaign-finance/advanced-search/contributions?acctno=A4600 (last visited Nov. 24, 2009).

[41] University of Maryland, Maryland Elections Center, Campaign Finance, Baltimore County Sitting Judges Campaign in the Preceding Election Cycle, http://www.mdelections.org/campaign-finance/advanced-search/contributions?acctno=A1555 (last visited Nov. 24, 2009).

[42] *See supra* note 40 & 41.

[43] *See supra* note 40 & 41.

up practice to accept the judgeship.[44] Government lawyers and district court judges might return to their previous posts, but lawyers in private practice do not have that security. In a matter of months, a law practice that has taken years to develop can be gone. Many of the most qualified lawyers view this as a risk not worth taking.

F. Minority Representation

For years in Maryland, everyone thought that the only way for minorities to be represented on the circuit court was through the contested election process. While it must be acknowledged that, in the past, this was the surest route to the bench for many qualified candidates, who would not otherwise have been appointed; however, in recent years, the election process has generally stifled minority representation. Many qualified minority candidates appointed by various governors have not won election to a fifteen-year term.[45] It is now generally conceded that contested judicial elections hinder diversity on the bench rather than promote it.

G. Personal Security Considerations

Campaigning puts a sitting judge's personal safety at risk. While in the courthouse, significant consideration is given to the judge's personal security. All criminal courtrooms have armed sheriffs present. Additionally, when the judge decides a contested domestic case, security can also be present in the courtroom. Furthermore, every courtroom has special security alarms that will summon an immediate response at the touch of a button. Judges also have protected and monitored parking areas. They do not ride on public elevators and are encouraged to remove all personal information from databases that are accessible to the public. Their chambers are not accessible to the public. The need for this is obvious: Judges routinely hear cases involving serious violence—both civil and criminal. In some instances, the decision made by a judge in a contested domestic case can be even more dangerous to the judge's personal security than his or her decision in a criminal case. The losing

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[44] Judicial canons require a judge to give up the practice of law. Md. Rule 16-813 (2009) (Md. Code of Judicial Conduct Canon 4(g)(1)).

[45] Rodney Warren of the Circuit Court for Anne Arundel County, Judge Alexander Wright of the Circuit Court for Baltimore County, and Donna Hill Staton of the Circuit Court for Howard County all were defeated by challengers to the sitting judges. *See* Michael Dresser, *Black Candidate Gets 2nd Chance at Judgeship Wright is Reappointed After Defeat Last Year in Circuit Court Vote*, BALT. SUN, Jan. 16, 2001, at 1B; Andrea Siegel, *Circuit Judge's Defeat Leaves All-White Bench; Warren Third Black Ousted; Fellow Appointee Also Loses; 2 GOP Attorneys Capture Spots; Election 2004; Anne Arundel*, BALT. SUN, Nov. 4, 2004, at 1B.

party in an ugly domestic matter often holds the judge personally responsible.

While judges can avoid situations that would likely expose them to personal contact with disgruntled litigants, judges running for election cannot. As stated above, judges who are running to retain their position in a contested election are out most nights and weekends at any event where they are likely to find groups of voters. While they have extensive security during the day, there is no security provided while campaigning. Often, they attend campaign events by themselves, without anyone even going with them. Because of general security concerns, Maryland judges have received special training on personal security considerations.[46] This training, however, did not even attempt to address the significant security concerns of a sitting judge's campaign. While it must be recognized that no judge has been harmed by an encounter with an angry litigant while campaigning, it is a real fear among judges. Under the current election system, it is only a matter of time before that fear is realized.

H. Ballot Design and Multiple Candidates

When there is more than one vacancy, the voter is instructed to vote for the number of candidates equal to the number of existing vacancies. Assuming that three sitting judges are on the ballot, and one is the focus of a challenge, all three are at risk of losing the election. Very qualified judges have been removed from the bench by efforts to unseat others on the ballot.[47] Another problem is that judges appear in alphabetical order on the ballot. In a recent election, the three sitting judges running for election had three challengers.[48] The incumbent judges' last names began with 'R', 'T' and 'W';[49] they were challenged by candidates whose

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[46] The Maryland Judicial Conference has held a special training session on personal security considerations for judges. For an overview of the Maryland Judicial Conference and its subcommittees, visit http://www.courts.state.md.us/mjc.html.

[47] For example in 2002, three sitting judges on the Circuit Court for Baltimore County ran and were challenged by a respected attorney. Election activists considered the challenge to be based on qualifications. The result, however, was that the challenger and the presumed target succeeded in winning full terms, and a judge who was on a ticket with the challenger ended up losing his seat as an unintended casualty. *See* Stephanie Hanes, *Wright Finishes Last in Bid to Retain His Circuit Court Seat; Judge, 53, is Unseated for 2nd Time in Two Years; Baltimore County; Election 2002*, BALT. SUN, Nov. 6, 2002, at 10B. In 1996, many pointed to a new judge's association with another judge on the ballot as reason for her loss to a challenger. *See* Norris West, *Hill Staton Refuses to be Bitter About Loss*, BALT. SUN, Nov. 10, 1996, at 4B.

[48] In 2006, Judges Gale Rasin, John Themelis and Barry Williams of the Circuit Court for Baltimore City were challenged by Attorneys Nicholas Delpizzo and Rodney Jones and Judge Emanuel Brown, then of the District Court for Baltimore City. *See* Maryland State Board of Elections, Official 2006 Gubernatorial Primary Election Results, Judge for Baltimore City, Judge of the Circuit Court Results, http://www.elections.state.md.us/elections/2006/results/primary/county_Baltimore_City.html (last visited Nov. 24, 2009).

[49] Judges Gale E. Rasin, John C. Themelis, and Barry G. Williams.

names began with 'B', 'D' and 'J'.[50] The incumbent judges ran a campaign to vote bottom up.[51] A newspaper article covering this election humorously pointed out: "Not since grade-school seating charts have last names been so important."[52]

The perception that voters vote for the first three candidates is not without merit.[53] There is no political affiliation indicated for any candidate, and rightfully so. Perhaps a notation as to whether the judge is an incumbent, who was approved by the nominating commission, would give the voter some frame of reference as to qualification, just as political affiliation provides a frame of reference for candidates to other offices.

I. Primary Elections: A Second Bite at the Apple

To appear on the ballot in the general election, a candidate must, within the number of seats vacant, be the highest vote-getter in the Democratic or Republican Party's primary election.[54] This means that if there are three vacant seats, the top three vote-getters in each party appear on the ballot in the general election.[55] Recognizing the fact that judges are supposed to be apolitical, judges are allowed to run in more than one primary.[56] A challenger to the appointed judge may also appear on the primary election ballot of both parties.[57] An independent or third-party[58] candidate, however, need not run in any primary.[59] Being nominated by the third-party's central committee in that county assures a place on the general election ballot.[60] Thus, a candidate could win in both major

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[50] Nicholas DelPizzo, Rodney Jones, and Judge Emanuel Brown.

[51] Julie Bykowicz, *For 3 Judges on City Ballot, Primary Isn't Easy as A-B-C*, BALT. SUN, Sept. 9, 2009, at 1A.

[52] *Id.*

[53] Judge Alexander Wright, then of the Baltimore County Circuit Court, Judge Donna Staton, then of the Howard County Circuit Court, and Judge Rodney C. Warren, then of the Anne Arundel County Circuit Court, all lost their seats in contested elections. Although race was considered a factor because the candidates were all African-American, the names of all three of those judges appeared after their challenger's names on the ballot. *See* Dresser, *supra* note 45; Siegel, *supra* note 45.

[54] *See* MD. CODE ANN., ELEC. LAW § 5-705 (2003).

[55] *See id.* at § 5-705(b)(3)-(4).

[56] *See id.* at § 5-203(b)(1). *See also* Suessmann v. Lamone, 383 Md. 697, 709, 862 A.2d 1, 8 (2004) (noting that, under Section 5-203, a judicial candidate officially registered in one party may be a candidate in another party's primary election, or in the primary elections of both parties at the same time).

[57] *See* MD. CODE ANN., ELEC. LAW § 5-203(b)(1) (2003).

[58] The Green Party, Libertarian Party, Independent Party, and Constitutional Party are recognized third-parties in Maryland. Maryland State Board of Elections, How to Register, http://www.elections.state.md.us/voter_registration/index.html#Parties (last visited Nov. 24, 2009).

[59] *See* MD. CODE ANN., ELEC. LAW § 5-703.1(b) (Supp. 2009).

[60] *See id.* at § 5-703.1(e).

parties' primaries but lose in the general election to an independent or third-party candidate.

J. Political Affiliation

The strongest argument by proponents of judicial elections is the difficulty of gaining appointment when one is not within the Governor's party. Qualified candidates for the judiciary, who are members of the minority party, have felt that they are unable to gain appointment to the bench due to their political affiliation or persuasion, and an open election is the only means possible to assume a judgeship.

Political affiliation should never be a factor considered for appointment. The Maryland Constitution sets forth on a broad scale the sole criteria for a judicial appointment: "[I]ntegrity, wisdom and sound legal knowledge."[61] When political qualifications are considered in making an appointment, fine candidates are denied an opportunity and the citizens of the state are denied the most qualified judge. The very sorry reality is that politics undoubtedly play a role in judicial appointments. This is especially disturbing when a single party holds a large majority of offices in the state.[62]

This strong argument, however, does not justify the much higher costs of contested elections. If a governor abuses his constitutional duty to appoint qualified judges and uses that duty to make political appointments, he has committed a serious breach of the oath he took,[63] and judicial elections are not going to resolve that.

On the federal level, the President, with the advice and consent of the Senate, appoints judges for life.[64] In reality, when appellate and district court judges are appointed in Maryland, the Maryland Legislature gives very little debate to the appointments. Unlike the process in the Maryland Senate, vigorous debate takes place in the United States Senate on many judicial appointments.[65] The result is that, although presidents

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[61] MD. CODE ANN., CONST. art. IV, § 2 (2003).

[62] For example, 33 of the 47 State Senators in Maryland are affiliated with the Democratic Party. Maryland State Archives, Senators by Political Party, Democrats, http://www.msa.md.gov/msa/mdmanual/05sen/html/sendem.html (Feb. 5, 2008). Additionally, 104 of the 141 State Delegates in Maryland are affiliated with the Democratic Party. Maryland State Archives, Delegates by Political Party, Democrats, http://www.msa.md.gov/msa/mdmanual/06hse/html/hsedem.html (Jan. 4, 2008).

[63] *See* MD. CODE ANN., CONST. art. I, § 9 (2003) ("I will, to the best of my skill and judgment, diligently and faithfully, *without partiality or prejudice*, execute the office of [Governor] . . . .") (emphasis added).

[64] U.S. CONST. art. II, § 2, cl. 2.

[65] *See*, *e.g.*, *Hearings on the Nomination of Sonia M. Sotomayor to be Associate Justice to the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. (2009); *Hearings on the Nomination of Robert H. Bork to be Associate Justice to the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 100th Cong. (1987).

usually appoint members of their own political party or philosophical ideology, the debate that takes place when a radical appointment is made and the arduous confirmation that appointees face, temper fringe appointments and encourages the President to make reasonable appointments. Such balance of powers and the debate it creates is the pinnacle of the democratic process. Such a system could serve the citizens of Maryland well.

V. RECOMMENDATIONS

A. Abolish Contested Elections

The Constitutional Convention of 1967-68 recommended that, like appellate judges who appear on the ballot without opposition in a yes/no vote to continue in office, judges of the circuit courts[66] be appointed with the advice and consent of the senate and then continue in office after a yes/no vote by the public.[67] At the time of the convention, the Maryland Constitution was already amended to provide such elections for appellate judges.[68] It is time for such an amendment to be passed for the circuit court judges of Maryland as well. After appointment, the judge would be required to appear on the ballot for continuance in office and then serve a ten-year term, whereupon the Governor could appoint the judge again or decline to do so.

Abolishing the contested election would remove the many conflicts outlined above. A judge would be able to concentrate on his or her work and have no need to be a successful politician and fundraiser. Potential judges would not be dissuaded by the rigorous election process. Additionally, the advice and consent of the senate would create a healthy check on the appointments of the Governor and limit the Governor's ability to make radical appointments. The undignified process of having judges run for election does not serve the people of Maryland well.

B. Abolish Contested Elections for Subsequent Terms

If, however, contested elections are to remain, contested elections should definitely be eliminated for a judge's second fifteen-year term. A vote for or against continuation in office protects the public from a judge who has gained a reputation for being out of touch or incompetent. Subjecting qualified, experienced judges with a fifteen-year track record to another contested election discourages those experienced judges from seeking a second term. For proof of this statement, one need look no

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[66] The proposed Constitution called the trial court of general jurisdiction the Superior Court. *See* PROPOSED CONSTITUTION, *supra* note 18, at 179 (§ 5.22).

[67] *Id.*

[68] *See* MD. CODE ANN., CONST. art. IV, § 5A (2003).

further than the current situation in Baltimore County, where two very experienced and respected members of the circuit court bench have announced that they will retire rather than face another contested judicial election.[69] Neither of these judges are near the mandatory retirement age and both have said they would definitely have stayed on the bench were it not for the contested election process.[70]

Judges are presently being appointed to the circuit court at a younger age than they were traditionally. Many judges see the judiciary as a career, as opposed to a place to spend time at the end of one's legal career. Accordingly, many judges are required to participate in more than one election in their judicial careers, if they choose to remain on the bench until the mandatory retirement age of seventy.[71] Some of these would-be two-term judges forgo a second term because they do not want to face the indignity of a second election. Unfortunately, many of these judges are the most serious and experienced judges in Maryland. They have developed a track record over their first fifteen years on the bench, sufficient for the public, if interested in investigating their performance, to make an informed decision as to their continuation in office. Therefore, it is difficult to understand the logic of the argument that these judges should be subject to a contested election.

C. Challenging One Judge

It should be recognized that any number of judges may run at the same time to retain the seat on the circuit court to which the Governor has appointed them. If, for whatever reason, only one judge is the focus of an election challenge, all the judges are at risk of losing their positions in a contested election. For example, if there are three judges facing election, and there is one challenger who campaigns on the statement that he is

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[69] Judge Lawrence R. Daniels informed the Baltimore County Bar Association by email that he would not seek another term, stating: "As much as I enjoy my service as a judicial officer, I must confess I have no desire to spend the next 16 months campaigning for office." Danny Jacobs, *Judge Daniels Won't Run for Re-Election*, DAILY REC. (Balt., Md.), June 22, 2009, at 3B. Judge John O. Hennegan informed the Governor that he would not seek another term because he doesn't have a "burning desire" to campaign for another term. Danny Jacobs, *Second Judge Opts Out of Baltimore County Race*, DAILY REC. (Balt., Md.), June 26, 2009, at 3B.

[70] Judge Daniels has 20 years of judicial experience, first on the District Court, and for the past seventeen years, on the Circuit Court for Baltimore County. He will not reach the mandatory retirement age of seventy until 2017. *See* Biography of Judge Lawrence R. Daniels, Maryland Manual Online, http://www.msa.md.gov/msa/mdmanual/31cc/html/msa11732.html (last visited Nov. 24, 2009). Judge Hennegan has eighteen years of experience on the Circuit Court for Baltimore County, and, like Judge Daniels, Judge Hennegan will also reach the mandatory retirement age of seventy in 2017. *See* Biography of Judge John O. Hennegan, Maryland Manual Online, http://www.msa.md.gov/msa/mdmanual/31cc/html/msa11777.html (last visited Nov. 24, 2009).

[71] *See* MD. CODE ANN., CONST. art. IV, § 3 (2003).

more qualified than Judge A, the voters in that election are not given the opportunity to vote for Judge A or the challenger; instead, the voter is instructed to vote for three judges. The result often is that both Judge A and the challenger are elected, and Judge C, who everyone agreed was highly qualified, loses his or her seat.

A reasonable alternative is to place each seat up for election on the ballot independently. A challenger can decide which seat they are seeking. Essentially, the challenged judge can focus his or her attention on the challenger, leaving the other incumbents free from risk of losing their seats. The public, by its vote, expresses its opinion as to who is more qualified: Judge A or the challenger.

D. District Court Judges as Candidates

The judicial canons do not permit fundraising and political activity by judges unless they are candidates for judicial office.[72] This is sensible because the need to be elected in a contested election is a system in which they are forced to participate if appointed to a circuit court judgeship. The appearance of impropriety in fundraising is an unintended consequence of being forced to win an election after they are appointed. Conversely, district court judges are not required to run in *any* election. The only time they must fall back on the safe harbor, which allows for political activity and fundraising, is by declaring themselves a candidate for judicial election to a circuit or appellate court.[73] District court judges should not be able to rely on the safe harbor provisions permitting political activity. The appearance of impropriety caused by fundraising is completely of their own doing.

If a district court judge intends to seek election to the circuit court, he or she should be required to resign from the bench prior to engaging in the campaign. Currently, district court judges are allowed to challenge circuit court judges appointed by the Governor without risk. Even if they lose the election for the circuit court, they retain their district court judgeship.[74] The appearance of impropriety when a sitting district court judge raises funds for a contested election is obvious. The impropriety of having one active member of the Maryland judiciary challenging another active member of the judiciary is equally obvious.

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[72] *Compare* Md. Rule 16-803 (2009) (Md. Code of Judicial Conduct Canon 5(a)) ("[a] judge who is not a candidate for election or re-election . . . shall not engage in any partisan political activity"), *with* Md. Rule 16-803 (2009) (Md. Code of Judicial Conduct Canon 5(b)) ("[a] judge who is a candidate for election or re-election . . . may engage in partisan political activity").

[73] *See* Md. Rule 16-803 (2009) (Md. Code of Judicial Conduct Canon 5(b)).

[74] *See* MD. CODE ANN., CONST. art. IV, § 41D (2003).

E. Eliminate Party Primary Election for Judges

Under the current system, a candidate who wins in both the Democratic and Republican primary could lose his or her seat on the bench to a candidate who did not have to run in any primary. At the same time, a third-party candidate would not have to spend a penny in a contested primary election. That third-party candidate could devote all of the funds raised for the judicial campaign to the general election by merely getting the approval of the central committee of the county for that party. Often this amounts to getting the approval of twenty or fewer voters. For instance, by the end of 2008, the Constitution Party, a recognized political party in Maryland, had fewer than fifteen registered voters in Baltimore County.[75] It must be remembered that judicial candidates appear on the general election ballot without party affiliation.[76] Therefore, the public has no way of knowing whether the name they see on the general election ballot for Judge of the Circuit Court is the candidate of the Libertarian, Green, Constitution, Democratic or Republican Party. Since all candidates for Judge of the Circuit Court appear on each election ballot without party affiliation, if primary elections are to remain for judges, all candidates for judge should appear on the primary election ballot as well. This will eliminate the chance that a candidate could win the general election without having appeared on any primary ballot at all. More importantly, if the same candidates are the top vote-getters in all primaries, they would not have to run in a general election.

F. Reform of the Judicial Nominating Commission

With the elimination of contested judicial elections, confidence must be restored to the judicial selection process. Such reform was indeed suggested by the Constitutional Convention of 1967-68.[77] The convention suggested a Judicial Nominating Commission that would recommend candidates to the Governor.[78] There was to be one commission for the appellate courts and one for the trial courts.[79] The Trial Courts Nominating Commission was to be comprised of no fewer than six members, consisting of an equal number of lawyers and lay members.[80] The lay members were to be appointed by the Governor and the lawyer members were to be elected by secret ballot by the lawyers in

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[75] *See* Maryland State Board of Elections, Maryland Voter Registration, 2008 End-of-Year Report, http://www.elections.state.md.us/pdf/vrar/2008_year.pdf (last visited Nov. 24, 2009).

[76] MD. CODE ANN., ELEC. LAW § 5-203(b)(1) (2003).

[77] *See* PROPOSED CONSTITUTION, *supra* note 18.

[78] *Id.* at 176 (§ 5.15).

[79] *Id.* at 177-78 (§§ 5.16-.17).

[80] *Id.* at 178 (§ 5.17).

the circuit where the vacancy existed.[81] The members would serve a term of years, giving them independence from the executive who appointed them.[82] Additionally, the Governor was required to appoint a judge from the candidates forwarded by the committee.[83] If the Governor failed to appoint a candidate from the list within a given time frame, the Court of Appeals would make the selection.[84] The overall objective of the proposed formula was to de-politicize the process and limit the ability of a governor to directly manipulate the commission.[85]

When the constitution failed to pass, Governor Mandel issued an Executive Order, establishing the commission introduced by the Convention, composed of the lawyers elected by the bar and lay members appointed by the Governor.[86] Since then, each governor has issued a similar order.[87] As time evolved, so have the orders establishing the nominating commissions. Today's commission, after years of modification, barely resembles the commission proposed by the convention and implemented by Mandel. In today's form, the nominating committee is comprised of nine lay members and four lawyer members.[88] The lay members are appointed by the Governor and the lawyer members are appointed by the Governor upon recommendation of the local bar president.[89] Governors are permitted to modify those committees as they see fit.[90]

Prior to the creation of the nominating committee, the Governor had free reign in appointing judicial candidates.[91] The design of the original commission was for the bar to elect the commission who would recommend candidates known to the members of the bar for their qualifications, integrity, and ability.[92] Only the most respected lawyers would be nominated. Who better to know the qualifications of candidates for appointment than their colleagues at the bar? Under the current system, with the commission appointed and removable at will by the Governor, the commission is a pretense and the Governor essentially has free reign in appointing judges. The Governor is able to communicate

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81 *Id.* at 178 (§ 5.18-.19).
82 *Id.* at 178 (§ 5.19).
83 PROPOSED CONSTITUTION, *supra* note 18, at 176 (§ 5.15).
84 *Id.*
85 *See* Friedman, *supra* note 18, at 574.
86 Exec. Order No. 01.01.1974.23, 2 Md. Reg. 45 (1975).
87 *See* Friedman, *supra* note 18, at 575.
88 Exec. Order No. 01.01.2008.04, 36 Md. Reg. 954 (2008) (rescinding orders 01.01.2007.08 and 01.01.2007.11).
89 *Id.* at (C)(2)(a)-(b).
90 MD. CODE ANN., CONST. art. II, § 24 (2003).
91 *See* Friedman, *supra* note 18, at 574-75.
92 *Id.* at 574.

with commission members who are beholden to him for their appointment. At best, this gives the appearance of impropriety.

A nominating committee more comparable to the commission intended by the Constitutional Convention of 1967-68, and Mandel's Executive Order, would be a more appropriate means to appointing qualified judges in an apolitical process. Eliminating the commission would be better than retaining the current commission as it currently stands. This is the only means to resolving the strongest legitimate argument of proponents of judicial elections, which is, that politics unfortunately play too large a role in the appointment of circuit judges.

VI. CONCLUSION

Contested judicial elections for the Circuit Court in Maryland need to be abolished. They do not serve the people of the state and do not assure that their circuit court judges are the most qualified. They require judges to participate in political activities that demean their office. Proponents of the current system argue that judges should spend time meeting the people, which is something that contested elections facilitate. It is argued that this is helpful to the judge as well as to the people whose cases the judge will have to decide, because it allows the people to become more familiar with the judge, which, in turn, makes the judge's adverse decisions more acceptable. Unfortunately, in reality, this is not the case. If anything, people resent the fact that the judge comes around, prior to the election, pleading for their support, and then disappears for the next fifteen years. They do not understand that, after the election, the judge is prohibited from participating in the same activities as before. Although there certainly is some advantage to the judge learning about the various parts of the county and its citizens, the disadvantages of campaigning far outweigh any beneficial effect.

Proponents also argue that contested elections facilitate minority representation on the circuit court. As demonstrated above, although that argument may have had validity in the past, in the last decade, contested elections have had the opposite effect.[93] The truth is that, recently, contested elections have prevented qualified minority judges from serving on the circuit courts of this state.

Contested elections require judges to do things that appear improper to the informed observer. Moreover, they prevent qualified lawyers from seeking a judgeship, while allowing lawyers with questionable qualifications to assume the position. To make circuit court judges the only judges required to run in contested elections is impractical, especially when judges of the courts below and above the circuit court are

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[93] *See supra* note 45 and accompanying text.

not subjected to this system. Readers should not be confused by the fact that other recommendations were made in this article regarding judicial election reform. The one recommendation that is paramount is that Maryland do away with this antiquated system of choosing circuit court judges in contested elections, where the most adept fundraiser and politician is elected to sit in judgment and is authorized to dispense justice. If that necessary reform is accomplished, most of the other recommendations are moot. Only if contested judicial elections are to remain should the other recommendations be considered.

ARTICLE

THE MARYLAND FLEXIBLE LEAVE ACT: IS IT REALLY THAT SIMPLE?

By: Darrell R. VanDeusen* and Donna M. Glover**

The American workforce is aging. A "baby boomer"[1] turns sixty years old every seven seconds, according to a report published by a collection of senior representatives from nine Federal agencies, including the Equal Employment Opportunity Commission ("EEOC") and the United States Department of Labor ("DOL").[2] At the same time, the American population continues to grow: Since 1980, the population of the United States has increased from approximately 225 million to an estimated 307 million; a net gain of one person every eleven seconds.[3]

Amidst the baby boomers, the "sandwich generation" has become more prevalent. The term "sandwich generation"[4] refers to that segment of the population providing support to both younger and older family members. It is a circumstance that affects a tremendous number of American workers; a Pew Research Center study said that seventy-one percent of today's baby boomers have at least one living parent.[5] An aging boomer population will not end the sandwich generation; it will only create the next layer of the sandwich, as the 75 million children of boomers confront the same challenges.

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[1] The United States Census Bureau considers a baby boomer to be someone born during the demographic birth boom between 1946 and 1964. Press Release, U.S. Census Bureau, Baby Boom Brought Biggest Increases Among 45-to-54 Year Olds (Oct. 3, 2001), http://www.census.gov/Press-Release/www/releases/archives/children/000321.html.

[2] *See* TASKFORCE ON THE AGING OF THE AMERICAN WORKFORCE, REPORT OF THE TASKFORCE ON THE AGING OF THE AMERICAN WORKFORCE 1, 8 (Feb. 2008), http://www.doleta.gov/reports/FINAL_Taskforce_Report_2_27_08.pdf.

[3] *See* U.S. Census Bureau, *U.S. POPClock Projection*, http://www.census.gov/population/www/popclockus.html (last visited Nov. 24, 2009).

[4] Sociologist Dorothy Miller first used the term "sandwich generation" to refer to inequality in the exchange of resources and support between generations. SUZANNE KINGSMILL & BENJAMIN SCHLESINGER, THE FAMILY SQUEEZE: SURVIVING THE SANDWICH GENERATION ix (Univ. of Toronto Press 1998).

[5] PEW RESEARCH CENTER, BABY BOOMERS APPROACH AGE 60: FROM THE AGE OF AQUARIUS TO THE AGE OF RESPONSIBILITY (Dec. 8, 2005), http://pewresearch.org/assets/social/pdf/socialtrends-boomers120805.pdf.

Sustained legislative efforts to address the need for American workers to take time to care for themselves, their parents, spouses, and children without jeopardizing their jobs, found support at the federal level in 1993 with the enactment of the Family and Medical Leave Act ("FMLA").[6] An increasing number of states have also considered protection in this regard.[7] Maryland jumped on this bandwagon in 2008 with the passage of the Maryland Flexible Leave Act ("MFLA").[8]

The MFLA requires employers who provide employees with any form of accrued paid time off, such as vacation, sick, or personal leave, to permit employees to use that paid time off because of the illness of a spouse, parent, or child.[9] The MFLA's broad brush represents the first time the Maryland General Assembly has given significant direction to employers on how to apply their leave policies. Before enactment of the MFLA, only Maryland's "adoption leave" law provided similar direction, as it mandated that "[a]n employer who provides leave with pay to an employee following the birth of the employee's child shall provide the same leave with pay to an employee when a child is placed with the employee for adoption."[10]

The General Assembly's 2008 version of the MFLA was less than clear in many areas, requiring emergency legislation in the 2009 session to address business concerns regarding interpretation of the Act. Yet, even after the 2009 amendments, questions still remain. Although the Maryland Department of Labor, Licensing & Regulation ("DLLR") could typically provide guidance, the Fiscal and Policy Note to the amended Act expressly states that "[t]he bill does not apply to State agencies nor does it provide administrative authority or enforcement responsibility to the Division of Labor and Industry."[11] This means that the judiciary is left to determine how the law applies to employers. This raises perhaps the first and most significant question: Is there a private cause of action created under the MFLA?

Moreover, it remains to be seen whether the MFLA is a precursor of future legislative attempts to mandate employee benefits under state law. Will Maryland join other jurisdictions, such as the District of Columbia, which now mandates that employers provide paid sick leave to employees for their own illness or that of a family member, and for domestic

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[6] 29 U.S.C. §§ 2601-2654 (2006).

[7] *See infra* Part III.C.

[8] *See* Flexible Leave Act, ch. 644, 2008 Md. Laws 4881-84 (codified at MD. CODE ANN., LAB. & EMPL. § 3-802 (2008)).

[9] MD. CODE ANN., LAB. & EMPL. § 3-802(a)(4), (a)(5), (c), (d) (Supp. 2009).

[10] MD. CODE ANN., LAB. & EMPL. § 3-801(c) (2008).

[11] MD. GEN. ASSEM., DEP'T. OF LEGIS. SERVS., FISCAL AND POLICY NOTE (REVISED): LABOR AND EMPLOYMENT – FLEXIBLE LEAVE ACT, S. 426-562, at 1 (2009).

violence situations?[12]

This article addresses the many issues surrounding the creation and anticipated application of the MFLA, and its integration with the FMLA. Part I presents the requirements of the MFLA, and examines the 2008 and 2009 legislation that resulted in the current Act. Part II reviews the history of Maryland's employment at-will doctrine as it relates to the historical recognition that employees have no particular "right" to specific leave. Part III offers an overview of past and present federal efforts to provide for and expand mandated employee leave. Part IV discusses the steps that other states have taken to mandate the way in which employers permit employees to take leave. Finally, Part V provides some analysis of the way in which the MFLA will likely be interpreted by Maryland courts.

I. THE REQUIREMENTS AND HISTORY OF THE MARYLAND FLEXIBLE LEAVE ACT

The rationale behind the MFLA is hard to challenge. There are times when an employee needs to take time off from work to care for an immediate family member. Why should an employer be permitted to make a distinction between an employee caring for him or herself, and caring for a family member, if the employee is not using any more leave than that provided by the employer in the first place? As with many things, however, the devil is in the details.

The MFLA applies to employers with fifteen or more employees in twenty calendar weeks in the current or preceding calendar year,[13] and it does not require that an employer provide paid time off if the employer does not already do so.[14] Employees who have any type of accrued leave (*e.g.*, vacation, sick, paid time off, personal days, compensatory time) under any employer policy may use the leave to take time off to care for any member of their immediate family who is ill.[15] The term "immediate family" includes a child, parent, or spouse.[16] To the extent that the employee has more than one form of paid leave, the employee has the right to elect the type and amount of accrued, unused leave to be used.[17]

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[12] *See* D.C. CODE §§ 32-501 to -517 (2001 & Supp. 2009).

[13] The definition of employer under the MFLA is virtually identical to that in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e(b)-174 (2006) and Maryland's original anti-discrimination law. *See* MD. ANN. CODE art. 49(B) § 15 (2003), *repealed by* Acts 2009, ch. 120, § 1(Oct. 1, 2009).

[14] MD. CODE ANN., LAB. & EMPL. § 3-802(c) (Supp. 2009) (explaining that the purpose of the MFLA is to "allow an employee of an employer to *use* leave with pay to care for an immediate family member who is ill . . . .") (emphasis added).

[15] *Id.* at § 3-802(d).

[16] *Id.* at § 3-802(a)(4).

[17] *Id.* at § 3-802(e)(1)(ii).

Any employee who is covered by a collective bargaining agreement, and who uses leave under the MFLA, must also comply with the terms of that agreement.[18] Additionally, employees are required to comply with any leave policies the employer already has in place, such as leave notice requirements.[19]

If an employer's leave policies are more generous than the MFLA, the employer's policy prevails.[20] However, if an employer's policy requires, for example, that an employee only use sick leave for his or her own illness, the MFLA would govern. In fact, under the MFLA, an employer's policy restricting sick leave for the employee's use might be facially discriminatory.

The MFLA contains a non-discrimination and non-retaliation provision. Employers may not discriminate against any employee who exercises his or her rights under the MFLA, and may not retaliate against any employee who "files a complaint, testifies against, or assists in an action brought against the employer."[21] Furthermore, the MFLA "applies to any leave taken after the effective date of the bill, regardless of when the leave was accrued."[22]

A. The "Original" MFLA from the 2008 Legislative Session

The MFLA, in its initial form, took effect on October 1, 2008.[23] As it still does, the Act applied to employers with fifteen or more employees, and required businesses that provide employees with any form of paid leave to permit employees to use such leave for the illness of an immediate family member.[24] But there were nearly as many questions raised as answers provided by the Act, particularly in the business community.[25]

Lawmakers may not have foreseen the controversy that was about to unfold. While members of the business community viewed the Act as a gateway to increased litigation, supporters of the legislation considered these concerns unfounded. Senator Robert J. Gargiola (D. Montgomery County), who sponsored the bill, stated that opponents misunderstood the

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[18] *Id.* at § 3-802(e)(2).

[19] *Id.* at § 3-802(c), (e)(2).

[20] MD. CODE ANN., LAB. & EMPL. § 3-802(e)(3) (Supp. 2009).

[21] *Id.* at § 3-802(f)(3).

[22] Letter from Kathryn M. Rowe, Assistant Att'y Gen., Office of Counsel to the Gen. Assembly, to the Honorable Ron George (May 28, 2008), *available at* http://mdchamber.org/docs/AG-FLA.pdf.

[23] *See* Flexible Leave Act, *supra* note 8.

[24] *See* MD. CODE ANN., LAB. & EMPL. § 3-802(a)-(c) (2008).

[25] In November of 2008, the University of Baltimore School of Law hosted a MFLA forum where a panel, which included Professor Michael Hayes and Delegate Ann Marie Doory, one of the sponsors of the bill, fielded nearly raucous criticism by many audience members.

intent of the MFLA, and that "[y]ou're not going to see any greater litigation than you see today . . . [t]here's really no reason to think that there should be any problem with this at all."[26]

There was a lack of specificity in the law, which fell into several areas. "Family member" was not clearly defined. The 2008 legislation stated that "immediate family" would include a "child, spouse, and parent."[27] The definition of "child," however, was not limited to persons under the age of eighteen.[28] It was also not clear whether the definition of "immediate family" was limited to these persons, so it was possible that it could extend to grandparents, domestic partners, and perhaps even aunts and uncles.[29] The lack of a definition of "illness" was even more troubling. There was no indication that the definition would follow the definition of "serious health condition" under the FMLA,[30] and there was no indication in the legislation as to what conditions were intended to be covered. Therefore, it was possible that any illness, no matter how minor, could arguably be covered.

In addition to these definitional issues, employers were also concerned that the MFLA might interfere with their no-fault attendance policies. A no-fault attendance policy is one that requires employees to manage their absences.[31] Under a no-fault policy, employers typically do not require reasons for an absence in any form (unless otherwise required by policy, for example, for FMLA certification), and based on either a total number of days absent or a related point system, employers can terminate employees for work absence.[32] Under the original MFLA, could an employee accumulate points for a MFLA-related absence, or would such conduct be discrimination on the part of the employer? What about the fact that the law protects an employee when using accrued, paid time off for an employee's immediate family members' illnesses, but not for the employee's own illness?

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[26] Andy Rosen, *Flexible Leave Act in Md. to be Signed*, DAILY REC. (Balt., Md.), May 22, 2008.

[27] MD. CODE ANN., LAB. & EMPL. § 3-802(a)(3) (2008).

[28] *Compare* MD. CODE ANN., LAB. & EMPL. § 3-802(a)(2)(i) (Supp. 2009), *with* MD. CODE ANN., LAB. & EMPL. § 3-802(a)(3) (2008).

[29] *Compare* MD. CODE ANN., LAB. & EMPL. § 3-802(a)(4) (Supp. 2009) ("'Immediate family' *means* . . . .") (emphasis added), *with* MD. CODE ANN., LAB. & EMPL. § 3-802(a)(3) (2008) ("'Immediate family' *includes* . . . .") (emphasis added).

[30] Under the FMLA, "serious health condition" entitling an employee to leave means "an illness, injury, impairment or physical or mental condition that involves inpatient care . . . or continuing treatment by a health care provider . . . ." 29 C.F.R. § 825.113 (2009).

[31] *See* THOMAS M. HANNA, THE EMPLOYER'S LEGAL ADVISOR 195 (Amacom 2007) ("[T]he term is meant to convey the idea that a prohibited number of absences and tardies will result in discipline even if the employee claims to be without fault for some or all of the occurrences.").

[32] *See id.* at 197-98.

Another question arose regarding whether all covered employers must operate in Maryland. Was a company headquartered in New Jersey, with fifteen or more employees working in Maryland, covered by the MFLA? Suppose a Maryland-based employer that had fifteen employees in Maryland also had workers in other states—were the workers in other states covered? Similarly, if a Maryland employer had ten employees in Maryland, and five employees based in the District of Columbia, was the employer covered because it had fifteen employees?

Employers were also uncertain about the scope of the term "leave with pay." The MFLA defined "leave with pay" as "time away from work for which an employee receives compensation" and specifically included "sick leave, vacation time, and compensatory time."[33] What about short-term disability? Paid time off programs?

B. Revisions to the MFLA: The 2009 Corrective Legislation

After almost eight months of questions regarding the ambiguities in the MFLA, the General Assembly passed emergency legislation to revise and clarify key terms in the law. Revising the MFLA, Senate Bill 562 went into effect on May 19, 2009.[34] The bill clarified that an employer's existing leave policy prevails.[35] The bill then explained that the purpose of the MFLA "is to allow an employee of an employer to use leave with pay to care for an immediate family member who is ill under the same conditions and policy rules that would apply if the employee took leave for the employee's own illness."[36]

Furthermore, the revised bill clarified certain ambiguous terms. "Child" is now defined as a child (whether adopted, biological or foster), stepchild, or legal ward, who is either (1) under eighteen-years-old, or (2) an adult who is incapable of caring for him or herself due to a mental or physical disability.[37] "Parent" now means "an adoptive, biological, or foster parent, a stepparent, a legal guardian, or a person standing *in loco parentis*."[38] Continuing to address the original MFLA's ambiguities, the bill clarified what constitutes "leave with pay." As now defined by statute, "'leave with pay' means paid time away from work that is earned and available to an employee . . . based on hours worked . . . or as an annual grant of a fixed number of hours or days of leave for performance or service."[39] Expressly excluded from "leave with pay," however, are benefits provided under an employee welfare benefits plan subject to

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[33] MD. CODE ANN., LAB. & EMPL. § 3-802(a)(4) (2008).
[34] S. 562, 426th Gen. Assem., Reg. Sess. (Md. 2009).
[35] MD. CODE ANN., LAB. & EMPL. § 3-802(e)(3) (Supp. 2009).
[36] *Id.* at § 3-802(c).
[37] *Id.* at § 3-802(a)(2).
[38] *Id.* at § 3-802(a)(6).
[39] *Id.* at § 3-802(a)(5)(i).

ERISA; insurance benefits, including benefits from an employer's self-insured plan; workers' compensation; unemployment compensation; disability benefits; and other similar benefits.[40]

The bill also addressed which employers and employees are covered under the statute. To be covered by the MFLA, an employee must be "primarily employed in the State."[41] Employers are covered if they employ fifteen or more employees for each working a day in each of twenty or more calendar weeks in the current or preceding year.[42] The law does not answer, however, whether a covered employer must have fifteen employees overall, or fifteen employees within the State. Presumably, the law would cover a Maryland employer who employs workers in New Jersey, if it had fifteen or more employees working in Maryland; however, the New Jersey employees are not primarily employed in Maryland and would not be covered by the MFLA. Reading these two provisions together, it appears that the Legislature's intent is to cover only Maryland-based employers with employees "primarily" working in Maryland. The term "primarily," however, is not defined. Perhaps "primarily" should be interpreted to mean at least fifty-one percent of the employee's work time is carried out in Maryland.

Finally, the bill clarified that the MFLA does not extend, nor does it limit, any leave entitlement an employee may have under the FMLA.[43] If an employer mandates that an employee substitute accrued, paid time off for the unpaid portion of the FMLA leave, the MFLA may apply. For example, if an employee is granted FMLA leave for his or her spouse's serious health condition, and the employer's policy requires the employee to exhaust vacation first, and sick leave next, that policy might violate the MFLA because the employee has the right to designate which leave he or she wants applied to his or her absence for a family member's illness. The Legislature, however, left the term "illness" undefined. The absence of a formal definition suggests that the MFLA is intended to go beyond the FMLA's limited "serious health condition" definition.[44]

II. HOW THE MFLA MODIFIES MARYLAND'S AT-WILL EMPLOYMENT RELATIONSHIP

A Maryland employee not working under a contract that limits the duration of employment or reason for the termination of that employment

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40 *Id.* at § 3-802(a)(5)(iii).
41 MD. CODE ANN., LAB. & EMPL. § 3-802(b)(1) (Supp. 2009).
42 *Id.* at § 3-802(b)(2).
43 *Id.* at § 3-802(g).
44 *See supra* note 30.

is considered employed "at-will."[45] This common law doctrine, recognized in every state, permits an employer or employee to terminate the employment relationship at any time, for any reason, so long as the reason is not unlawful.[46] One off-shoot of the "at-will" doctrine is the generally accepted principle that private employers have discretion to establish the benefits provided for their employees; there is no entitlement to leave or any other non-statutory employer provided benefits.[47]

The United States Congress, the Maryland General Assembly, and the Maryland judiciary have made limited modifications to the at-will doctrine. Judicially recognized exceptions to this doctrine are based in tort, contract, and statutory law.[48] They include the tort of wrongful discharge in violation of a public policy, and federal or state anti-discrimination statutes.[49]

A. The Tort of Wrongful Discharge

Maryland's wrongful discharge theory provides that, where a specific federal or state statutory provision and remedy cover unlawful employer conduct, a common law remedy is not available to an employee.[50] Thus, for example, an employee who believes she was fired for a discriminatory reason cannot bring a wrongful discharge claim against her employer if the employer is subject to Title VII of the Civil Rights Act of 1964 ("Title VII"), Maryland's state anti-discrimination provisions under Title 20 of the State Government Article of the Maryland Code, or local ordinances that provide a judicial remedy for violation of their respective code.[51]

If that same employee works for an employer not subject to one of these statutes (typically because the employer does not employ a sufficient number of employees), the employee can bring a claim under a

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[45] *See* Adler v. Am. Standard Corp., 291 Md. 31, 35, 432 A.2d 464, 467 (1981), *aff'd*, 830 F.2d 1303, 1305-06 (4th Cir. 1987) (seminal case in which the Court of Appeals of Maryland adopted the tort of wrongful discharge, creating an exception to the employment "at-will" doctrine).

[46] *See id.* at 38, 432 A.2d at 468.

[47] *See* Hrehorovich v. Harbor Hosp. Ctr., Inc., 93 Md. App. 772, 794, 614 A.2d 1021, 1032 (1992).

[48] *See* Wholey v. Sears Roebuck, 370 Md. 38, 52-55, 803 A.2d 482, 490-92 (2002).

[49] *See*, *e.g.*, Suburban Hosp., Inc. v. Dwiggins, 324 Md. 294, 309, 596 A.2d 1069, 1077 (1991) (stating that limitations or conditions in "at-will" contracts should be enforced but not expanded by the courts).

[50] *See* Watson v. Peoples Sec. Life Ins. Co., 322 Md. 467, 478, 588 A.2d 760, 765 (1991); Makovi v. Sherwin-Williams Co., 316 Md. 603, 612, 561 A.2d 179, 183 (1989).

[51] *See*, *e.g.*, BALT. CITY, MD., CODE, art. 4 § 3-1 (2009); BALT. CO., MD. CODE §§ 29-2-202 to -203 (2009); FREDERICK CO., MD., CODE § 1-2-93 (2009); HARFORD CO., MD., CODE §§ 95-1, 95-5, 95-7 (2009); MONTGOMERY CO., MD., CODE § 27-19 (2009); SAINT. MARY'S CO., MD., CODE § 162A-1. (2009); CHARLES CO., MD., CODE § 210-16 (2008); HOWARD CO., MD., CODE § 12.208 (2008); PRINCE GEORGE'S CO., MD., CODE § 2-222 (2003).

wrongful discharge theory.[52] But Maryland courts have viewed wrongful discharge as a narrow exception to the employment at-will doctrine, limited to clear violations of public policy.[53] In Maryland, courts have applied the tort of wrongful discharge primarily to an employee's refusal to commit a wrongful act;[54] to an employee's performance of an important public function, or for refusing to violate a professional code of ethics;[55] and to an employee's exercise of statutory rights or privileges.[56]

The MFLA establishes that it is the public policy of the state of Maryland to require that covered employers provide leave in a certain way. Until passage of the MFLA, an employee had no reasonable statutory basis for suing an employer where, for example, the employer's policy limited use of sick leave to the employee's own illness. The MFLA makes possible a wrongful discharge suit against an employer in such a case. Consider, for example, the circumstance where an employee takes leave for a purpose designated as permitted under the MFLA, but is fired. Although the MFLA provides no remedy, the wrongful discharge theory could be applied.

B. Contract Exceptions to "At-Will" Employment

An enforceable contract between an employer and employee may modify the "at-will" relationship.[57] The most common sort is the individual employment contract—typically a written agreement for a high level executive.[58] A contract between a labor union and an employer,

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[52] *See*, *e.g.*, Owen v. Carpenters' Dist. Council, 161 F.3d 767, 774 (4th Cir. 1998); Molesworth v. Brandon, 341 Md. 621, 629, 672 A.2d 608, 612 (1996).

[53] *See*, *e.g.*, Porterfield v. Mascari II, Inc., 374 Md. 402, 410, 414, 823 A.2d 590, 594, 609 (2003) (court held that wrongful discharge exception did not apply because "no sufficiently clear mandate of public policy" was violated, as employee was fired after stating intention to consult with legal counsel before formally responding to an unfavorable work evaluation).

[54] *See*, *e.g.*, Insignia Residential Corp. v. Ashton, 359 Md. 560, 755 A.2d 1080 (2000) (employee terminated for refusing to provide sexual favors in return for her job was tantamount to prostitution and a violation of public policy); Magee v. DanSources Tech. Servs., Inc., 137 Md. App. 527, 769 A.2d 231 (2001) (human resources director terminated for refusal to submit a false health claim was a violation of the public policy health care provisions of sections 24 and 1347 of Title 18 of the United States Code, which make it a crime to knowingly defraud a health benefit program).

[55] *See Wholey*, 370 Md. at 43, 803 A.2d at 484 ("[A] clear public policy mandate exists in the State of Maryland which protects employees from a termination based upon the reporting of suspected criminal activities to the appropriate law enforcement authorities.").

[56] *See*, *e.g.*, *Watson*, 322 Md. 467, 588 A.2d 760 (1991) (employee terminated for filing charge of sexual assault and battery against a co-worker); Ewing v. Koppers Co., 312 Md. 45, 537 A.2d 1173 (1988) (employee terminated solely for filing a workers' compensation claim).

[57] *See* Samuels v. Tschechtelin, 135 Md. App. 483, 525, 763 A.2d 209, 232 (2000) (quoting Univ. of Balt. v. Iz., 123 Md. App. 135, 171, 716 A.2d 1107, 1125 (1998)).

[58] *See*, *e.g.*, County Comm'rs for Saint Mary's County v. Lacer, 393 Md. 415, 903 A.2d 378 (2006) (citing BLACK'S LAW DICTIONARY 257 (7th ed. 1999) (defining a "collective bargaining agreement")).

known as a collective bargaining agreement, likewise modifies the at-will relationship.[59] A contract typically limits the relationship temporally, and contains a termination only for "cause" provision.[60] Unlike at-will employment relationships, employment contracts in Maryland are subject to the covenant of good faith and fair dealing.[61]

Contract-based theories have also led courts to modify the "at-will" doctrine by holding that, in appropriate circumstances, an employer's handbook, policies, or statements may constitute contractual obligations.[62] The Court of Appeals of Maryland first recognized this possibility in *Dahl v. Brunswick.*[63] As a result, employers learned that they were able to eliminate this unintended consequence by setting forth their policies with a well-drafted and well-placed disclaimer in a handbook.[64] Maryland courts have also rejected employees' attempts to insert an implied covenant of good faith and fair dealing when the employment relationship is "at-will."[65]

Thus, when deciding what benefits to provide employees, employers in Maryland have had the discretion to establish policies, including leave provisions, without creating a contractual obligation, or being directed to provide benefits in a particular way or in a particular amount from the Legislature or the courts. The MFLA, while not creating a contractual obligation, statutorily modifies an employer's ability to decide the manner in which leave-taking will be authorized.

C. The Reluctance of the General Assembly to Statutorily Restrict Employer Discretion in Administering Leave

Passage of the MFLA was a departure from the General Assembly's record of permitting businesses the discretion to determine how their leave policies were administered. Recent judicial results that run counter to this practice have not withstood legislative resolve. For example, in an

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[59] *See* Judd Fire Protection, Inc. v. Davidson, 138 Md. App. 654, 661 n.5, 897 A.2d 573, 577 n.5 (2001).

[60] *See* Johns Hopkins Univ. v. Ritter, 114 Md. App. 77, 81, 689 A.2d 91, 93 (1996).

[61] *See Dwiggins*, 324 Md. at 309-10, 596 A.2d at 1076-77.

[62] *See* Staggs v. Blue Cross of Md., Inc., 61 Md**.** App**.** 381, 486 A.2d 798 (1985) (order of summary judgment in favor of employer was vacated as a substantial dispute of fact existed regarding whether provisions pertaining to termination in an employer's policy memorandum constituted a contractual obligation).

[63] 277 Md. 471, 356 A.2d 221 (1976) (an employer's policy directives can become contractual obligations where employees have knowledge of those directives and consider them to be terms of employment, and employees accepted employment or continued working for the employer in reliance on the unwritten policy or practice).

[64] *See* Castiglione v. Johns Hopkins Hosp., 69 Md. App. 325, 341, 517 A.2d 786, 793-94 (1986) (justifiable reliance on an employer's handbook or policy is precluded where contractual intent is expressly disclaimed).

[65] *See generally Dwiggins*, 324 Md. 294, 596 A.2d 1069.

unreported 2007 opinion, *Catapult Technology, Ltd. v. Wolfe*,[66] the Court of Special Appeals of Maryland held that accrued, unused, paid time off constituted "wages" under the Maryland Wage Payment and Collection Law ("MWPCL") and must be paid to employees upon termination.[67] The court's ruling in *Catapult* conflicted with common practice, and the DLLR's position, that an employer could deny payment for accrued leave upon termination if the policy had been communicated to employees.[68] After *Catapult*, however, the DLLR changed its position and conferred upon employees a "right" to payment for accrued, unused leave upon termination, regardless of the employer's policy or handbook language.[69] These changes were nevertheless short-lived, as the General Assembly did not agree with either the court's opinion or the DLLR's revised interpretation of the MWPCL.

In 2008, the General Assembly rejected the holding of *Catapult* by passing legislation that returned Maryland law to the *pre-Catapult* position.[70] Amending the MWPCL, the law, in addition to allowing employers to adopt policies regarding employee leave, restricts the employer's obligation to pay that leave when employees terminate employment.[71] The restriction is qualified by the need for an employer to disclose the written policy to employees at the beginning of employment.[72] Most employers may satisfy this "safe harbor" notice requirement *via* their employee handbook or through other written communication provided to employees upon employment.

III. EXPANSION OF EMPLOYEE LEAVE RIGHTS AT THE FEDERAL AND STATE LEVEL

There is no doubt that advocates of the MFLA drew inspiration from the FMLA. The MFLA specifically provides that it does not "(1) extend

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[66] No. 997, 2007 Md. App. LEXIS 165 (Md. Ct. Spec. App. Aug. 20, 2007).

[67] *Id.* at *15, *21.

[68] *See* DIVISION OF LABOR AND INDUSTRY, MARYLAND GUIDE TO WAGE PAYMENT AND EMPLOYMENT STANDARDS 11 (Sept. 30, 2008), http://www.dllr.state.md.us/labor/wagepay/mdguidewagepay.doc (providing that whether unused accrued time is payable upon termination "depends on the employer's written policy, and whether th[e] policy was communicated to the employee at the time of hiring").

[69] After *Catapult*, the Maryland Guide stated, "[w]hen an employee has earned or accrued his or her leave in exchange for work, an employee has a *right* to be compensated for unused leave upon the termination of his or her employment regardless of the employer's policy or language in the handbook." *See* Richard G. Vernon, A Change in the Game Plan: New Rules for Paying for Accrued Vacation in Maryland, http://lerchearly.com/articles/employ/RGV_vacation_article.doc (last visited Nov. 24, 2009) (emphasis added).

[70] Act of Apr. 24, 2008, ch. 220, 2008 Md. Laws 1445-47 (codified at MD. CODE ANN., LAB. & EMPL. §§ 3-504, 3-505 (2008)).

[71] MD. CODE ANN., LAB. & EMPL. § 3-505(b) (2008).

[72] *Id.* at §§ 3-504(a)(1), 3-505(b).

the maximum period of leave an employee has under the federal Family and Medical Leave Act of 1993; or (2) limit the period of leave to which an employee is entitled under the federal Family and Medical Leave Act of 1993."[73] This section briefly reviews the general requirements of the FMLA, examines some of the proposed federal legislation that would impact the way in which employers provide leave, and, finally, analyzes what other states have done to limit the discretion employers have in deciding how to provide leave.

A. The Family and Medical Leave Act

The FMLA was President Clinton's first major legislative effort.[74] Virtually identical bills were passed by the 101st and 102nd Congresses, but vetoed by President George H. W. Bush.[75] This was the first piece of federal legislation to mandate a leave entitlement for certain employers and employees.[76]

With the FMLA, Congress implemented "a minimum labor standard for leave," based upon the same principles as "child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment."[77] In essence, Congress created a baseline for unpaid leave entitlement that a covered employer must provide to eligible employees. The FMLA was intended to encourage employers to provide more generous leave than the federal minimum. Congress made it clear, however, that states may enact (and many have already enacted) leave laws that are more beneficial than leave available under the FMLA.[78]

The FMLA seeks to balance the demands of family and work. Like most employment laws, the FMLA provides employee rights to which an employer must adhere.[79] The Act protects employees from retaliation by an employer for exercising those rights.[80] Provided the jurisdictional requirements are met,[81] employees who believe that their rights have been violated under the FMLA are entitled to file a civil lawsuit or file a

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[73] *Id.* at § 3-802(g) (Supp. 2009).

[74] Robert B. Moberly, *Labor-Management Relations During the Clinton Administration*, 24 HOFSTRA LAB. & EMP. L.J. 31, 32 (2006) (citing BILL CLINTON, MY LIFE 490 (2004)).

[75] *See* H.R. REP. NO. 103-8, pt. 1, at 25, 26 (1993) (traces history of the legislation).

[76] Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL'Y 65, 71 (2004).

[77] S. REP. NO. 103-3, at 4-5 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3, 6-7.

[78] *See*, *e.g.*, 29 C.F.R. § 825.701(a) (2009) ("Nothing in FMLA supersedes any provision of State or local law that provides greater family or medical leave rights than those provided by FMLA.").

[79] 29 U.S.C. § 2615(a)(1) (2006).

[80] *Id.* at § 2615(a)(2), (b).

[81] *Id.* at § 2617(a)(2). The Act provides jurisdictional requirements that determine the eligibility of both employees and employers. *Id.*

complaint with the Secretary of Labor.[82] Employees who prevail in their claims are entitled to back pay, out-of-pocket expenses, attorneys' fees, and other equitable relief.[83] It is important to note that such claims must be filed within two years, or three years in the case of an alleged willful violation of the Act.[84]

As passed in 1993, an employee who is eligible for FMLA leave may take unpaid leave for a total of twelve workweeks of leave during any twelve-month period.[85] Leave may be taken for one or more of the following reasons: the birth of a daughter or son and to care for this daughter or son; the placement of a daughter or son with the employee for adoption or foster care; to care for the spouse, daughter, son, or parent of the employee, if this spouse, daughter, son, or parent has a serious health condition; for a serious health condition that makes the employee unable to perform the functions of his or her position; or for any other qualifying exigency due to a spouse, daughter, son or parent of the employee on an active duty contingency operation (or notified of an impending one) in the Armed Forces.[86] Leave taken for the birth or placement of a daughter or son expires at the end of the twelve month period, beginning on the date of the birth or placement.[87] In almost every circumstance, an employee who returns from FMLA leave within or at the end of the twelve-week period is entitled to be restored to the position held when leave began, or "an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment."[88]

The FMLA has subsequently been amended by the National Defense Authorization Act for Fiscal Year 2008[89] ("NDAA"), extending FMLA protection to employees who are needed to care for family members in the military with a serious injury or illness incurred in the line of active duty ("Military Caregiver Leave").[90] Similarly, the NDAA amendment allows families of National Guard and Reserve personnel on active duty to take FMLA job-protected leave in order to manage activities associated with their service, known as "qualifying exigencies" ("Qualified Exigency Leave").[91] Employees may take up to twenty-six weeks unpaid leave for Military Caregiver Leave in a calendar year; Qualifying Exigency Leave is limited to a period of twelve weeks during the

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82 *Id.* at § 2617(a)(2), (b)(1).
83 *Id.* at § 2617(a)(1)-(3).
84 *Id.* at § 2617(c).
85 29 U.S.C.A. § 2612(a)(1) (2009).
86 *Id.*
87 29 U.S.C. § 2612(a)(2) (2006).
88 *Id.* at § 2614(a)(1).
89 Pub. L. No. 110-181, 122 Stat. 3 (2008).
90 Pub. L. No. 110-181, § 585, 122 Stat. 3, 129 (codified at 29 U.S.C.A. § 2612(a)(3) (2009)).
91 29 U.S.C.A. § 2612(a)(1)(E) (2009).

employer's designated FMLA year.[92] Under the amendments, an employee may not take more than twenty-six weeks of leave during a calendar year period regardless of the qualifying reason for the leave.[93] The NDAA of 2010 expanded the military caregiver requirements of the FMLA, with regard to the time frame a service member may undergo medical treatment or be treated for pre-existing conditions.[94] This version of the NDAA also extended a "qualifying exigency" to lower members of the regular Armed Forces deployed to foreign countries.[95]

B. Other Recently Proposed Federal Legislation Expanding Employee Leave Rights

1. Proposed Amendments to the FMLA

Most of Congress' attempts to amend the FMLA in the past year related to expanding coverage to employees and certain family members. The Family and Medical Leave Enhancement Act of 2009[96] would increase the number of employees eligible for coverage by reducing the amount of employees required to be employed within a seventy-five-mile radius from fifty to twenty-five.

The Military Family Leave Act of 2009,[97] would allow the spouse, child, or parent of a member of the uniformed services to take up to two weeks of leave each year if the service member is notified of an impending call or order to active duty in support of, or is deployed in connection with, a contingency operation for each military family member called to active duty. The employee could elect—but an employer could not require—the substitution of accrued paid time off for the leave provided for under this legislation.[98]

The Balancing Act of 2009[99] would amend the FMLA to provide for paid time to care for a newborn child or sick family member, provide paid sick leave, provide leave related to domestic violence or sexual assault, and allow employees time away from work to attend their children's school-related activities, attend to needs of elderly family members, and obtain routine medical care. Likewise, the Domestic Violence Leave Act[100] would amend the FMLA by extending its coverage to domestic partners, and allowing employee leave for domestic violence, sexual

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92 *Id.* at § 2612(a)(1), (a)(3).
93 *Id.* at § 2612(a)(4).
94 National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 565.
95 *Id.*
96 H.R. 824, 111th Cong. §§ 1-2 (2009).
97 S. 1441, 111th Cong. §§ 1, 2(a) (2009); H.R. 3257, 111th Cong. §§ 1, 2(a) (2009).
98 S. 1441, § 2(a); H.R. 3257, § 2(a).
99 H.R. 3047, 111th Cong. §§ 1, 153(a), 162(a), 174(a)(1), 193(a) (2009).
100 H.R. 2515, 111th Cong. §§ 1, 2(a), 3(b), 3(d) (2009).

assault, and stalking. The Family and Medical Leave Inclusion Act[101] attempts to expand the FMLA to permit eligible employees to take up to twelve weeks of unpaid leave to care for a same-sex spouse, domestic partner, parent-in-law, adult child, sibling, or grandparent who has a serious health condition.

The Healthy Families Act,[102] which would cover employers with fifteen or more employees, proposes to allow employees to earn one hour of paid sick time for every thirty hours worked up to a maximum of fifty-six hours annually. Employees would be able to use paid leave for their own or a family member's illness, or use the paid time off for preventative care.[103] The bill extends these paid leave provisions for employees who are the victims of domestic violence, stalking, or sexual assault.[104]

Finally, there has been an effort to overturn the FMLA regulations issued by the DOL in November 2008, which became effective January 16, 2009.[105] The Family and Medical Leave Restoration Act[106] would essentially void the 2009 regulations, reinstate the old ones, and require the DOL to promulgate additional regulations.

2. Other Proposed Federal Leave Laws

Reaching far beyond the possibility of paid FMLA leave, or paid sick leave, the Paid Vacation Act of 2009[107] would initially require employers with 100 or more employees to provide one week of paid vacation to employees with one or more years of service. After three years, employers with fifty or more employees would also have to provide one week of paid vacation, and those employers with one hundred or more employees would have to provide two weeks of paid vacation.[108]

C. State Leave Laws

Maryland's first attempt to direct employers how to structure their leave policies *via* the MFLA is, by comparison to other states' provisions, a relatively modest step into the world of regulated employee leave. Maryland followed several states in enacting its own version of the FMLA, including California, Connecticut, Hawaii, Maine, Minnesota,

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101 H.R. 2132, 111th Cong. §§ 1, 2(a)-(b) (2009).

102 S. 1152, 111th Cong. §§ 1, 4, 5(a)(1) (2009); H.R. 2460, 111th Cong. §§ 1, 4, 5(a)(1) (2009).

103 S. 1152, § 5(b)(1)-(3); H.R. 2460, § 5(b)(1)-(3).

104 S. 1152, § 5(b)(4); H.R. 2460, § 5(b)(4).

105 *See* Family and Medical Leave Act of 1993, 73 Fed. Reg. 67934 (Nov. 17, 2008) (to be codified at 29 C.F.R. pt. 825).

106 H.R. 2161, 111th Cong. (2009).

107 H.R. 2564, 111th Cong. § 3 (2009).

108 *Id.*

New Jersey, Oregon, Rhode Island, Vermont, Washington, Wisconsin, and the District of Columbia.[109]

State counterparts of the FMLA typically expand coverage and inflate the allotted time and protected reasons for leave.[110] For example, the District of Columbia Family and Medical Leave Act ("D.C. FMLA") applies to all employers and provides coverage for employees after working 1,000 hours of service during the twelve month period before the leave.[111] The D.C. FMLA allows for sixteen weeks of family leave plus sixteen weeks of medical leave for an employee's own serious health condition during a two year period, and allows for twenty-four hours leave per year to participate in children's educational activities.[112]

The New Jersey Family Leave Act ("NJ FLA") requires covered employers, those with fifty or more employees, to grant eligible employees time off from work in connection with the birth or adoption of a child or the serious illness of a parent, child, or spouse.[113] The NJ FLA's definition of "parent" includes a parent-in-law or a step-parent.[114] The NJ FLA provides for up to twelve weeks of leave in a twenty-four month period, counted from the first day of the employee's leave.[115] New Jersey also provides family leave insurance, which provides for six weeks of pay or one-third of an employee's total yearly wages (whichever is the lesser) for employee absences related to birth or adoption, or to care for a seriously ill child, spouse, parent, or domestic partner.[116]

As a final example of a state FMLA law, the California Family and Medical Leave Act ("CA FMLA") covers employers with fifty or more employees, and provides for twelve weeks of family leave plus four months of maternity disability, which may be combined for a total of twenty-eight weeks per year.[117] The CA FMLA also allows for up to forty hours per year to participate in children's educational activities, [118] and provides for paid leave of fifty-five percent of an employee's wages up to a maximum of $959 (for 2009) for up to six weeks of leave to bond

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[109] *See* U.S. Dep't of Labor, Employment Standards Admin., Federal vs. State Family and Medical Leave Laws, http://www.dol.gov/whd/state/fmla/index.htm (last visited Nov. 24, 2009).

[110] The Federal FMLA does not preempt state laws providing rights greater than or equal to those granted under federal law. 29 U.S.C. § 2651(b) (2006); DOL Family and Medical Leave Act of 1993, 29 C.F.R. § 825.701(a) (2009).

[111] D.C. CODE § 32-501(1)-(2) (2001).

[112] *Id.* at §§ 32-502(a) to -503(a).

[113] N.J. STAT. ANN. §§ 34:11B-2 to -3 (2000).

[114] *Id.* at § 34:11B-3.

[115] *Id.* at § 34:11B-4. *See also* OFFICE OF THE ATT'Y GEN. OF N.J. DEP'T OF LAW AND PUBLIC SAFETY, THE N.J. FAMILY LEAVE ACT FACT SHEET (Jan. 2007), http://www.state.nj.us/lps/dcr/downloads/flafactsheet.pdf.

[116] N.J. STAT. ANN. §§ 43:21-27, -38 (Supp. 2009).

[117] CAL. GOV'T CODE §§ 12945, 12945.2 (2005).

[118] *See* CAL. LAB. CODE § 230.8 (Supp. 2009).

with a newborn, adopted, or foster child (both parents), or to care for a seriously ill parent, child, spouse, or registered domestic partner.[119]

In developing the MFLA's provisions, the Maryland General Assembly considered legislative leave initiatives in other states.[120] In its Fiscal and Policy Note regarding Senate Bill 344 (cross-filed with H. 40), the Legislature noted that "[s]everal other states require employers to provide paid family medical leave."[121] The Legislature considered California's law, which requires an employer who provides sick leave for employees to allow employees to use that sick leave for a child's, parent's, spouse's, or domestic partner's illness.[122]

Additionally, the legislature measured laws in Maine, Minnesota, and Washington.[123] Maine's law requires employers with more than twenty-five employees that provide paid leave to allow the employee to use the leave to care for a child, spouse, or parent who is ill.[124] Minnesota's statute requires employers to allow employees to use sick leave benefits for a child's illness, and in Washington, employers must allow employees to use accrued sick leave to care for a child with a health condition that requires treatment or supervision, and to care for an employee's spouse, parent, parent-in-law, or grandparent who has a serious health condition.[125]

Maryland legislators likely did not consider the D.C. Accrued Sick and Safe Leave Act ("ASSLA"), as it was under construction around the same time as the MFLA.[126] ASSLA requires employers to provide employees with paid sick leave, with the amount of leave dependent on employer size.[127] Employers with one hundred or more employees must provide one hour of paid leave for every thirty-seven hours worked up to seven days per calendar year; employers with between twenty-five and ninety-nine employees must provide one hour of paid leave for every forty-three hours worked, not to exceed five days per year; and employers

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119 CAL. UNEMP. INS. CODE § 3301(a), (c) (Supp. 2009).

120 *See* MD. GEN. ASSEM. DEP'T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, S. 425-344, at 3 (2008); MD. GEN. ASSEM. DEP'T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, H. 425-40, at 3 (2008).

121 MD. GEN. ASSEM. DEP'T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, S. 425-344, at 3 (2008); MD. GEN. ASSEM. DEP'T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, H. 425-40, at 3 (2008).

122 *See* MD. GEN. ASSEM. DEP'T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, S. 425-344, at 3 (2008); MD. GEN. ASSEM. DEP'T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, H. 425-40, at 3 (2008); CAL. LAB. CODE § 233 (2003).

123 *See* MD. GEN. ASSEM. DEP'T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, S. 425-344, at 3 (2008); MD. GEN. ASSEM. DEP'T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, H. 425-40, at 3 (2008).

124 ME. REV. STAT. ANN. tit. 26 § 636 (2007).

125 MINN. STAT. ANN. § 181.9413 (2006); WASH. REV. CODE. ANN. § 49.12.270 (2008).

126 D.C. CODE §§ 32-131.01 to .17 (Supp. 2009).

127 *Id.* at § 32-131.02.

with fewer than twenty-five employees must provide one hour of paid leave for every eighty-seven hours worked, up to three days per year.[128] Leave under ASSLA may be used for an employee's own illness, a family member's illness, or for absences from work related to an employee or family member who is the victim of stalking, domestic violence, or sexual abuse.[129]

Considering other states' leave laws, the MFLA is a relatively moderate approach to expanding employee leave rights. The concern for those who have to look to it, whether employee or employer, is that the General Assembly did not provide sufficient clarity to resolve some of the issues that will no doubt come up with application of the law.

IV. INTERPRETATION OF THE MFLA

The MFLA should not be a difficult law for employers to comply with following passage of the corrective legislation in 2009. As the statute puts it: "The purpose of this section is to allow an employee of an employer to use leave with pay to care for an immediate family member who is ill under the same conditions and policy rules that would apply if the employee took leave for the employee's own illness."[130] Many employers already permit leave in this manner. But is it really that simple? This section addresses some of the areas that might spur litigation and require court interpretation under the MFLA.

A. The MFLA Does Not Authorize the DLLR to Issue Regulations

The DLLR's position has been that it will not promulgate regulations interpreting the MFLA because the statute does not provide the agency with the authority to do so.[131] As such, it appears that any interpretive analysis will be done through litigation. Since Maryland district and circuit court opinions are not reported, it may be years before judicial decisions on the MFLA are available as guidance to employers and employees.

B. The MFLA and Employer Coverage

The statute provides that an employer is a person "engaged in a business . . . in the State," and "includes a person who acts directly or indirectly in the interest of another employer with an employee."[132] The

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[128] *Id.* at § 32-131.02(a)(1)-(3).

[129] *Id.* at § 32-131.02(b)(1)-(4).

[130] MD. CODE ANN., LAB. & EMPL. § 3-802(c) (Supp. 2009).

[131] The Fiscal and Policy Note states that the law does not "provide administrative authority or enforcement responsibility to the Division of Labor and Industry." MD. GEN. ASSEM. DEP'T. OF LEGIS. SERVS., FISCAL AND POLICY NOTE (REVISED): LABOR AND EMPLOYMENT – FLEXIBLE LEAVE ACT, S. 426-562, at 1 (2009).

[132] MD. CODE ANN., LAB. & EMPL. § 3-802(a)(3)(i)-(ii) (Supp. 2009).

Revised Fiscal and Policy Note provides that the Act "does not apply to State agencies," and, therefore, the State of Maryland may claim exemption from the requirements of the law.[133] It is less clear whether counties and municipalities are exempt, although the 2008 Revised Fiscal and Policy Note provides that the law was intended to apply only to private sector employers.[134] To whom does the latter phrase refer? Does this suggest that the statute provides for individual supervisor liability? Does the phrase refer to professional employer organizations that handle human resources functions for small employers, or employment agencies that provide employees to an employer?

The statute only applies to employers that employ "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year."[135] Does this employee complement refer to all employees the employer has nationwide, or just to the number of employees that are working in Maryland? For example, is an employer who has 200 employees nationwide, but only seven employees working in Maryland required to comply with the Act? Although the law seems to make no distinction, there are many practical reasons why an employer with fewer employees than fifteen in Maryland (even though it has more employees elsewhere) would be significantly and adversely impacted by having to comply with the law.

C. The MFLA and "Primary Employment" in Maryland

The Act provides that it applies to "an employee who is primarily employed in the State."[136] It is not clear what this means. Is an employee required to have his or her workstation in the state? What about an employee who works in an office in Pennsylvania, but who travels to Maryland regularly to conduct business? What will constitute "primary" employment? Should over fifty percent of the employee's work be conducted in Maryland? What about the employee who does not actually work in Maryland, but whose primary responsibility is to interact with Maryland residents by telephone or computer?

D. The MFLA and Immediate Family Members

While the definition of immediate family member seems simple enough ("child, spouse, or parent"), and the definition of child is limited

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[133] MD. GEN. ASSEM. DEP'T. OF LEGIS. SERVS., FISCAL AND POLICY NOTE (REVISED): LABOR AND EMPLOYMENT – FLEXIBLE LEAVE ACT, S. 426-562, at 1 (2009).

[134] MD. GEN. ASSEM. DEP'T. OF LEGIS. SERVS., FISCAL AND POLICY NOTE (REVISED): LABOR AND EMPLOYMENT – FLEXIBLE LEAVE ACT, S. 425-40, at 1 (2008).

[135] MD. CODE ANN., LAB. & EMPL. § 3-802(b)(2)(ii) (Supp. 2009).

[136] *Id*. at § 3-802(b)(1).

in the same manner as it is under the FMLA,[137] does the employee need to be the primary care-giver for the immediate family member? Does the child need to live at home?

E. The MFLA and the Potential for Employee Abuse

As with every entitlement statute, the problem does not stem from those employees (and employers) who try to ensure that they follow both the mandate and intent of the law, but those who seek ways to "job" the system. For example, if an employer has a policy that provides an employee may take sick leave for personal illness, and need not provide any doctor's note unless the employee is absent for three days, then the Act requires that the same rule be applied when the employee claims that he or she needs to be absent due to a sick spouse. How can an employer minimize the potential for abuse here, when the real reason the employee took the leave was not because his or her spouse was sick, but rather he or she wanted a long weekend away? Or, what about the employee who is repeatedly absent on Monday or Friday, not for her own illness, but for an unidentified illness of her parent?

F. The MFLA and Employer Over-Reaction

As employers contemplate the hypothetical "parade of horribles" that might arise with employee abuse of the Act, there comes the potential for employer over-reaction. It appears that nothing in the law prohibits an employer from revising its leave policies to make them more restrictive for employees and, by extension, for employees using leave for purposes contemplated under the Act.

G. The MFLA and No-Fault Attendance Policies

Will employers with no-fault attendance policies violate the MFLA if even one of the points accumulated under such a policy is for an MFLA qualifying leave? The Act provides that "[t]he purpose of this section is to allow an employee of an employer to use leave with pay to care for an immediate family member who is ill under the same conditions and policy rules that would apply if the employee took leave for the employee's own illness."[138] At the same time, "[a]n employer may not discharge, demote, suspend, discipline, or otherwise discriminate against an employee" for exercising specific rights under the Act.[139] If the points accumulated under a no-fault policy lead to discipline due to an

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[137] *See id.* at § 3-802(a)(2) (providing that "'[c]hild' means an adopted, biological, or foster child, a stepchild, or a legal ward who is: (i) under the age of 18 years; or (ii) at least 18 years old and incapable of self-care due to a mental or physical disability").

[138] *Id.* at § 3-802(c).

[139] *Id.* at § 3-802(f).

employee's MFLA leave, will it be sufficient for the employer to demonstrate that it is treating the employee in the same manner as if the employee had been absent for her own illness?

H. The MFLA and Collective Bargaining Agreements

The Act also provides that "an employee of an employer who uses leave under [the MFLA] shall comply with the terms of a collective bargaining agreement or employment policy."[140] Additionally, "[i]f the terms of a collective bargaining agreement with an employer or an employment policy of an employer provide a leave with pay benefit that is equal to or greater than the benefit provided under this section, the collective bargaining agreement or employment policy prevails."[141] The law, therefore, requires that employers and unions may no longer rely upon negotiated language in a collective bargaining agreement regarding leave if the provisions of the agreement do not comply with the Act.

I. The MFLA and the FMLA

The Act provides that "[t]his section does not: (1) extend the maximum period of leave an employee has under the federal Family and Medical Leave Act of 1993; or (2) limit the period of leave to which an employee is entitled under the federal Family and Medical Leave Act of 1993."[142] The MFLA, of course, could not limit the period of FMLA leave available: a state law cannot restrict application of Federal law.[143]

J. The MFLA and Wrongful Discharge

Since the MFLA does not provide for a private cause of action, it appears that a claim of wrongful discharge, based upon the public policy articulated in the statute, provides the remedy for a violation of the Act. Therefore, Maryland's three-year general statute of limitations would apply to such a claim.[144]

V. CONCLUSION

As illustrated above, the MFLA will present numerous interpretive difficulties for employers and employees alike. Rather than wait for the judiciary to answer these questions, some of these difficulties could be resolved if the DLLR issued interpretive regulations. As there are no plans for such action, and the DLLR has taken the position that it is without authority to promulgate interpretive guidance, employers will

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140 *Id.* at § 3-802(e)(2).
141 MD. CODE ANN., LAB & EMPL. § 3-802(e)(3) (Supp. 2009).
142 *Id.* at § 3-802(g).
143 U.S. CONST. art. VI, cl. 2.
144 MD. CODE ANN., CTS. & JUD. PROC. § 5-101 (2006).

have to use their best judgment in addressing the Act's gray areas. Whether an employer's best judgment will coincide with that of a court is anyone's guess.

ARTICLE

PROTECTING THE FAMILY PET: THE NEW FACE OF MARYLAND DOMESTIC VIOLENCE PROTECTIVE ORDERS

By: Joshua L. Friedman* and Gary C. Norman**

A wretched soul, bruised with adversity,
We bid be quiet when we hear it cry;
But were we burden'd with like weight of pain,
As much, or more, we should ourselves complain.

- William Shakespeare[1]

I. INTRODUCTION

Domestic violence is on the rise, and pets are increasingly becoming the victims of marital disputes. There is a demonstrated link between acts and offenses of domestic violence and animal abuse. Domestic abusers often do not think twice about beating or otherwise harming pets that have bonded with the other spouse in order to control, coerce, intimidate, or cause emotional harm to that spouse.

There is an emerging awareness that animals are more than just property.[2] Several states have recognized, through the enactment of

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[1] THE COMEDY OF ERRORS act 2, sc. I, lines 34-37 (Paul Negri & Susan L. Rattiner eds., Dover Publications, Inc. 2002).

[2] Am. Society for the Protection of Animals, Position Statement on Property, http://www.aspca.org/about-us/policy-positions/ownership-guardianship.html (last visited

legislation fortifying their family law systems, that animals play an integral role in the lives of their human counterparts. Legislatures throughout the country have granted local courts the power to issue protective orders that account for the unique circumstances that arise when victims of domestic abuse have companion animals.

Despite attempts from the Animal Law Section of the Maryland State Bar Association and its fellow sponsors in the Maryland State Senate and the House of Delegates, similar legislation has yet to take root in Maryland. Two critical components are needed in order to advocate and move this issue forward in Maryland: The realization that animals are a mainstream issue and political will.

This article reviews the literature that demonstrates the linkages between animals and domestic violence. In conducting this review, the authors discuss media reports and published works on the subject. The authors also provide an overview of current legislation enacted in other jurisdictions across the United States. Additionally, a review of bills recently introduced in the Maryland General Assembly from 2007 to 2009 is provided. Finally, the authors put forth arguments in support of the enactment of legislation authorizing the inclusion of pets and service animals in Maryland protective orders.

II. OVERVIEW OF DOMESTIC VIOLENCE

Domestic violence can be defined as "a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner."[3] Domestic violence is a complex and consequential public health issue, which should be of concern to civic society. Physical, sexual, emotional, economic, or psychological actions, or the threat thereof, are all forms of domestic violence when the intended purpose of each of these enumerated actions or threats is manipulation, terror, intimidation, isolation, injury, humiliation, fear, or coercion.[4]

Domestic violence can happen to people of all ages, races, ethnicities, religions, socioeconomic classes, and professions.[5] The statistics, which reflect how disproportionately domestic violence affects women, are overwhelming. "One in every four women will experience domestic

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Nov. 24, 2009) ("By viewing animals as more than mere property, the focus shifts from the ownership interest in the animal to what is in the best interest of [the] animal.").

[3] U.S. Dept. of Justice, Office on Violence Against Women, About Domestic Violence, http://www.ovw.usdoj.gov/domviolence.htm (last visited Nov. 24, 2009).

[4] *Id.*

[5] WomensLaw.org, Domestic Violence (Sept. 2, 2009), http://womenslaw.org/simple.php?sitemap_id=39.

violence in her lifetime."[6] "Eighty-five percent of domestic violence victims are women."[7] "Over fifty percent of all women will experience physical violence in an intimate relationship,"[8] and twenty-four to thirty percent of those women will experience regular and on-going domestic violence.[9] The majority of domestic violence cases, unfortunately, are also never reported to law enforcement.[10] Additionally, the cost of domestic violence exceeds $5.8 billion each year.[11] To rectify this issue, "all fifty states now have a version of the civil protection order, which mandates both court and law enforcement participation in instances where persons eligible for relief are in fear of harm."[12] Aside from the use of private methods to prevent abuse, filing for a civil protection order ranked among the top ten in both the most commonly used and most helpful strategies for battered women.[13]

Although there are a number of societal, psychological, and other explanations for the causes of domestic violence,[14] the desire for control over the victim is the primary motive for most abusers:

> Batterers utilize a wide array of coercive tactics to cement their control of their partners, such as isolating them from sources of help, humiliating them privately and in public, controlling their access to money, food, community and transportation, and microregulating their personal lives . . . . Physical violence only punctuates . . . coercive tactics.[15]

Furthermore, one study demonstrated that "the 'control motive' plays a greater role as an impetus for domestic violence than for other categories of violence."[16] This study found that threats and coercive tactics were

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[6] National Coalition Against Domestic Violence, Domestic Violence Fact Sheet, http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf (last visited Nov. 24, 2009).

[7] *Id.*

[8] *See* WomensLaw.org, *supra* note 5.

[9] *Id.*

[10] *See* National Coalition Against Domestic Violence, *supra* note 6.

[11] *Id.*

[12] Richard A. DuBose, III, Comment, Katsenelenbogen v. Katsenelenbogen*: Through the Eyes of the Victim – Maryland's Civil Protection Order and the Role of the Court*, 32 U. BALT. L. REV. 237, 241 (2003).

[13] Jane C. Murphy, *Engaging With the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 506-08 (2002).

[14] Sally F. Goldfarb, *Reconceiving Civil Protective Orders for Domestic Violence: Can Law End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1493 (2008).

[15] Judith A. Wolfer, *The Changing American Family and the Law: Top 10 Myths About Domestic Violence*, 42 MD. B. J. 38, 38-39 (May/June 2009).

[16] Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 867 (2009) (citing a study conducted by Richard B.

more likely to be used before acts of physical violence in domestic violence cases than in other categories of violence.[17] The fact that domestic violence involves nonphysical acts, and is only "punctuated" by the physical violence, demonstrates that the "control motive" is indeed a prevalent cause. One can logically infer that an abuser will target his or her victim's helpless pet or service animal as a means to effectuate this control.

III. THE IMPACT ON ANIMALS CAUSED BY DOMESTIC VIOLENCE

To millions of Americans, animals are not merely property—they are much more. The closeness of the relationship between humans and their furry companions is "[b]eyond dispute . . . [as] human[s] . . . have long enjoyed an abiding and cherished association with their household animals."[18] Animals have a salubrious and psychological effect on their human counterparts. The presence of animals may lead to the improvement of vital signs, decreased medication usage and doctor visits, as well as the amelioration of loneliness, fear, and abandonment among older adults.[19] Not to mention, children, through their companionship with animals, learn positive traits, including empathy, responsibility, and respect for life.[20]

Animals are also known to have a special effect on victims of domestic violence. Pets or service animals reportedly furnish solace, emotional support, and assistance to victims of domestic violence; enabling these victims, after an incident of abuse, to return to their past activities of daily living with less significant difficulty. Animal

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Felson & Steven F. Messner, *The Control Motive in Intimate Partner Violence* 63 SOC. PSYCHOL. Q. 86, 91 (2000)).

[17] *Id.* at 867-68 (citing Felson & Messner, *supra* note 16, at 91).

[18] Sonia S. Waisman & Barbara R. Newell, *Recovery of "Non-Economic Damages" for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, 7 ANIMAL L. 45, 53 (2001) (citing Nahrstedt v. Lakeside Vill. Condo. Ass'n., 878 P.2d 1275, 1292 (Cal. 1994)).

[19] *See*, *e.g.*, Jennifer Robbins, Note, *Recognizing the Relationship Between Domestic Violence and Animal Abuse: Recommendations for Change to the Texas Legislature*, 16 TEX. J. WOMEN & L. 129, 132 (2006); Rachel Hirschfeld, *Ensure Your Pet's Future: Estate Planning for Owners and Their Animal Companions*, 9 MARQ. ELDER'S ADVISOR 155, 156 (2007), *available at* http://www.animallaw.info/articles/art_pdf/arus9marqeldersadvisor155.pdf (citing Anita Gates, *Pitter Patter of Paws Time-Tested Remedy*, N.Y. TIMES, Jul. 24, 2001, at F6); Kelly Henderson, *No Dogs Allowed?: Federal Policies on Access for Service Animals*, 7 ANIMAL WELFARE INFO. CENTER. NEWSL. 2 (Summer 1996), *available at* http://www.nal.usda.gov/awic/newsletters/v7n2/7n2hende.htm.

[20] Susan L. Pollet, *The Link Between Animal Abuse and Family Violence*, N.Y. L.J., Jan. 28, 2008, at 4.

companions also allow for personal exercise and opportunities to search for escape routes.[21]

The link between domestic violence and violence against pets or service animals has more than just a notable effect on the bond between humans and animals; it can be a potent mechanism of power and control for the abuser.[22] Violence against pets or service animals is a tangible, consequential way of controlling and terrorizing the human victim. Moreover, men and women are not the only victims to experience the sounds and sensations—as well as the physical and emotional torment, scars, and aftermath—of domestic violence.[23] Specifically, "animals may be hostages, tools of humiliation, or threatening examples of potential human pain and suffering that could be inflicted."[24] Animal abuse may consist of repugnant actions, including "choking, drowning, shooting, stabbing, and throwing the animal against a wall or down the stairs."[25]

Animals serve as instrumentalities in domestic violence in other ways, such as the horrific subjection of women or children to acts of bestiality at the hands of their abusers.[26] Escalating cycles of violence toward a pet or service animal concomitantly occurs with worsening domestic violence within the dwelling.[27] Moreover, when animal abuse is present, the chance of domestic violence lethality generally increases.[28]

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[21] Maryland's Peoples Law Library, Domestic Violence/Companion Animals (June 7, 2009), http://www.peoples-law.org/domviol/pets/protect_pet.html; Robbins, *supra* note 19, at 132.

[22] Allie Phillips, *The Few and The Proud: Prosecutors Who Vigorously Pursue Animal Cruelty Cases*, 42 PROSECUTOR 20, 21 (Jul.-Sept. 2008) ("The actual killing, torturing and beating of pets—or the threat of such actions—is used by abusers as a weapon to ensure submission and silence by women and children."); Dianna J. Gentry, *Including Companion Animals in Protective Orders: Curtailing the Reach of Domestic Violence*, 13 YALE J.L. & FEMINISM 97, 101-02 (2001) ("It is because of this relationship with animals that abusers readily have the ability to exercise control over domestic violence victims through their pets.").

[23] No matter against whom (or what) domestic violence is perpetrated, such violence should be condemned and prosecuted to the fullest extent possible.

[24] Carol D. Raupp, *Treasuring, Trashing, or Terrorizing: Adult Outcomes of Childhood Socialization about Companion Animals*, 7 SOC'Y & ANIMALS 141, 143 (1999).

[25] Phil Arkow & Tracy Coppola, *Expanding Protective Orders to Include Companion Animals* 3 (2009), http://www.americanhumane.org/assets/docs/advocacy/ADV-ppo-report-09.pdf.

[26] Gentry, *supra* note 22, at 101 (citing Frank R. Ascione, *Battered Women's Reports of Their Partners' and Their Children's Cruelty to Animals*, *in* CRUELTY TO ANIMALS AND INTERPERSONAL VIOLENCE 290, 292-93 (Randall Lockwood & Frank R. Ascione eds., Purdue Univ. Press 1998)).

[27] *See* Joan E. Schaffner, *Linking Domestic Violence, Child Abuse and Animal Cruelty*, ABA-TIPS ANIMAL L. COMM. NEWSL. (George Washington University Law School, Washington, D.C.), Fall 2006, at 4, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1001255.

[28] Phillips, *The Few and The Proud*, *supra* note 22, at 21.

In many cases, abusers realize their intended goal by viciously dominating the life of their victim through the threat of harm to a beloved pet or service animal. This course of action instills insecurity and terror in the victims.[29] The same motivations exist for battering pets and for battering women: "discipline, retaliation, demonstration of power or omnipotence, and instillation of fear and the habit of compliance."[30] Thus, whether physically harming an animal or merely threatening to harm an animal, abusers realize their goal of gaining control over their victims.

Domestic violence can acquire an especially disturbing character when targeted at pets or service animals, because children are often present. A nationwide survey of fifty of the largest domestic violence shelters dating back to 1997 reported that eighty-five percent of women and sixty-three percent of children reported domestic incidents of animal abuse.[31] As a result of witnessing domestic violence, children may become desensitized to the value of life and personal property.[32] Consequently, the connection between committing acts of violence to animals and eventual violence to human counterparts is disturbing. For example, "Columbine High School killers, Eric Harris and Dylan Klebold, shot woodpeckers, Milwaukee serial killer and cannibal, Jeffrey Dahmer, staked severed dog heads on fence posts, and 'Son of Sam' serial killer, David Berkowitz, poured ammonia into his mother's fish tank."[33] The common thread is that all of these individuals committed acts of abuse against animals before turning to human targets.[34]

The long-term impact of domestic violence on children is also significant. A child's exposure to domestic violence may lead to, among other things, stuttering, headaches, bed-wetting, anxiety, depression, suicidal behavior, clinging, or aggressive behavior.[35] Even where children do not necessarily morph into killers, as depicted above, they are

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[29] *See* Bonfante, *infra* note 132.

[30] Robbins, *supra* note 19, at 133.

[31] Press Release, The Humane Society, Vermont Becomes Second State to Include Animals in Domestic Violence Protective Orders (May 26, 2006), http://www.hsus.org/press_and_publications/press_releases/vermont_second_state_pets_protection_orders.html.

[32] James Blewett, Research Connects Abuse in Childhood with Cruelty to Animals (Oct. 30, 2008), http://www.communitycare.co.uk/Articles/2008/10/30/109812/the-link-between-animal-cruelty-and-child-protection.html.

[33] Julie Bykowicz, *Link Between Cruelty to Pets, Humans Explored: Conference Notes Links to Spouse, Child Abuse*, BALT. SUN, Apr. 22, 2002, at 8B.

[34] *Id.* ("Criminal justice researchers have known it for years: Children who hurt and torment animals often grow into adults who assault other people. Many communities, including Howard County, are beginning to acknowledge that link. Some people have taken steps toward dealing with the dangers it presents.").

[35] Robbins, *supra* note 19, at 135 (citing Elaine Hilberman & Kit Munson, *Sixty Battered Women*, 2 VICTIMOLOGY 460, 463 (1978)).

three times more likely to commit violence against animals if they have personally encountered domestic violence.[36] Therefore, when an act of domestic violence occurs in the presence of children, there is an obvious detrimental impact on these reluctant observers, dramatically increasing the need to alleviate the situation.

The bond of a victim with his or her pet or service animal may hinder that victim's ability to seek and acquire help. Victims are unlikely to flee domestic violence for safe harbor, such as a women's shelter, if they must leave pets or service animals in their wake.[37] Multiple studies show that "18-48 percent of battered women have delayed leaving an abusive home, or have returned to their batterer, out of fear for the welfare of their pets or livestock."[38] Additionally, women in rural locales and women with disabilities may encounter special issues regarding domestic violence, such as the welfare of their farm animals or service animals in deciding whether to flee domestic violence.[39]

Unfortunately, many women's shelters do not investigate whether the violence included pet or service animal abuse. Given that the welfare of pets or service animals has a substantial influence on whether victims choose to flee homes where domestic violence is prevalent, it is critical that service providers capture data and provide refuge to the pets or service animals of victims. Professor Joan Schaffner, a Fellow at the Oxford Center for Animal Ethics,[40] argues that it is imperative for shelters to take the needs of a victim's pet into account and have procedures in place to provide shelter for these animals until reunited with their victim owners.[41]

To address this influential factor on the rehabilitation and safety of victims, many Maryland service providers have established—or plan to establish—"safe haven programs," where pets or service animals can also receive shelter.[42] The American Humane Society, in a manual created for

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[36] *See*, *e.g.*, Cheryl L. Currie, *Animal Cruelty by Children Exposed to Domestic Violence*, 30 CHILD ABUSE & NEGLECT: THE INT'L J. 425, 429 (2006).

[37] Phillips, *The Few and The Proud*, *supra* note 22, at 21.

[38] *Id.*

[39] *See* Rural Womyn Zone, Violence Against Rural Women, http://www.ruralwomyn.net/rural_violence_difference.html (last visited Nov. 24, 2009) ("Rural environments are distinct from urban environments in ways that affect the ability of the criminal justice system to investigate and prosecute domestic violence and child victimization cases. Furthermore, rural environments present barriers that create difficulties for service providers in treating and counseling victims.").

[40] Oxford Centre for Animal Ethics, Fellows, http://www.oxfordanimalethics.com/index.php?p=fellows (last visited Nov. 24, 2009).

[41] Schaffner, *supra* note 27, at 1.

[42] Bykowicz, *supra* note 33, at 8B; Allie Phillips, *American Humane Launches Pets and Women's Shelter (PAWS) Program*, 42 PROSECUTOR 16, 16 (Apr.-June 2008).

its Pets and Women's Shelters Program, also furnishes guidance to service providers on the issue of allowing pets to stay in shelters with their owners.[43]

In sum, there is a proven link between intimate partner domestic violence and animal abuse. Consequently, the judiciary and legislature are beginning to recognize the need to extend legal protection to animals suffering from domestic violence.[44] The American Humane Society contends, "[t]he inclusion of companion animals in domestic violence protective orders is the next logical step . . . ."[45] In response to widespread public support, many state legislatures are considering the addition of protective orders for pets and service animals.[46] In Maryland, "[t]he framework for such legislation is already in place and merely requires amending . . . existing laws."[47]

IV. THE EVOLUTION OF DOMESTIC VIOLENCE PROTECTION IN MARYLAND

A. Legislative History of Domestic Violence Protection in Maryland

As discussed above, the established link between domestic violence and animal abuse should prompt broader remedies and relief to protect household pets and service animals. In Maryland, attempts have been made, with varying successes, to advance this innovative, yet necessary, legal concept. To properly analyze these developments and the need for future reform, a discussion of the history of domestic violence law in Maryland is imperative.

In accord with the recognition that domestic violence constitutes a pervasive issue, the Maryland General Assembly enacted the Domestic Violence Act in 1980.[48] Subsequently, the Court of Appeals of

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> Providing a method for family pets to be safely housed with other family members works toward keeping families and communities safe. In February 2008, American Humane launched the Pets and Women's Shelter (PAWS) Program. The PAWS Program was created specifically to maintain the human-animal bond between women, children and family pets that are faced with the disaster of losing their home and needing each other for comfort . . . . The program provides domestic violence shelters a helpful start-up manual that covers all aspects of on-site housing for pets. In a straightforward effort to make this as stress-free as possible for the shelter, the PAWS Program asks that the family members—not the shelter staff—care for their pets during their residency at the shelter.

Id.

[43] Phillips, *American Humane Launches Pets and Women's Shelter (PAWS) Program*, *supra* note 42.

[44] Arkow & Coppola, *supra* note 25, at 1.

[45] *Id*.

[46] *Id*. at 1-2.

[47] *Id*. at 2.

[48] Act of May 27, 1980, ch. 887, 1980 Md. Laws 3273-81 (codified at MD. CODE ANN., CTS. & JUD. PROC. §§ 4-501 to -506 (1980).

Maryland, in *Coburn v. Coburn*,[49] described the purpose of the Act: "[T]o protect and 'aid victims of domestic abuse by providing an immediate and effective' remedy. The statute provides a wide variety and scope of available remedies designed to separate the parties and avoid future abuse."[50] The court further reasoned that the primary goals of the statute were "preventive, protective and remedial, not punitive."[51]

Unfortunately, the Act was unduly restrictive. For example, to qualify for protection under the Act, one had to be a "spouse, blood relative or step relation" to the abuser, and the victim and abuser were required to have "resided together when the abuse occurred."[52] Therefore, unmarried couples were unable to obtain protection under the 1980 Act.[53] Additionally, the Act allowed for a temporary *ex parte* order to last for only five days and a subsequent protective order to last for fifteen days, which included the time the temporary order was in effect. In 1992, the Maryland Legislature addressed these inefficiencies by completely overhauling the Domestic Violence Act.[54]

The 1992 amendments to the Act by the Maryland General Assembly were comprehensive.[55] The amendments allowed for the judicial modification of a protective order, provided penalties for the violation of such orders,[56] and expanded the definition of abuse in Maryland to include "battery or assault and battery; rape or sexual offense . . . or attempted rape or sexual offense; [and] false imprisonment."[57] Today, many states, including Maryland, incorporate "assault and acts resulting in bodily harm" as well as "threats of bodily harm" in the definition of "abuse."[58] In sum, the 1992 amendments expanded the definition of what constitutes abuse,[59] expanded the group of persons eligible for relief

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[49] 342 Md. 244, 674 A.2d 951 (1996).

[50] *Id.* at 252, 674 A.2d at 955 (internal citations omitted).

[51] *Id*. at 253, 674 A.2d at 955 (internal citations omitted).

[52] Susan Carol Elgin, *Domestic Violence: Is Maryland Responding?*, 28 MD. B. J. 43, 44 (Mar./Apr. 1995).

[53] MD. CODE ANN., CTS. & JUD. PROC. § 4-503(b)(2) (Supp. 1981).

[54] *See* Act of May 5, 1992, ch. 65, 1992 Md. Laws 1447-63 (codified as amended at MD. CODE. ANN., FAM. LAW §§ 4-507 to -510, 7-103.1 (Supp. 1992)).

[55] Elgin, *supra* note 52, at 44.

[56] *See* Triggs v. State, 382 Md. 27, 49, 852 A.2d 114, 128 (2004) (holding that separate harassing telephone calls comprised individual acts for purposes of violating a protective order, which was in effect).

[57] *Compare* MD. CODE ANN., FAM. LAW § 4-501(b)(1) (Supp. 1992), *with* MD. CODE ANN., FAM. LAW § 4-501(b)(1) (Supp. 1991).

[58] Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1138 (2009).

[59] The expanded definition reads: battery or assault and battery, serious bodily injury or threat of such an injury; rape or sexual assault offense; or attempted rape or sexual offense; false imprisonment and abuse of a child or vulnerable adult. MD. CODE ANN., FAM. LAW § 4-501(b) (Supp. 1992).

under the Act,[60] and increased the time for protection under a protective order from only 30 to 200 days.[61]

Since 1992, the Maryland General Assembly has frequently amended the Act, and other Articles of the Maryland Code,[62] to reflect the ever-shifting nature of domestic violence protection law. The General Assembly should continue to expand the law's coverage to address pervasive issues, such as animal abuse.

B. Legislative Relief Currently Available for Victims of Domestic Violence[63]

An extensive array of statutory provisions enable Maryland citizens to seek protection from abusive relationships.[64] Where an abusive relationship is with a neighbor, co-worker, or acquaintance, a victim may petition for interim, temporary, *ex parte*, or final peace orders, which may be issued by a commissioner or judge of a district court.[65] Where a current or former spouse is involved, however, in addition to an interim, temporary or *ex parte* protective order, an individual may also petition for a final protective order.[66] Other individuals may qualify for such an order if an intimate relationship has existed for longer than ninety days or if the relationship is based on marriage, consanguinity, or adoption.[67] Additionally, when a child or "vulnerable adult" is a victim, the State's Attorney's Office, the Department of Social Services, an adult residing in the home, or an adult who is related by consanguinity or adoption may petition for a protective order, which may be issued on behalf of that child or vulnerable adult.[68]

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[60] The new definition included, among other things, former spouses, current spouses who were not household members, cohabitants and vulnerable adults. *Id.* at 4-501(h).

[61] *Id.* at § 4-506(g).

[62] For instance, in 1999, amendments to the Courts and Judicial Proceedings Article augmented protections in the state by creating a protective order applicable to non-spouses, styled the "peace order." Act of May 13, 1999, ch. 404, 1999 Md. Laws 2677-88 (codified as amended at MD. CODE ANN., CTS. & JUD. PROC. §§ 3-1501 to -1509 (2006)); Anna R. Benshoof, *House Bill 233: Courts and Judicial Proceedings – Peace Orders*, 29.2 U. BALT. L.F. 82 (1999).

[63] Please note that this section reflects the current status of Maryland's domestic violence statutes as of the publication of this article. In 2009, the Maryland General Assembly enacted an amendment concerning each statute's respective notification requirement. Acts of May 19, 2009, ch. 711 (Md. 2009) (to be codified at MD. CODE ANN., FAM. LAW §§ 4-504(d), 4-504.1(f)(3), 4-505(b)(1)). The changes shall take effect on January 1, 2010, and "shall remain effective for a period of 2 years and, at the end of December 31, 2011, with no further action required by the General Assembly, [the changes] shall be abrogated and of no further force and effect." *Id.* The Act will then revert back to its current status. *Id.*

[64] *See* MD. CODE ANN., FAM. LAW, §§ 4-504 to -511 (2006 & Supp. 2009).

[65] MD. CODE ANN., CTS. & JUD. PROC., §§ 3-1501 to -1509 (2006).

[66] MD. CODE ANN., FAM. LAW §§ 4-504.1 to -506 (Supp. 2009).

[67] MD. CODE ANN., FAM. LAW § 4-501(d), 4-501(l)(2) to (3) (2006).

[68] *Id*. at § 4-501(m)(2)(ii)(1)-(4).

Maryland has endeavored to ensure that the application process for protective orders is easy and accessible. Victims who petition for the issuance or service of an interim, temporary, or final protective order, or a witness subpoena, are exempt from paying filing fees or costs.[69] Additionally, pre-printed forms are available to aid *pro se* petitioners.[70] This form allows the petitioner to request remedies,[71] such as emergency family maintenance or sole use and possession of the family vehicle.[72] After filing the form, the petitioner appears before a judge for a hearing.[73] The court is allocated wide discretion in granting protective orders and other requested relief based upon the evidence presented.[74]

When a petition for such an order is filed, the court must first determine whether statutorily defined abuse has occurred.[75] Upon a finding of abuse, the court, in an *ex parte* proceeding, may order the alleged abuser to, among other things, refrain from further abuse.[76] After service of the order, it shall remain in effect for no more than seven days.[77] If, however, the court is unable to effectuate service—or for other good cause—the court may continue the temporary order for no more than six months.[78] This temporary *ex parte* order will state the date and time of the final protective order hearing.[79]

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[69] MD. CODE ANN., FAM. LAW § 4-504(c) (Supp. 2009).

[70] *See* Coburn, 342 Md. at 254 & n.9, 674 A.2d at 956 & n.9 (1996) (citing Martha F. Rasin, *The New Domestic Violence Law's Surprising Track Record*, 26 MD. B.J. 30, 32 (Nov./Dec. 1993)).

[71] *Id.* at 254, 674 A.2d at 956.

[72] MD. CODE ANN., FAM. LAW § 4-506(d)(9)-(10) (Supp. 2009).

[73] *Id.* at § 4-505(a)(1).

[74] *Coburn*, 342 Md. at 254, 674 A.2d at 956.

[75] *Id.* at 254-55, 674 A.2d at 956.

[76] *See* MD. CODE ANN., FAM. LAW § 4-505(a)(2) (Supp. 2009). The court may further: (a) order the abuser to refrain from any contact or attempt at contact with the victim, (b) order the abuser to refrain from entering the victim's residence, (c) in the event that the abuser and the victim reside together at the time of the abuse, order the abuser to vacate the home and award temporary possession and use of the home to the victim (provided that if the victim is a nonspouse, either (i) the name of that nonspouse must appear on the lease or deed to the property, or (ii) the nonspouse must have resided in the home with the abuser for a period of no fewer than 90 days within one year before the petition was filed) (or in the event the victim is a minor child, award temporary use and possession of the home to an adult living in the home), (d) order the abuser to remain away from the victim's place of employment, school, temporary residence, the residence of victim's family members, or the victim's child care provider while the victim's child is in the care of that provider, (e) award temporary custody of the victim and abuser's minor child, and (f) in the event the abuse consisted of (i) the use or threat of a firearm, or (ii) serious bodily harm or threat of serious bodily harm, order the abuser to surrender any firearms in the abuser's possession to law enforcement and refrain from purchasing or possessing any firearms for the duration of the order. *Id.* at § 4-505(a)(2)(ii) to (viii).

[77] *Id.* at § 4-505(c)(1).

[78] *Id.* at § 4-505(c)(2).

[79] *Id.* at § 4-506(b)(1)(i).

At the final protective order hearing, the court may order the abuser to refrain from further abuse for a period of one year.[80] Additionally, the order may extend an adult family member's temporary possession of the family home for, again, no more than one year.[81] The order may also include other appropriate relief.[82]

In the event that the court is closed for business, Maryland's Family Law Article also provides that a District Court Commissioner may issue an interim protective order to protect an individual.[83] This order provides all pertinent information for the temporary and final protective order hearing.[84] Under an interim protective order, the person may be eligible for the same relief that is available under a temporary protective order, with a few exceptions.[85] The duration of an interim protective order shall last until the occurrence of either (1) the holding of a temporary protective order hearing, or (2) the end of the second business day that the office of the Clerk of the District Court is open for business following the issuance of the interim order.[86]

As noted above, persons not eligible for relief under the domestic violence statute may obtain protection through a peace order. By their nature, peace orders are less comprehensive.[87] Similar to protective orders, courts possess discretion to modify or rescind a peace order upon serving the victim and respondent with notice and holding a hearing.[88]

Protective orders, on the other hand, provide critical restrictions on interaction with, and conduct toward, victims. The violation of a protective order can result in a fine, imprisonment, or finding of contempt.[89] For an individual's first violation, sanctions include "a fine

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[80] *Id.* at § 4-506(d)(1), (i)(1). Recent amendments to the statute make it mandatory for a final protective order to order an abuser to surrender any firearms in the abuser's possession and to refrain from possession. MD. CODE ANN., FAM. LAW § 4-506(e) (Supp. 2009). Additionally, the court may now issue a final protective order effective for two years if the abuser committed an act of abuse against the petitioner within one year of a previous final protective order's expiration. *Id.* at § 4-506(i)(2). Under previous versions of the statute, protective orders could not exceed one year in duration. *See* MD. CODE ANN., FAM. LAW § 4-506(g)(1) (2006).

[81] MD. CODE ANN., FAM. LAW § 4-506(d)(4), (i)(1) (Supp. 2009).

[82] *Id.* at § 4-506(e).

[83] *Id.* at § 4-504.1(a)-(b).

[84] *Id.* at § 4-504.1(e)(1)(i). Particularly, "[a] temporary protective order hearing shall be held on the first or second day on which a District Court judge is sitting after issuance of the interim protective order, unless the judge continues the hearing for good cause." *Id.* at § 4-504.1(e)(1)(ii).

[85] *Compare* MD. CODE ANN., FAM. LAW § 4-504.1(c) (Supp. 2009), *with* § 4-505(a)(2) (Supp. 2009).

[86] *See* MD. CODE ANN., FAM. LAW § 4-504.1(h) (Supp. 2009).

[87] MD. CODE ANN., CTS. & JUD. PROC. § 3-1504(a)(3) (2006) (granting authority to issue a peace order with "only the relief . . . minimally necessary to protect the victim").

[88] *Id*. at § 3-8A-19.4.

[89] MD. CODE ANN., FAM. LAW § 4-508(a)-(b) (2006).

not exceeding $1,000 or imprisonment not exceeding ninety days, or both . . . ."[90] These penalties increase for one's second offense, involving "a fine not exceeding $2,500 or imprisonment not exceeding one year, or both."[91]

At one time, domestic violence laws in Maryland were considered "among the worst in the nation for providing protection to victims."[92] With recent amendments to the domestic violence statute, however, the Maryland Legislature has made great strides towards bolstering the statute's original purpose.[93] Notwithstanding these improvements, peace and protective orders in Maryland are still lacking, as they do not currently include pets and service animals within their gamut. As such, Maryland peace and protective orders presently lack consequence to deter abusers from inflicting harm upon their victims' animals.[94]

V. DOMESTIC VIOLENCE PROTECTION FOR ANIMALS AT THE STATE AND FEDERAL LEVEL

Maryland, along with forty-five other states, the District of Columbia, Puerto Rico, and the Virgin Islands, have laws classifying certain types of animal cruelty as a felony offense.[95] To date, however, only several key states have recognized the necessity of incorporating inclusive language in protective or peace orders that provide for the protection of family pets.

A. State Statutory Provisions

Utilizing the separation of powers doctrine, many legislatures throughout the country are currently prioritizing and focusing on this important issue. By addressing animal cruelty in domestic violence statutes, legislatures are acknowledging the obvious correlation between animal abuse and family violence.[96] For example, believed to be the first

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[90] MD. CODE ANN., FAM. LAW § 4-509(a)(1) (Supp. 2009).

[91] *Id*. at § 4-509(a)(2).

[92] Elgin, *supra* note 52, at 44.

[93] For an overview of the most recent amendments to the domestic violence statute, see Maryland Network Against Domestic Violence, 2009 Domestic Violence Legislative Agenda – Final Report, http://www.mnadv.org/2009%20Legis%20Agenda.pdf (last visited Nov. 24, 2009).

[94] Laura Smitherman, *Gansler Urges Expansion of Animal Cruelty Laws*, BALT. SUN, Jul. 11, 2009, at 4A.

[95] The Humane Society of the U.S., Fact Sheet: State Animal Cruelty Provisions (Aug. 2009), http://www.hsus.org/web-files/PDF/state_cruelty_chart.pdf.

[96] *See*, *e.g.*, S. 353, 205th Leg., Reg. Sess. (Cal. 2007). During that session, the California Legislature found that:

> (a) There is a correlation between animal abuse, family violence, and other forms of community violence. (b) According to the California Department of Justice, California law enforcement received 181,362 domestic violence calls in 2005. (c)

state in the nation to do so, Maine amended its domestic violence statute in 2006 to afford protection of animals in domestic violence situations and to award custody of animals to victims of abuse.[97] Several states have followed suit, including Hawaii, which, as of the writing of this article, is the most recent state to enact domestic violence laws protecting animals.[98]

General characteristics of these legislative initiatives[99] include enjoining the abuser from injuring, threatening, or harming the animal in

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> Perpetrators often abuse animals in order to intimidate, harass, or silence their human victims. (d) A survey of pet-owning families with substantiated child abuse and neglect found that animals were abused in 88 percent of homes where child physical abuse was present. (e) A 1997 survey of 50 of the largest shelters for battered women in the United States found that 85 percent of women and 63 percent of children entering shelters discussed incidents of pet abuse in the family. (f) A study of women seeking shelter at a safe house showed that 71 percent of those having pets affirmed that their partner had threatened, hurt, or killed their companion animals. (g) Another study showed that violent offenders incarcerated in a maximum security prison were significantly more likely than nonviolent offenders to have committed childhood acts of cruelty toward pets.

Id. at § 1.

[97] ME. REV. STAT. ANN. tit. 19-A, § 4007(1)(N) (Supp. 2008); Pam Belluck, *New Maine Law Shields Animals in Domestic Violence Cases*, N.Y. TIMES, Apr. 1, 2006, *available at* http://www.nytimes.com/2006/04/01/us/01pets.html.

[98] HAW. REV. STAT. ANN. § 586-4(a) (West, Westlaw through 2009 Act 34) (effective Jan. 1, 2010).

[99] As of the writing of this article, fourteen jurisdictions in the United States include some sort of protection for animals under their respective protective order statutes. *See* CAL. FAM. CODE § 6320(b) (Supp. 2009) (allowing court to grant protective order which awards petitioner exclusive care of animal and requires respondent to refrain from, among other things, taking, threatening, or harming the animal); COLO. REV. STAT. ANN. § 18-6-800.3(1) (Supp. 2009) (including acts against property, which includes animals, in the definition of domestic violence); COLO. REV. STAT. ANN. § 18-6-803.5(1)(a) (Supp. 2009) (defining violations of a protection order as when an abuser "contacts, harasses, injures, intimidates, molests, threatens, or touches the protected person or protected property, including animals"); CONN. GEN. STAT. § 54-1K (b) (2009) ("A protective order issued . . . may include provisions necessary to protect any animal owned or kept by the victim including, but not limited to, an order enjoining the defendant from injuring or threatening to injure such animal."); Animal Protection Amendment Act of 2008, No. 17-281, §107, 2008 D.C. Sess. Law Serv. 10 (to be codified at D.C. CODE § 16-1005(c)) (adding animal law protections not previously allotted by the statute); HAW. REV. STAT. § 586-4 (West, Westlaw through 2009 Act 34) (Effective January 1, 2010, the law will provide that an "ex parte temporary restraining order may also enjoin or restrain both of the parties from taking, concealing, removing, threatening, physically abusing, or otherwise disposing of any animal identified to the court as belonging to the household in question."); 725 ILL. COMP. STAT. 5/112A-14(b)(11.5) (Supp. 2009) (providing that court shall, when issuing an order of protection prohibiting abuse by a family or household member, grant petitioner exclusive custody of animal and ordering respondent to stay away from and refrain from harming the animal); IND. CODE ANN. § 31-9-2-29.5 (2007) (extending protections under this domestic or family violence provision to "[a] crime involving animal cruelty and a family or household member . . . ."); IND. CODE ANN. § 35-46-3-12.5 (Supp. 2008) (providing that "a person who knowingly or intentionally kills a vertebrate animal with the intent to threaten, intimidate, coerce, harass, or terrorize a family or

any way; requiring that the abuser stay a certain distance away from the animal; and imposing criminal penalties upon violations of these orders. Criminal sanctions include criminal contempt, monetary fines, or civil penalties, and even imprisonment. Remedial measures aimed at restoring victims are also available; such measures include psychological, or psychiatric counseling and treatment. Taken together, these statutory measures provide excellent examples of what Maryland's Legislature can do should it decide to enact such legislation.

B. The Federal Alternative

Federal law provides protections similar to those afforded under state laws. The Federal Violence Against Women Act of 1994 ("VAWA") provides for the interstate enforcement of protection orders.[100] VAWA establishes a federal criminal offense for the violation of a protection order when the restrained party crosses interstate boundaries.[101] Amendments to VAWA also provide for increased federal funding for numerous domestic violence programs.[102]

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household member" will be found to have committed domestic violence animal cruelty); LA. REV. STAT. ANN. § 46:2135(7) (Supp. 2009) (providing that court may grant exclusive care of any pets and direct the abuser to refrain from harassing, abusing, or injuring the pets); ME. REV. STAT. ANN. tit. 19-A, § 4007(1)(N) (providing that, upon finding that the abuser has committed the alleged abuse, the court may grant a protective order which "[directs] the care, custody or control of any animal owned, possessed, leased, kept or held by either party"); NEV. REV. STAT. ANN. § 33.018(1)(e)(7) (Supp. 2007) (providing that the injuring or killing of an animal, when done to harass the other, constitutes domestic violence); *Id.* at § 33.030(1)(e) (providing that a court may grant a temporary order enjoining the abuser from "physically injuring, threatening to injure or taking possession of any animal owned of kept by the [victim]"); N.Y. JUD. CT. ACTS § 352.3(1)(c) (McKinney 2008) (court may issue order requiring the abuser to "refrain from intentionally injuring or killing, without justification, any companion animal the [abuser] knows to be owned, possess, leased, kept or held by the [victim]"); S. 2552, 15th Gen. Assem., Reg. Sess. (P.R. 2008), *available at* http://www.oslpr.org/2005-2008/leyes/pdf/ley-154-04-Ago-2008.pdf (for Spanish) and http://www.oslpr.org/download/en/2008/A-0154-2008.pdf (for English) (providing that court may grant exclusive custody of animal with the victim and order the defendant "to keep far away from the animal"); TENN. CODE ANN. § 36-3-601(1) (Supp. 2008) (defining abuse as, among other things, "inflicting, or attempting to inflict, physical injury on any animal . . . ."); VT. STAT. ANN. tit. 15, § 1103(c)(2)(G) (Supp. 2008) (providing that a court may issue "an order concerning the possession, care and control of any animal owned . . . or held as a pet by either party or minor child residing in the household"); W. VA. CODE ANN. § 48-27-702 (Supp. 2009) ("Whenever a law enforcement officer . . . respond[ing] to an alleged incident of domestic violence, forms a reasonable suspicion that an animal is a victim of cruel or inhumane treatment, he or she shall report the suspicion and grounds to the county humane officer within twenty-four hours of the response to the alleged incident of domestic violence.").

[100] Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified in relevant part at 18 U.S.C. § 2262 (2006)).

[101] *Id*.

[102] *See*, *e.g.*, 42 U.S.C. § 10416 (2006) (authorizing national domestic violence hotline and Internet grant); 42 U.S.C. § 3796hh (2006) (authorizing grants to encourage arrest policies

Congress revised and expanded VAWA in 1996 and again in 2000.[103] "While the first version of the Act made important strides against domestic violence, [the 2000 amended version of the Act] mandated a national commitment aimed at fighting the on-going problem of domestic violence through federal funding."[104] In an "effort to promote the fight against domestic violence at the state level," the revised statute directs federal funding to "state law school clinics, domestic violence shelters, and legal service offices . . . ."[105]

While these expanded federal protections for victims of domestic abuse do not directly address animal rights, they have still increased the potential for significant reduction of animal abuse cases in the United States through the funding of domestic violence programs and the enforcement of protective orders that also provide protection to animals. The link between violence to animals and domestic violence[106] likewise reveals logical causalities between the decrease of domestic violence and the aforementioned decrease in animal abuse. Although federal preemption[107] laws often hinder state action,[108] in the case of animal protection, these aforementioned federal laws can earnestly motivate state legislatures to promptly enact affirmative animal law legislation.

A prime example can be seen in *United States v. Stevens*,[109] a case in which the Supreme Court of the United States has granted certiorari. In *Stevens,* the Justice Department argued that Title 18, Section 48 of the United States Code, which prohibits the knowing creation, sale, or possession of depictions of animal cruelty with the intent to place them in interstate or foreign commerce for commercial gain, was a legitimate exception to the First Amendment's free speech clause.[110] This would

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and enforcement of protection orders); 42 U.S.C. § 10409 (2006) (authorizing appropriations for battered women's shelters); 42 U.S.C. § 10418 (2006) (authorizing demonstration grants for community initiatives).

[103] *See* Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1498 (2000); National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, 110 Stat. 2656 (1996).

[104] DuBose, III, *supra* note 12, at 241 (citing Murphy, *supra* note 13, at 503 nn.21-24).

[105] *Id.* (citing Murphy, *supra* note 13, at 503 nn.21-24).

[106] *See* Dana M. Campbell & Pamela D. Frasch, *Criminal Law*, *in* LITIGATING ANIMAL LAW DISPUTES: A COMPLETE GUIDE FOR LAWYERS 473-74 (Joan Schaffner & Julie Fershtman eds., Am. Bar Ass'n 2009).

[107] *See* Gibbons v. Ogden, 22 U.S. 1 (1824).

[108] *See*, *e.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

[109] 533 F.3d 218 (3d Cir. 2008) (en banc) (holding that statute was unconstitutional because animal cruelty depicted on video tape was protected speech), *cert. granted*, 129 S. Ct. 1984 (2009).

[110] *Id.* at 223. Despite the recent surge in public interest for the protection of animals, in its analysis, the court did not find the protection of animals to be a "compelling government interest." *Id.* at 230.

thereby criminalize the sale of videotapes of animal cruelty in states where "such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place . . . ."[111]

Although the Supreme Court has yet to rule on this matter as of the publication of this article, the high profile of the case has already generated considerable public sympathy for animal rights issues.[112] With the continued expansion and public scrutiny of notable cases, such as *Stevens*, and legislation,[113] federal laws will likely continue to aid the fight for animal rights at the state and local levels.[114]

VI. ADVOCATING FOR A DOMESTIC VIOLENCE BILL IN MARYLAND: MARYLAND'S LEGISLATIVE PURPOSE IN SYNC WITH ANIMAL INTERESTS

As animals take on a status broader than mere chattel, a new and burgeoning field of animal law emerges.[115] This ever-evolving field of law concerns a varied set of issues: from the welfare and protection of animals to the interaction and relationship between animals and their human counterparts.

In Maryland, the recently founded Animal Law Section ("Section") of the Maryland State Bar Association ("MSBA") has been a leading voice in this new field.[116] The mission of the Section, which was approved as a fully qualified section of the MSBA in 2006,[117] is "to facilitate the

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[111] 18 U.S.C. § 48(c)(1) (2006).

[112] *See*, *e.g.*, Krista Gesaman, *Kitty Stomping is Sick: But are Depictions of Animal Cruelty the Legal Equivalent of Child Pornography? The Supreme Court Will Decide*, NEWSWEEK, Oct. 3, 2009, *available at* http://www.newsweek.com/id/216740.

[113] *See*, *e.g.*, Animal Legal Defense Fund, Inc. v. Glickman, 154 F.3d 426 (D.C.Cir.1998) (en banc).

[114] Kathryn Alfisi, *Animal Law*, DC BAR, Mar. 2008, *available at* http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/march_2008/animal_law.cfm.

[115] *See generally* Gary C. Norman, *The Disabled, Service Animals, and the Law*, *in* LITIGATING ANIMAL LAW DISPUTES: A COMPLETE GUIDE FOR LAWYERS, *supra* note 106, at 267.

[116] The authors of this article are members of this Section. Gary C. Norman is the 2009-10 Chair of the Section. The authors are planning a regional animal law symposium hosted by the Animal Law Section of the Maryland State Bar Association, and in conjunction with the University of Baltimore School of Law and the University of Pennsylvania School of Law. *The Impact on & Opportunities for Animals in the Current Political and Economic Climate* will be held on April 9, 2010, at the University of Baltimore School of Law.

[117] In Summer 2005, Alan Nemeth approached the Board of Governors of the Maryland State Bar Association with the idea of establishing a Special Committee on Animal Law. In October 2005, the first meeting was held. By Spring 2006, there were 113 members of this Special Committee; since only a threshold of 100 members were required to be considered for recognition as a Section, the Section acquired full status within the bar association by Summer 2006. The first Board of Directors, (the "Section Counsel"), was comprised of the following individuals: Barbara R. Graham, Joan Epstein, Dorothy R. Haynes, Larry Kreis, Kate Masterton, Shannon McClellan, Megan Mechak, Kathleen Tabor, and Alan Nemeth as Chair.

development of good legal practice in animal-related issues by providing educational programs and resources and by participating in the legislative process."[118] Striving to carry out this mission, the Section has quickly become active in legislative advocacy in Annapolis.

For instance, testifying on House Bill 11 before the Judiciary Committee of the House of Delegates, the Section advocated that coverage of the existing Maryland animal cruelty statute should be expanded to include malicious offenses of third parties.[119] Furthermore, concerned members of the Section's Board of Directors have established a Domestic Violence Subcommittee ("Subcommittee") under the legislative committee, with the goal of enhancing protections in Maryland for victims of domestic violence.[120]

The MSBA has a full-time registered staff attorney dedicated to governmental affairs in Annapolis.[121] MSBA sections and committees, including the Animal Law Section, work in concert with the staff attorney to introduce legislation. Additionally, the active support of special interest groups committed to animal law issues furnish valuable counsel and assistance in expanding peace and protective orders to include pets or service animals. These special interest groups also help to sort, funnel, and determine issues for the Section to address.

Legislative bills seldom pass when initially introduced. Accordingly, a coordinated, long-term effort to propose positive legislation and galvanize legislators in accord with the merits and utility of such legislation is necessary.[122] In the 2007, 2008, and 2009 sessions of the Maryland General Assembly, the Section advocated positive legislation to include pets and service animals as part of peace and protective

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[118] Md. State Bar Ass'n, Animal Law Section, http://www.msba.org/sec_comm/sections/animallaw/index.htm (last visited Nov. 24, 2009).

[119] *Oral Testimony of Barbara Graham, Hearing on Md. H.D. 11 Before the Judiciary Comm.*, 423d Gen. Assem. (Jan. 25, 2006), *available at* http://www.msba.org/sec_comm/sections/animallaw/hb11.htm. Ms. Graham, Former Section Counsel and Treasurer of the Animal Law Section, testified that Maryland House Bill 11 provides a remedy for past conduct, such as wounding an animal as an instrumentality of domestic violence. *Id.* The legislation advocated by the Section's Domestic Violence Subcommittee, however, would have built on this, thereby advancing the law one step forward for Maryland victims.

[120] Mary L. Randour & Alan Nemeth, *Animal Cruelty and Domestic Violence: Two Forms of the Same Crime*, MD. B. BULL., Apr. 2007, *available at* http://www.msba.org/departments/commpubl/publications/bar_bult/2007/april/animalcru.asp.

[121] *See generally* 2009 MSBA Preliminary State Legislative Program, *available at* http://www.msba.org/sec_comm/committees/lawscomm/2009FinalStateProgram.pdf.

[122] MD. GEN. ASSEM., DEP'T OF LEGIS. SERVS., HOW A BILL BECOMES A LAW, http://dls.state.md.us/side_pgs/legislation/legislation.html (last visited Nov. 24, 2009) (providing an explanation of the Maryland General Assembly and the method through which bills are enacted in this State).

orders.[123] While speedily passing in the Maryland Senate, legislation has failed to receive a favorable vote in the Judiciary Committee of the Maryland House of Delegates, thus precluding it from enactment in the Maryland General Assembly.[124]

In contrast to the views of some Maryland legislators,[125] legislation that addresses the welfare of animals in the State of Maryland does not detract from its importance. Although the legislation specifically covers animals, it is still a significant resource for humans.[126] As stated above, there is a demonstrated and consequential link between violence to animals and domestic violence, either through violence against humans directly or as an instrumentality of other offenses.[127] Therefore, influential members of the Maryland General Assembly should not reflexively dismiss animal-related legislation as an inane measure.[128] Now is the time for a law that amends current domestic relations law in Maryland to incorporate pets and service animals in peace and protective orders.

VII. ON THE ROAD TO A BETTER TOMORROW: THE FIGHT FOR DOMESTIC VIOLENCE LEGISLATION IN MARYLAND OVER THE PAST THREE YEARS

A. Legislative Efforts in 2007: Senate Bill 965 and House Bill 1376

In light of the positive legislation enacted in Maine in 2006, the Section's Subcommittee eagerly assumed the project of expanding peace

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[123] *See* S. 736, 426th Gen. Assem., Reg. Sess. (Md. 2009); H.D. 901, 426th Gen. Assem., Reg. Sess. (Md. 2009); S. 615, 425th Gen. Assem., Reg. Sess. (Md. 2008); H.D. 1257, 425th Gen. Assem., Reg. Sess. (Md. 2008); S. 965, 424th Gen. Assem., Reg. Sess. (Md. 2007); H.D. 1376, 424th Gen. Assem., Reg. Sess. (Md. 2007).

[124] *See*, *e.g.*, H.D. 901, 426th Gen. Assem., Reg. Sess. (Md. 2009) (receiving no further action from the House Judiciary Committee, despite receiving a favorable vote in the Senate).

[125] Lisa Rein, *Domestic Violence Bills Languish on Judiciary Panel*, WASH. POST, May 11, 2008, at C8.

> Some victims' advocates say they are not taken seriously when they testify before the Judiciary Committee [of the House of Delegates]. At a hearing on a bill to require an abuse suspect to stay away from family pets, some lawmakers joked about whether protected animals should include chickens and farm animals. 'They're not realizing that the pet becomes part of the arsenal' of an abuser, said Cheryl R. Kravitz, a domestic violence survivor from Silver Spring who is co-chairman of the [G]overnor's Family Violence Council. . . . The [Judiciary] [C]ommittee rarely approves bills addressing animal cruelty, respecting [Chairman Joseph Vallario's] view that they are not serious measures.

Id. Indeed, the authors note that, on occasion, when advocates testify on animal related issues, such advocates are met with unprofessional "barks."

[126] *See*, *e.g.*, Yeager, *infra* note 165.

[127] *See* Dana M. Campbell & Pamela D. Frasch, *Criminal Law*, *in* LITIGATING ANIMAL LAW DISPUTES: A COMPLETE GUIDE FOR LAWYERS, *supra* note 106, at 473-74.

[128] *See* Rein, *supra* note 125.

and protective orders in Maryland to incorporate pets or service animals.[129] In the 2007 session of the Maryland General Assembly, the Subcommittee, in collaboration with its chief sponsor, Delegate Susan McComas, introduced House Bill 1376.[130] Introduced in March—which is considered a late point in the session—the bill required approval from the Rules and Executive Nominations Committee of the House of Delegates before progressing legislatively.[131] A similar version of this bill was also introduced as Senate Bill 965 in the same legislative session.[132]

During testimony for Senate Bill 965 and House Bill 1376, the Subcommittee elucidated the reason for its advocacy efforts and urged that the bill be introduced in the hopes that the Legislature would provide the tools, including greater authorization to law enforcement efforts, to best protect these animal "pawns" of domestic violence situations.[133] The Judiciary Committee of the Maryland House of Delegates and the Judicial Proceedings Committee of the Maryland Senate conducted hearings, but undertook no subsequent committee action.[134] The cross-filed bills slowly grinded to a halt, not because of their merit, but rather, due to lack of legislative support.[135]

B. Legislative Efforts in 2008: Senate Bill 615 and House Bill 1257

In 2008, the Subcommittee introduced a cross-filed version of its bill in collaboration with its chief sponsor in the Maryland Senate, Senator Jamie Raskin, Esq., and its chief sponsor in the House of Delegates, Delegate Susan McComas.[136] Senator Raskin and Delegate McComas cross-filed the bills as Senate Bill 615 and House Bill 1257.[137] The cross-

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[129] *See* Randour & Nemeth, *supra* note 120.

[130] MD. GEN. ASSEM., DEP'T OF LEGIS. SERVS.,, SYNOPSIS: HOUSE BILLS AND JOINT RESOLUTIONS, 2007 MD. GEN. ASSEM. SESS. (Mar. 5, 2007) at 3, http://mlis.state.md.us/2007rs/synopsis/sH030534.pdf.

[131] *Id*.

[132] Cynthia Lifson, Legislative Counsel, Md. Network Against Domestic Violence, *2007 Legislative Wrap-up: No Change for Victims of Domestic Violence*, VOICE (Spring/Summer 2007), *available at* http://www.mnadv.org/The_Voice/The_Voice_Spring-Summer_2007_rev.pdf.

[133] *Testimony, Hearing on Md. S. 965 Before Md. Senate Judicial Proceedings Comm.*, 424th Gen. Assem. (Mar. 16, 2007) (testimony of Maricruz Bonfante, Esq., Section Counsel of the Animal L. Section and Team Leader of Subcommittee) (testimony on file with author); *Testimony, Hearing on Md. H.D. 1376 Before the Judiciary Comm.*, 424th Gen. Assem. (Mar. 16, 2007) (testimony of Bonfante) (testimony on file with author).

[134] Lifson, *supra* note 132.

[135] Smitherman, *Gansler Urges Expansion of Animal Cruelty Laws*, *supra* note 94.

[136] *See* MD. GEN. ASSEM., DEP'T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, Md. S. 615 (2008), *available at* http://www.mlis.state.md.us/2008rs/fnotes/bil_0005/sb0615.pdf; MD. GEN. ASSEM., DEP'T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, Md. H.D. 1257 (2008), *available at* http://www.mlis.state.md.us/2008rs/fnotes/bil_0007/hb1257.pdf.

[137] *Id*.

filed bills possessed language similar to the previously cross-filed bills of 2007 and aimed to amend the Family Law and Criminal Law Articles to enhance protections of pets or service animals from domestic violence.[138]

The subcommittee enjoyed the support of the Women Legislators of Maryland, Inc. on Senate Bill 615.[139] The Domestic Violence Center of Howard County, Inc. ("the Center") also urged favorable reports.[140] The Center indicated that, where physical violence or verbal and emotional abuse of intimate partners was present, the abuse of an animal was, likewise, often present as well.[141] For instance, in 2008, numerous abusers intentionally or recklessly injured or even killed pets to establish power and control and as a mechanism of intimidation and terror.[142] The Center testified as to one horrific account of an abuser who deliberately kept a family pet outside in the freezing winter cold, causing that pet's death due to hypothermia.[143]

During the internal deliberations on Senate Bill 615, an amendment was introduced, removing the provisions related to stalking, as well as language related to corresponding changes to the animal cruelty statute[144] in the Criminal Law Article of the Maryland Code.[145] The bill received a favorable report with amendments from the Judicial Proceedings Committee.[146] Eventually, the bill passed in the Maryland Senate, by a vote of forty-two to five.[147] While the Subcommittee's bill passed in the Senate, albeit with amendments, the Judiciary Committee reported the House version, House Bill 1257, unfavorably, thereby negating its advancement in the 2008 session.[148]

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138 *Id*.

139 *See* Women Legislators of Md., Inc., Legislative Wrap-up (2008), http://www.womenlegislatorsmd.org/documents/2008LegislativeWrapUp.pdf.

140 *Cruelty Toward a Pet or Service Animal: Hearing on Md. S. 615 Before the Judicial Proceedings Comm.*, S. 615, 425th Gen. Assem. (Feb 20, 2008) (testimony of Keri Peterson, Client Services Coordinator, Domestic Violence Center of Howard County, Inc.); *Hearing on Md. H.D. 1257 Before the Judicial Proceedings Comm.*, H.D. 1257, 425th Gen. Assem. (Feb 20, 2008) (testimony of Keri Peterson, Client Services Coordinator, Domestic Violence Center of Howard County, Inc.).

141 *Id*.

142 *Id*.

143 *Id*.

144 *See* MD. CODE ANN., CRIM. LAW §§ 10-601 to -623 (2002 & Supp. 2009).

145 S. 425-168474/1, Reg. Sess. (Md. 2008), *available at* http://mlis.state.md.us/2008rs/amds/bil_0005/sb0615_16847401.pdf (Amendments to Senate Bill 615).

146 MD. GEN. ASSEM., BILL INFO., S. 615, 425th Gen. Assem., Reg. Sess. (Md. 2008), *available at* http://mlis.state.md.us/2008rs/billfile/SB0615.htm.

147 *Id*.

148 Phil Arkow, Am. Humane Ass'n, Pets in Protection Orders by State (Nov. 2, 2008), http://nationallinkcoalition.org/images/PPO_-_Summary_by_State.pdf.

C. Legislative Efforts in 2009: Amendments to the Maryland Code—Senate Bill 736 and House Bill 901

In the 2009 regular session of the Maryland General Assembly, numerous unaffiliated domestic violence-related bills were passed. For instance, a set of cross-filed bills authorized judges to order the surrender of firearms at the temporary protective order stage and during the entirety of the final protective order stage.[149] Another bill expanded the time that judges were authorized to extend a temporary protective order—from a total of thirty days to six months—in order to furnish service.[150] A third bill required the Department of Public Safety and Correctional Services to notify the petitioner within one hour following *in personam* service of an interim or temporary protective order on a respondent.[151] Finally, a set of cross-filed bills authorized judges to order a law enforcement officer to utilize all reasonable and necessary force to enforce a temporary custody provision of an interim or temporary protective order.[152]

On March 12, 2009, in an effort to shore up support for the bills, representatives of the Section testified before the Judicial Proceedings Committee of the Maryland Senate.[153] During the testimony, the Section put forth the following arguments for the arduous three-year initiative to enhance provisions for pets and service animals:

> (1) Abusers realize the importance of relationships between victims and their pets or service animals and use such relationship to coerce such victims to acquiesce to demands;
> (2) Victims will stay in an abusive situation for fear of what may be done to the family pet or service animal;
> (3) Current peace and protection orders do not address the connection between violence against animals and the effect on human being; Judges have no statutory authority to include a pet or service animal in a peace or protection order A victim who stays in her dwelling arguably has protection for herself and all within the dwelling, including pets, but the Victim who decides to leave has no protection by the current statute;
> (4) Victims, who often apply for protection under a peace or

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[149] S. 267, 426th Gen. Assem., Reg. Sess. (Md. 2009); H.D. 296, 426th Gen. Assem., Reg. Sess. (Md. 2009).

[150] S. 601, 426th Gen. Assem., Reg. Sess. (Md. 2009); H.D. 98, 426th Gen. Assem., Reg. Sess. (Md. 2009).

[151] H.D. 1196, 426th Gen. Assem., Reg. Sess. (Md. 2009).

[152] S. 714, 426th Gen. Assem., Reg. Sess. (Md. 2009); H.D. 464, 426th Gen. Assem., Reg. Sess. (Md. 2009).

[153] *Oral Testimony, Hearing on Md. S. 736 Before the Judiciary Comm.*, 426th Gen. Assem. (Mar. 12, 2009) (testimony of Maricruz Bonfante) (testimony transcript on file with author).

> protection order as pro-se litigants, are unaware of any rights or arguments that can be posited to request assistance respecting pet or service animals as the intended victims or instrumentalities of domestic violence;
> (5) Even where a victim is able to get a consent to a protection order allowing for protection of a household pet or service animal, such terms are typically unenforceable because there is no penalty for violation of that provision of the order; and
> (6) Statutory provisions in the Maryland code respecting animal cruelty or aggravated animal cruelty apply to prior conduct but fail to address on-going or future conduct of an abusive party in the context of domestic violence.[154]

The Subcommittee initiated its first attempt of enhancing the Maryland domestic violence laws by garnering the support of special interest groups, such as the Humane Society of the United States, as well as Maryland legislators.[155] The Subcommittee's correspondence to the Humane Society explained that the goal of the proposed legislation would be the amendment of the Maryland Code's Family Law and the Criminal Law Articles, such that augmented forms of relief could be enabled.[156]

The Subcommittee then drafted proposed amendments to the Family Law Article regarding protective orders, and the Criminal Law Article regarding stalking.[157] These amendments would allow a court to order an abuser to stay away from and refrain from acts of cruelty, or aggravated cruelty, to a pet.[158] The amendments would also expand the definition of stalking to include malicious conduct to a pet.[159]

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[154] *Id*.

[155] Letter from Alan Nemeth, Chair of the Animal L. Section, Md. State B. Ass'n. to Delegate Susan McComas (Feb. 2007); Letter from Maricruz J. Bonfante, Esq., Chair of the Pet Domestic Violence Subcomm., Animal L. Section, Md. State B. Ass'n. to Jake Oster, the Humane Society of the U.S. (Feb. 1, 2007).

[156] Bonfante, *supra* note 155.

[157] Nemeth, *supra* note 155.

[158] *Id.*

[159] *Id*. Additionally, the International Institute for Animal Law has drafted and proposed model legislation entitled the Model Domestic Abuse Animal Protection Act. The language of this Act may be helpful to such states as Maryland considering positive legislation on the issue of domestic violence and animals:

> §1 Purpose: The purpose of the Domestic Abuse Animal Protection Act is to allow for the inclusion of animals in domestic violence protective orders.
> §2 Protection Orders: a) In any domestic violence case, the court shall order that the petitioner be granted the exclusive care, custody, or control of any animal owned, possessed, leased, kept, or held by either the petitioner or the respondent or a minor child residing in the residence or household of the petitioner of the respondent. b) The court shall further order the respondent to stay away from the animal and forbid the respondent from taking, transferring, encumbering, concealing, molesting, attacking, striking, threatening, harming, or otherwise disposing of the animal.

Not to be discouraged by its previous unsuccessful attempts,[160] the Section, in collaboration with Senator Raskin and Delegate McComas, re-introduced its animal law-related domestic violence bills in the 2009 session of the Maryland General Assembly.[161] The cross-filed bills, Senate Bill 736 and House Bill 901, entitled "Domestic Violence - Cruelty Toward a Pet or Service Animal," proposed to amend the Family Law and the Criminal Law Articles of the Maryland Code to include pets and service animals within the purview of protective orders.[162]

The bills also authorized a court to order the abuser to: (1) remain away from the pet or service animal of the person eligible for relief, (2) remain away from the pet or service animal of a family member, or (3) refrain from cruelty or aggravated cruelty to the pet or service animal.[163] Additionally, the bills indicated that, if the abuser had possession of the pet or service animal, the court could order the respondent to relinquish the pet or service animal to the person entitled to relief, a family member, or a suitable third party.[164] The bills also authorized the imposition of a misdemeanor charge with maximum penalties of a $1,000 fine and imprisonment of ninety days for a first offense and a $2,500 fine and one year imprisonment for a second or subsequent offense.[165]

The Subcommittee benefited from the written and oral testimony of numerous individuals and organizations.[166] For instance, the joint oral

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§3 Penalties: a) Any violation of this statute is a Class A misdemeanor. b) Any violation subsequent to the first violation is a Class 4 felony.

Int'l Inst. for Animal Law, Domestic Abuse Animal Protection Act, *available at* http://www.animallaw.com/protectiveordermodellaw.htm.

[160] Much like the mythical character of *Sisyphus*, condemned for all eternity to push a massive boulder up the mountain. ALBERT CAMUS, THE MYTH OF SISYPHUS AND OTHER ESSAYS 3 (Alfred A. Knopf, Inc. 1955).

[161] S. 736, 426th Gen. Assem., Reg. Sess. (Md. 2009); H.D. 901, 426th Gen. Assem., Reg. Sess. (Md. 2009).

[162] S. 736; H.D. 901.

[163] S. 736, at 5-6; H.D. 901, at 5-6.

[164] S. 736, at 5-6; H.D. 901, at 5-6.

[165] S. 736, at 5; H.D. 901, at 5.

[166] *Joint Oral Testimony of Tracy Coppola, M.S., E.L., & Allie Philips, J.D. on behalf of the Am. Humane Ass'n, Hearing on Md. S. 736 Before the Judiciary Comm.*, 426th Gen. Assem. (Mar. 12, 2009) (testimony transcript on file with author); *Oral Testimony of Kathleen T. Bailey, Esq., Hearing on Md. H.D. 901 Before the Judiciary Comm.*, 426th Gen. Assem. (Mar. 12, 2009) (testimony transcript on file with author); Bonfante, *supra* note 155; *Written Testimony of Cheryl Kravitz, A Domestic Violence Survivor, Hearing on Md. S. 736 Before the Judiciary Comm.*, 426th Gen. Assem. (Mar. 12, 2009) (testimony transcript on file with author); *Testimony of Jeanne Yeager, Executive Director of the Mid-shore Council on Family Violence, Hearing on Md. S. 736 Before Judicial Proceedings Comm.*, 426th Gen. Assem. (Mar. 12, 2009) (testimony transcript on file with author); *Written Testimony of Gary C. Norman, Esq., on behalf of the Maryland Area Guide Dog Users, Inc., Hearing on Md. S. 736 Before Judicial Proceedings Comm.*, 426th Gen. Assem. (Mar. 12, 2009) (testimony transcript on file with author).

testimony of Allie Phillips, J.D., Director of Public Policy, and Tracy Coppola, J.D., a Legislative Analyst, both with the American Humane Association, stated, in pertinent part, that:

> Including pets in domestic violence protective orders is a critical step toward combating the cycle of interpersonal violence. This simple step is receiving national recognition, as the District of Columbia, Puerto Rico, and a number of states—California, Colorado, Connecticut, Illinois, Louisiana, Maine, Nevada, New York, Tennessee, and Vermont—have enacted similar laws. Currently, 12 other states—Arizona, Georgia, Hawaii, Iowa, Massachusetts, Minnesota, New Jersey, New Mexico, Ohio, South Carolina, Texas, and Washington—have similar bills pending to encourage judges to include pets in domestic violence protective orders at their discretion and on a case-by-case basis. This process, which is not addressed by state animal cruelty laws, is a strong means of preventing abusers from manipulating the loving bond between both child and adult victims and their pets.[167]

Likewise, Jeanne Yeager, the Executive Director of the Mid-Shore Council on Family Violence, provided testimony in favor of Senate Bill 736.[168] Her testimony concluded with the following:

> When a victim leaves an abusive relationship she takes . . . power and control away from the abuser, which enrages the batterer. This is why leaving is the most dangerous time for the victim and for those things she loves most, like her pets. This is also the time when she needs the most support in the form of shelter and Protective Orders. So the question should not be why does she stay, it should be what we have done to help her leave safely and without fear of retaliation to those pets she loves.[169]

As a result of this strong support, the newly introduced legislation received a favorable vote from the Judicial Proceedings Committee, and passed in the Maryland Senate on a vote of forty-three to three.[170] Unfortunately, the heady and seemingly meteoric rise of enhanced protections for companion animals and service pets that would have been allowed by the cross-filed set of bills, once again stalled in the Judiciary Committee of the House of Delegates. This was despite the positive report of the Department of Legislative Services of the Maryland General

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[167] Coppola & Philips, *supra* note 166.

[168] Yeager, *supra* note 166.

[169] *Id*.

[170] MD. GEN. ASSEM., BILL INFO., S. 736, 425th Gen. Assem., Reg. Sess. (Md. 2008), *available at* http://mlis.state.md.us/2008rs/bill file/SB0736.htm.

Assembly, which stated that the mandates of these bills could be implemented and enforced by currently existing resources, thereby imposing, quite literally, zero costs on small businesses.[171]

In response to the public outcry concerning the death of a small animal by torture, Maryland Governor Martin O'Malley requested that the Attorney General of Maryland, Doug Gansler, review the current state of animal cruelty laws.[172] In his correspondence to the Governor on this issue, the Attorney General expressed that the state of animal cruelty laws in Maryland should be enhanced.[173] Logically, if the Governor follows the recommendation of the Attorney General, this will include expanding protective orders to include pets. If the Governor and the Attorney General are now increasingly aware of, and educated on, the need for legislative action on the issue of animal cruelty, then the Chair and members of the Judiciary Committee in the House of Delegates also need to rise to the occasion.

The Judiciary Committee has dismissed the need for legislative action as an animal issue rather than a human issue. This may be due to a lack of understanding.[174] In 2006, 23,813 domestic violence cases were filed in the District Court Courts of Maryland.[175] Given the studies that discuss the prevalence of animal abuse in cases of domestic violence, one can reasonably infer that a significant portion of these cases involved animal cruelty. When domestic violence against animals and domestic violence against humans combine, tragic circumstances occur. The power to inform is the power to persuade, especially if those who are to be

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[171] *See* MD. GEN. ASSEM. DEP'T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, Md. S. 736 (2009), *available at* http://mlis.state.md.us/2009rs/fnotes/bil_0006/sb0736.pdf; MD. GEN. ASSEM. DEP'T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, Md. H.D. 901 (2009), *available at* http://mlis.state.md.us/2009rs/fnotes/bil_0001/hb0901.pdf. The important work of this institution becomes akin to a paper tiger—even when the bill indicates a revenue-neutral affect on the state—as the bill must be on the Committee Chairman's agenda to have any positive result.

[172] Laura Smitherman, *O'Malley Asks for Review of Md. Laws on Animal Cruelty*, BALT. SUN, June 19, 2009, at 10A.

> Invoking the memory of a pit bull set ablaze in Baltimore, Gov. Martin O'Malley has asked the state's attorney general to review Maryland's animal cruelty laws to determine if they are sufficient to deter such 'heinous' crimes. . . . Maryland ranks 32 out of all U.S. states and territories in terms of the strength of animal protection laws, according to the Animal Legal Defense Fund. Other states' laws are considered tougher because they include provisions such as banning those convicted of animal cruelty from owning pets and issuing restraining orders to protect pets.

Id.

[173] Smitherman, *Gansler Urges Expansion of Animal Cruelty Laws*, *supra* note 94.

[174] *Id*.

[175] *See* Md. Judiciary, Annual Statistical Abstract: Fiscal Year 2006, Table DC-8.13 (2006), *available at* http://www.courts.state.md.us/publications/annualreport/reports/2006/2006_annual_report.pdf.

persuaded open their eyes and hearts to the plight of the voiceless—an issue that can clearly be remedied through positive legislation.

VIII. ANALYSIS

In Maryland, an illogical resistance exists surrounding animal-related domestic violence issues. The legislative advocacy of the Section failed, not because the proposed bills foisted costly, unfunded mandates on the state, but rather, because the proposed bills would have required legislators to address the law, not as it is, but as it *should* or *ought* to be.[176] Legislators must realize that their status as "representatives of the people" includes representation of the interests of *all*; especially those without a voice—just a bark or a meow.

Therefore, in Maryland, pets and service animals must be included in protective orders, either as a facet of overall measures to prevent and sanction animal cruelty or as a facet of protecting humans. Naturally, pets and service animals cannot express their choice for a particular legislator at the ballot box. This does not detract from the need for earnest legislation in their favor.

To this end, the authors of this article agree with the following statement: "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants."[177] A piece of legislation should not be designated "non-meritorious" solely because its language addresses an animal-related issue. Similarly, proposed legislation involving animal issues should not eliminate the affirmative obligation of legislators to engage in fair, robust, and intellectual contemplation on the merits.

In 2006, the Maryland General Assembly enacted House Bill 11, which expanded the scope of the animal cruelty statute to encompass the offenses of third-party non-owners.[178] A former board member of the Section adroitly argued the need to enact House Bill 11 as a measure to protect pets from the brunt of domestic violence.[179] She testified that, before the enactment of House Bill 11, an ex-spouse or intimate partner could visit the abode of the other spouse or partner, and then express frustration and anger indirectly by harming a pet.[180] While this

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[176] *See generally* Gary C. Norman, *Why Shouldn't Money Be Accessible?*, 19:9 ADA COMPLIANCE GUIDE NEWSL. (Sept. 2008).

[177] Children's Hosp. of D.C. v. Adkins, 284 F. 613, 632 (D.C. Cir. 1922) (citing Stone v. Mississippi, 101 U.S. 819 (1879)).

[178] H.D. 11, 423d Gen. Assem., Reg. Sess. (Md. 2006).

[179] *See* Graham, *supra* note 119.

[180] *See id.*

legislation was a positive first step in addressing cruelty against animals, gaps in the law remain.[181]

The Animal Cruelty and Aggravated Animal Cruelty Statute does not cover the issue of protective orders. Thus, amending the boundaries of Maryland domestic relations law to authorize the inclusion of pets and service animals in protective orders is a logical step on the continuous path of progress. Arguably, Maryland may rely on the traditional police powers reserved to the states under the Tenth Amendment of the United States Constitution,[182] to prevent or sanction domestic violence.[183] The seminal decision of the United States Supreme Court in *Jacobson v. Massachusetts*[184] provided compelling language reflecting the meaning of police powers:

> The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.[185]

Similarly, the Court of Appeals of Maryland has stated that, "a statute enacted in the exercise of the State's police power need only bear a real and substantial relation to the public health, morals, safety and welfare of the citizens of the State."[186]

The Maryland Legislature may redress social ills as a function of these police powers that affect the general populace by "restraining and regulating private individuals' rights to liberty and uses of property."[187] These police powers include criminalizing acts that are within the

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[181] The Mayor of Baltimore City has established a task force to address these issues. *See* Jill Rosen, *Task Force to Fight Animal Abuse in Baltimore*, BALT. SUN, Jul. 9, 2009, at 2A.

[182] *See* U.S. CONST. amend. X.

[183] *See generally* Georges C. Benjamin & Anthony D. Moulton, *Public Health Legal Preparedness: A Framework for Action*, 36:1 J. MED., L. & ETHICS 13, 16 (2008) (providing an example where police powers were invoked in Maryland to address an animal biting a small child); Lawrence O. Gostin, Jacobson v Massachusetts *at One Hundred Years: Police Powers and Civil Liberties in Tension*, 95:4 AM. J. PUB. HEALTH 576 (Apr. 2005), *available at* http://ajph.aphapublications.org/cgi/reprint/95/4/576.pdf

[184] 197 U.S. 11 (1905). This decision of the Court is viewed as a watershed in the law of public health.

[185] *Id.* at 26-27 (citing Crowley v. Christensen, 137 U.S. 86, 89 (1890)).

[186] Steuart Petroleum Co. v. Bd. of County Comm'rs of St. Mary's County, 276 Md. 435, 446, 347 A.2d 854, 861 (1975).

[187] James G. Hodge, Jr., *Implementing Modern Public Health Goals through Government: An Examination of New Federalism and Public Health Law*, 14 J. CONTEMP. HEALTH L. & POL'Y. 93, 100 (1997).

public's interest to prohibit.[188] Additionally, on local and state levels, legislative bodies are increasingly turning to broader police powers in an attempt to address social ills.[189] Domestic violence, especially where animals are the brunt or instrumentalities of it, is an immediate social ill that requires the implementation of Maryland's police powers.

Domestic violence that involves cruelty or aggravated cruelty to animals, or that targets animals as an instrumentality of overall power and control of abused individuals, is a problem on individual, interpersonal, and societal levels, as it has been linked to mental disorders, family violence, and a myriad of public health issues.[190] In line with these police powers, the expansion of the Maryland domestic relations laws address the tactics of abusers, which have a tangible effect on public health and welfare. Arguably, reliance on violence against animals as a measure of power, submission, victim isolation, rage, and perpetual terror, among other things,[191] is a significant issue of public health necessitating, once again, based on the police powers, an expansion of the law.

Notably, the Legislature can expand provisions in Maryland law to include animals within the gamut of "stalking," a linchpin of the ability of abusers to exercise power and control over their victims. This permits legislators to address the "human" issue while serving the interests of the animals.[192] Accordingly, "[i]ncluding in a protection order a provision prohibiting the abuser from having contact with companion [and] service…animals can help prevent further . . . threats, intimidation, and danger to victims of domestic violence."[193]

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[188] Dawson v. State, 329 Md. 275, 283, 619 A.2d 111, 115 (1993) (citing Rice v. State, 311 Md. 116, 126, 532 A.2d 1357, 1362 (1987); Greenwald v. State, 221 Md. 235, 240, 115 A.2d 894, 897 (1959), *appeal dismissed*, 363 U.S. 719 (1960)).

[189] *See* Hodge, *supra* note 187, at 93-94.

[190] Robbins, *supra* note 19, at 144 (citing Frank R. Ascione, *The Abuse of Animals and Human Interpersonal Violence*, in CHILD ABUSE, DOMESTIC VIOLENCE, AND ANIMAL ABUSE 50, 52 (Frank R. Ascione & Phil Arrow eds., 1999)).

[191] *See* Janet Mickish & Kathleen Schoen, *Peace Orders and Animals in Domestic Violence*, 35 COLO. LAW. 105, 107 (2006) (citing Clifton Flynn, *Battered Women and Their Animal Companions: Symbolic Interaction Between Human and Nonhuman Animals*, 8 SOC'Y & ANIMALS 101, 109 (2000)) (noting that male domestic violence offenders often harm companion animals to: "demonstrat[e] power, teach[] submission, isolate victims from a network of support and relationships, express[] rage at self-determined action by victims, perpetuat[e] the context of terror, launch[] a preemptive strike against a victim leaving, punish[] and terroriz[e] by stalking and executing an animal, forc[e] a victim to be involved in the abuse, and confirm[] their power").

[192] Tara J. Gilbreath, *Where's Fido: Pets Are Missing in Domestic Violence Shelters and Stalking Laws*, 4 J. ANIMAL L. 1, 18 (2008) ("A stalker can threaten or injure a victim's pet without consequences under existing anti-stalking law. . . . By passing new laws allowing animals entrance into domestic violence shelters and including them in anti-stalking legislation, legislatures can mitigate the vulnerability under the current law.").

[193] Mickish & Schoen, *supra* note 191, at 109-10.

For the reasons set forth above, the authors agree that ensuring the safety of pets is a necessary part of realizing this same safety for victims of domestic violence. So long as pets are publicly ignored, domestic violence victims will continue to remain with their abusers, sacrificing their own physical and psychological health in an attempt to protect their animals.[194] The Maryland General Assembly has the power to safeguard against this deleterious impact on the human and animal bond through the enactment of positive legislation.

X. CONCLUSION

"*He who is cruel to animals becomes hard also in his dealings with men*."[195]

Existing Maryland domestic relations laws continue to lag behind other states, especially regarding the inclusion of pets and service animals in protective orders. The authors recognize that some legislators believe humans must be the focal point. These legislators should not myopically view these bills as involving only animal-related issues. As illustrated above, often, such bills, and the issues that such bills seek to redress, affect the welfare of humans as well.

The enactment of positive legislation will, as it often does, ignite a public discussion on such issues as animal cruelty and domestic violence. The consequential question is therefore, whether legislators in the Maryland General Assembly will possess the biblical "good courage"[196] and poise against parochial and anti-animal interests, and strive to improve the law, not as it is, but as it could be.

When zealous advocates such as the Section engage in the legislative process by providing earnest testimony, legislators should heed such arguments. Certainly, enhancing the state of Maryland's laws to permit the inclusion of pets and service animals in protective orders is laudable in its own degree as a facet of the overall principles set forth in the Maryland Code concerning the welfare of animals. Maryland legislators, in their capacity as community leaders, have an advantageous opportunity to build on the enactment of similar bills in numerous other states, as set forth herein. By enhancing their current domestic relations laws to encompass our furry companions, several states have met the call of the human and animal bond. Similarly, amending Maryland domestic relations law to encompass pets and service animals within the purview

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[194] Robbins, *supra* note 19, at 136-37.

[195] Kirsten E. Brimer, *Justice for Dusty: Implementing Mandatory Minimal Sentences for Animal Abusers*, 113 PENN. ST. L. REV. 649, 653 (2008) (quoting IMMANUEL KANT, LECTURES ON ETHICS, 240 (Louis Infield trans., Hackett 1963) (1775-1780)).

[196] *Psalms* 31:24.

of protective orders will progressively ensure that Maryland maintains pace with emerging trends in the law as a vehicle of positive social regulation.

In conclusion, interested parties should note the poignant words of one author: "[The] only source of hope and strength [of a victim] is a competent attorney who can ensure . . . equal justice and complete freedom from . . . violence . . . . In order to build confidence, courage, and a spirit of collaboration, counsel should encourage the battered client to actively participate in [his or her] case." [197] What is more, as many of the legislators in the Maryland General Assembly are attorneys, they must heed the guiding principles of the Rules of Professional Conduct: A lawyer must serve as an advisor, an advocate, a negotiator, and an evaluator; he must be competent, prompt and diligent; he must be guided by personal conscience; and he must be a zealous advocate on behalf of his clients.[198] In this particular case, the battered clients can only plaintively bark or meow; therefore, to ensure their "equal justice and complete freedom"[199] from domestic violence, we must speak up on their behalf.

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[197] Phyliss Craig-Taylor, *Lifting the Veil: The Intersectionality of Ethics, Cultural, and Gender Bias in Domestic Violence Cases*, 32 RUTGERS L. REC. 31, 40 (2008) (citing Lisa E. Martin, *Providing Equal Justice for the Domestic Violence Victim: Due Process and the Victim's Right to Counsel*, 34 GONZ. L. REV. 329, 337 (1999)).

[198] *See* Md. Rules app. at 622-24 (Md. Lawyers' Rules of Professional Conduct, Preamble).

[199] *See* Craig-Taylor, *supra* note 197 and accompanying text.

RECENT DEVELOPMENT

GONZALES v. STATE: WHERE A DEFENDANT HIRES PRIVATE COUNSEL WHO SUBSEQUENTLY FAILS TO APPEAR AT TRIAL, THE COURT CANNOT FORCE THE DEFENDANT TO EITHER CONSENT TO SUBSTITUTE COUNSEL OR PROCEED *PRO SE*.

By: Leslee Tingle

The Court of Appeals of Maryland held that a judge cannot mandate that a defendant either accept substitute counsel or proceed *pro se* when the defendant has chosen to hire a private attorney. *Gonzales v. State*, 408 Md. 515, 970 A.2d 908 (2009). Specifically, when a partner of a law firm attends a trial on behalf of retained counsel, and the defendant expresses a meritorious reason why substitute counsel is not satisfactory, the court must allow a postponement where necessary to allow counsel of record to appear on the defendant's behalf. *Id*. at 531, 970 A.2d at 917.

The State charged Miguel Gonzales ("Gonzales") with first-degree burglary in the Circuit Court for Baltimore County. Gonzales hired a private attorney, Spencer Gordon ("Gordon"), to represent him at trial. Gordon asked the court to enter both his appearance and the appearance of his firm, Henslee & Gordon, LLC.

On the date of Gonzales' trial, Gordon did not appear. Instead, Gordon's law firm sent substitute counsel, Marshall Henslee ("Henslee"). Gonzales indicated before the trial court that Henslee was not his attorney. Gonzales further pointed out that Gordon was his attorney and that it was Gordon alone with whom he spoke about his case. The trial court advised Gonzales that Henslee was his attorney and that he had the option to either continue with Henslee as his attorney or to continue *pro se*.

Trial commenced on January 16, 2007, in the Circuit Court for Baltimore County. Gonzales chose to represent himself and was found guilty of first-degree burglary. On appeal, the Court of Special Appeals of Maryland affirmed the ruling of the trial court. The Court of Appeals of Maryland then granted Gonzales' petition for certiorari.

The court first looked to Supreme Court precedent for the proposition that, when a defendant can afford to hire private

representation, he has the right to choose the person whom he wants to represent him. *Gonzales*, 408 Md. at 530, 970 A.2d at 916 (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006)). The court also noted that defendants can choose at any time to represent themselves. *Id.* at 530, 970 A.2d at 916 (citing *Faretta v. California*, 422 U.S. 806, 835 (1975)). When a defendant chooses to discharge his or her attorney, however, he or she must knowingly and intelligently waive the right to counsel. *Id*. at 530, 970 A.2d at 916 (citing *Faretta v. California*, 422 U.S. 806, 835; *Johnson v. State*, 355 Md. 420, 444, 735 A.2d 1003, 1016 (1999)).

In analyzing Gonzales' decision to represent himself, the court examined the requirements of Maryland Rule 4-215, which sets forth the provisions to which a court must adhere when considering a defendant's request to proceed *pro se*. *Id.* at 530, 970 A.2d at 916-17 (citing *Johnson*, 355 Md. at 452, 735 A.2d at 1020). The court noted that the goal of Maryland Rule 4-215 is to promote fairness in administration, simplify court proceedings, and protect the defendant's fundamental right to assistance of counsel. *Id.* at 532, 970 A.2d at 917-18 (citing *Parren v. State*, 309 Md. 260, 386, 534 A.2d 597, 607 (1987)).

The court specifically focused on Maryland Rule 4-215(e), which states that, when a defendant wishes to discharge his attorney, the court must allow the defendant to explain his reason for doing so. *Id.* at 531, 970 A.2d at 917 (citing *Williams v. State*, 321 Md. 266, 273, 582 A.2d 803, 806 (1990)). Thereafter, the trial judge should consider the merit of the request. *Gonzales*, 408 Md. at 531, 970 A.2d at 917 (citing *Moore v. State*, 331 Md. 179, 186-87, 626 A.2d at 968, 971-72 (1993)). If the judge determines that the defendant's request is meritorious, the judge shall permit the discharge and allow the defendant an opportunity to obtain new counsel. *Id.* at 531, 970 A.2d at 917 (quoting *Williams*, 321 Md. at 273, 582 A.2d at 806). If the trial court determines that the request is without merit, however, then it can give the defendant the option to proceed with current counsel or to continue *pro se*. *Id.* at 533, 970 A.2d at 918 (citing *Fowlkes v. State*, 311 Md. 586, 606, 536 A.2d 1149, 1159 (1988)).

In determining whether the trial court properly followed the mandates of Maryland Rule 4-215, the Court of Appeals of Maryland noted that, when Gonzales' chosen counsel did not appear on the date of trial, it was the trial court's responsibility to ensure that Gonzales' request to proceed *pro se* was both knowing and voluntary. *Id.* at 535-36, 970 A.2d at 919-20. In this instance, Gonzales hired Gordon and, based on the record, Gonzales believed that Gordon would be the

attorney that would handle his case. *Id*. In determining whether Gonzales' reasons for discharging Henslee were meritorious, however, the trial court never inquired as to the status of the relationship between Gonzales and Henslee or the relationship between Gonzales and Gordon. *Id*. at 536, n.10, 970 A.2d at 920, n.10. Therefore, the court could not make an accurate assessment of Gonzales' discharge of counsel. *Gonzales*, 408 Md. at 536, n.10, 970 A.2d at 920, n.10. Without inquiring into the status of Gonzales' relationship with both attorneys, the trial judge did not have sufficient information to conclude that Gonzales was rejecting representation from both Gordon and Henslee, which effectively made his waiver of counsel legally unsound. *Id*.

The Court of Appeals of Maryland stated that the trial court did not address Gonzales' concerns regarding the attorney who he thought represented him. *Id*. at 533-35, 970 A.2d at 919. The trial court also did not attempt to discern Gonzales' understanding of the circumstances surrounding the issue of substitute counsel. *Id*. Thus, the trial court failed to adhere to the requirements of Maryland Rule 4-215(e) because it moved forward with the directive of the rule even though the court had no clear understanding of which attorney the defendant wished to discharge. *Id*. at 534-35, n.9, 970 A.2d at 919, n.9. The trial court erroneously proceeded under its own declaration that Henslee was in fact Gonzales' attorney. *Id*. at 522-23, 970 A.2d at 912. Therefore, because the trial court placed Gonzales in a position that forced him to accept Henslee as substitute counsel or proceed *pro se*, the requirement that the waiver of assistance of counsel be knowing and voluntary was unfulfilled. *Gonzales*, 408 Md. at 537, 970 A.2d at 921.

The Court of Appeals of Maryland concluded that the record was sufficiently clear to show that Gonzales had indicated that Gordon was his attorney and that Gonzales had no intention of discharging Gordon. *Id*. at 536, 970 A.2d at 919. Simply because Henslee was Gordon's law partner, he did not automatically have authorization to represent Gordon's clients. *Id*. at 536, 970 A.2d at 920. The court noted that the Maryland Rules support the conclusion that individual attorneys, rather than every lawyer in a law firm, represent clients. *Id*. at 537, n.12, 970 A.2d at 921, n.12. When a defendant can afford private representation, he has the luxury of choosing an attorney to develop his defense based on any factor he considers to be important. *Id*. at 537, 970 A.2d at 921.

This case illustrates an ideological disconnect between the behavior in which legal professionals engage and what paying clients expect

from their attorneys. The Court of Appeals of Maryland makes it clear to both trial courts and practicing attorneys that the right to proceed with counsel of one's choice is a fundamental right. In the future, when substitute counsel is present, trial courts will need to be more diligent in examining whether a defendant's choice to proceed *pro se* is actually knowing and voluntary. Furthermore, practitioners will need to be more thorough in their client meetings to make sure that, should a situation arise where substitute counsel is needed, the possibility is discussed and agreed upon by the client.

RECENT DEVELOPMENT

GRADY v. BROWN: THE BOULEVARD RULE REQUIRES A JURY DETERMINATION OF WHETHER AN UNFAVORED DRIVER EFFECTIVELY YIELDED THE RIGHT-OF-WAY, AND THEREFORE, DOES NOT MANDATE THAT AN UNFAVORED DRIVER IS NEGLIGENT AS A MATTER OF LAW.

By: Stephen Cornelius

The Court of Appeals of Maryland held that the determination of an unfavored driver's negligence, where the Boulevard Rule applies, is a question for the jury. *Grady v. Brown*, 408 Md. 182, 968 A.2d 1084 (2009). Specifically, when an unfavored driver inches forward to obtain an unobstructed view of the favored highway, he or she will not be held negligent as a matter of law when an accident results. *Id.* at 197-98, 968 A.2d at 1092-93.

John Grady ("Grady") was operating his motorcycle on the favored highway, Falkirk Road. Darin Brown ("Brown") was operating his motor vehicle on the unfavored highway, an unnamed alley adjacent to Falkirk road. After coming to a full stop, Brown, for the purpose of getting an unobstructed view of oncoming traffic, inched forward and stopped his vehicle parallel to a parked truck on Falkirk Road. At this time, Grady's motorcycle skidded for about eight feet before striking the front bumper of Brown's vehicle. Although Grady disputed these facts, the Court of Appeals of Maryland accepted the version of facts most favorable to Brown because he was the non-moving party on appeal.

Grady initiated a motor tort claim against Brown in the Circuit Court for Baltimore City. The jury found that Brown was not negligent and the circuit court subsequently denied Grady's Motion for Judgment Notwithstanding the Verdict. Grady appealed to the Court of Special Appeals of Maryland, which affirmed the lower court's decision. Grady then petitioned for a writ of certiorari, which the Court of Appeals of Maryland granted.

The court commenced its analysis with an explanation of the Boulevard Rule. *Grady*, 408 Md. at 193-95, 968 A.2d at 1090-91. The Boulevard Rule states that a driver approaching a highway from

an unfavored road must yield the right-of-way to any other vehicle approaching on the favored highway. *Id.* at 195, 968 A.2d at 1091 (citing MD. CODE ANN., TRANSP. §§ 21-403(b)(1), 21-705(c) (2009)). In applying this rule, the court acknowledged past decisions, which posited that, when an unfavored driver is involved in an accident with a favored driver and the Boulevard Rule applies, the unfavored driver is negligent as a matter of law. *Id.* at 195, 968 A.2d at 1091 (quoting *Creaser v. Owens*, 267 Md. 238, 245, 297 A.2d 235, 239 (1972)). As such, Grady argued that, because Brown entered the favored highway, he was negligent as a matter of law. Therefore, according to Grady, it was improper for the circuit court to submit the question of negligence to the jury. *Id.* at 196-97, 968 A.2d at 1092.

The Court of Appeals of Maryland disagreed, and effectively modified the application of the Boulevard Rule. *Id.* at 197, 968 A.2d at 1092. The dissent stressed that the majority's new approach created an unjust outcome for favored drivers because they can no longer assume that vehicles will not intrude upon their lane of travel. *Id.* at 202, 968 A.2d at 1095 (Wilner, J., dissenting). The majority, however, defended its position on the grounds that the Boulevard Rule must be applied with a "modicum of common sense," and that it was created to afford highway motorists with an uninterrupted right to maintain the speed limit. *Grady*, 408 Md. at 194, 197, 968 A.2d at 1090, 1092 (quoting *Belle Isle Cab Co. v. Pruitt*, 187 Md. 174, 179, 49 A.2d 537, 539 (1946)). Consequently, Brown was not precluded from inching forward and stopping his vehicle parallel to the cars parked in the shoulder after coming to a stop, nor was he required to remain back from the curb for an infinite amount of time. *Id.* at 197, 968 A.2d at 1092. The court further explained that the rationale underlying the Boulevard Rule was to require unfavored drivers to yield to motorists on the favored highway. *Id.* at 198 n.4, 968 A.2d at 1093 n.4.

The court also cited to a factually similar case where the unfavored driver stopped at a stop sign before inching forward to obtain an unobstructed view. *Id.* at 198, 968 A.2d at 1093 (citing *Craig v. Englar*, 11 Md. App. 146, 273 A.2d 224 (1971)). There, the court determined that the unfavored driver acted reasonably. *Id.* at 198, 968 A.2d at 1093 (citing *Craig*, 11 Md. App. at 150, 273 A.2d at 226). In addition, the Court of Appeals of Maryland noted that, when there are conflicting facts and competing interests at stake, the problem is one for the jury to resolve. *Id.* at 198, 968 A.2d at 1093 (quoting *Rea Constr. Co. v. Robey*, 204 Md. 94, 100, 102 A.2d 745, 747 (1954)). Accordingly, the court held that it was proper for the circuit court to

allow the jury to consider Brown's testimony addressing whether he yielded the right-of-way and whether Grady caused the accident. *Grady*, 408 Md. at 197-98, 968 A.2d at 1092-93.

The Court of Appeals of Maryland has modified the application of the Boulevard Rule as it pertains to a determination of negligence. Unfavored motorists are no longer negligent as a matter of law in traffic accidents that are governed by the Boulevard Rule. Instead, a jury must weigh the evidence and testimony presented by both drivers to determine if the unfavored motorist yielded the right-of-way. The court's interpretation of the Boulevard Rule encourages practitioners to diligently investigate the factual circumstances underlying all motor vehicle accidents because defendants are afforded an opportunity to demonstrate that their actions were reasonable.

RECENT DEVELOPMENT

GREGG v. STATE: AMENDMENTS TO THE DNA POST-CONVICTION STATUTE APPLY RETROSPECTIVELY, REQUIRING PETITIONERS TO ESTABLISH THAT POST-CONVICTION DNA TESTING COULD PROVIDE EXCULPATORY OR MITIGATING EVIDENCE THAT IS RELEVANT TO PETITONER'S CONVICTION.

By: Robyn McQuillen

The Court of Appeals of Maryland held that, when a petitioner requests post-conviction DNA testing, courts should apply any amendments to the Maryland DNA Post-Conviction Statute retrospectively. *Gregg v. State*, 409 Md. 698, 976 A.2d 999 (2009). Rather than requiring petitioners to establish that DNA testing was not available at the time of their original trial and that the evidence would be "materially relevant" to establishing their innocence, the relaxed standard of the 2003 amendment to the DNA Post-Conviction Statute allows petitioners to seek post-conviction DNA testing if the evidence might be exculpatory or mitigating. *Id.* at 711-12, 976 A.2d at 1006-07.

Appellant, Donte Gregg ("Gregg"), was convicted in 2003 of first-degree murder, conspiracy to commit murder, and use of a handgun in the commission of a felony. Epithelial cells were found on the trigger of the gun used in the crime, but neither the State nor the defense analyzed the cells for DNA identification during Gregg's trial. At trial, Gregg asserted that he did not shoot the victim and that his physical contact with the murder weapon came from defending himself from the actual shooter.

In 2003, Gregg filed a Petition for DNA Evidence Post-Conviction Review, which the Circuit Court for Baltimore City dismissed without prejudice at the petitioner's request. The Court of Special Appeals of Maryland affirmed his conviction in 2004. In November 2005, without holding a hearing, the circuit court denied Gregg's Motion for New Trial and for Release of Evidence for Forensic Testing. Gregg then filed a motion for reconsideration and requested a hearing and a notice of appeal, which was dismissed by the Court of Special Appeals of Maryland. Gregg then filed a Petition for Post-Conviction Relief to

seek the right to file a late appeal to the Court of Appeals of Maryland, which was granted on March 20, 2008.

In both of the 2003 and 2005 motions, Gregg requested relief under the DNA Post-Conviction statute, which is codified in section 8-201 of the Criminal Procedure Article of the Maryland Code. *Gregg*, 409 Md. at 704-05, 707, 976 A.2d at 1002-04 (citing MD. CODE ANN., CRIM. PROC. § 8-201 (2008)). This statute was enacted in 2001, and amended in 2003 and 2009, to permit persons convicted of serious crimes to seek post-conviction DNA testing of evidence that could potentially change the outcome of their convictions. *Id.* at 701, 708 n.5, 976 A.2d at 1000, 1004 n.5. The pertinent statute is section 8-201(c), which lists evidentiary requirements the court must find in order to permit DNA testing. *Id.* at 709, 976 A.2d at 1005, (citing MD. CODE ANN., CRIM. PROC. § 8-201 (2008)). Before the 2003 amendment, the statute listed requirements that the petitioner had to establish, including: (1) DNA testing for certain evidence was not available or was out of his or her control at the original trial; and (2) that there is a reasonable probability that the DNA testing will "produce results materially relevant to the petitioner's assertion of innocence." *Id.* at 709, 976 A.2d at 1005 (quoting MD. CODE ANN., CRIM. PROC. § 8-201(c) (2003)). The 2003 amendment to section 8-201(c) requires petitioners to show that the DNA evidence: (1) has "the potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction;" and (2) that a generally accepted scientific test is employed to examine the evidence. *Id.* at 711, 976 A.2d at 1006 (quoting MD. CODE ANN., CRIM. PROC. § 8-201(c) (2008)).

First, the court decided whether the original version of the statute or the 2003 amendment applied to Gregg's petition for post-conviction DNA testing. *Id.* at 707, 976 A.2d at 1004. Gregg argued that the 2003 amendment of section 8-201(c) applied because it was the version in effect when his 2005 motion was filed. *Gregg*, 409 Md. at 712, 976 A.2d at 1007 (citing MD. CODE ANN., CRIM. PROC. § 8-201(c) (2008)). According to Gregg, the court was required to allow DNA testing of the epithelial cells found on the gun because that evidence could show that he was not the shooter and that the actual shooter's DNA would be found on the murder weapon. *Id.* at 712, 976 A.2d at 1007. He argued that this evidence would be exculpatory or might mitigate other evidence related to his conviction. *Id.* The State argued that the original version of section 8-201(c) applied because it was the version in effect when Gregg was convicted and when he filed

his first motion for post-conviction DNA testing. *Id.* at 713, 976 A.2d at 1007 (citing MD. CODE ANN., CRIM. PROC. § 8-201(c) (2003)). According to the State, under the original wording of the statute, the court rightfully dismissed Gregg's motion because DNA testing of the epithelial cells was available to Gregg at his original trial. *Id.* Further, the State asserted that evidence from DNA testing would not provide "materially relevant" information that would necessarily exonerate Gregg or implicate someone else in the shooting. *Id.* at 713-14, 976 A.2d at 1008.

In deciding which version of section 8-201(c) applied to Gregg's motion for post-conviction DNA testing, the court noted that legislative enactments that have a procedural or remedial effect should be applied retrospectively. *Gregg*, 409 Md. at 714, 976 A.2d at 1008 (citing *Langston v. Riffe*, 359 Md. 396, 406-08, 754 A.2d 389, 394-95 (2000)). The court found that section 8-201 has both a procedural effect, by detailing how petitioners are to seek post-conviction DNA testing, and a remedial effect, by providing a means for incorrect convictions or sentences to be reversed. *Id.* at 715, 976 A.2d at 1008-09. Therefore, the version of section 8-201 in effect when a petitioner files the motion should be applied retrospectively to determine if the courts are required to fulfill petitioner's post-conviction DNA testing request. *Id.* at 715-16, 976 A.2d at 1008-09.

The court found that, because Gregg's 2003 petition for post-conviction DNA testing was dismissed without prejudice, his 2005 petition should only have to conform to the requirements of the 2003 amendments of section 8-201(c). *Id.* at 716, 976 A.2d at 1009 (citing MD. CODE ANN., CRIM. PROC. § 8-201(c) (2008)). The court also found that Gregg had satisfied the two requirements under the 2003 amendment of section 8-201(c). *Id.* at 716-19, 976 A.2d at 1009-11 (citing MD. CODE ANN., CRIM. PROC. § 8-201(c) (2008)). The presence of another's epithelial cells, while not a guarantee of Gregg's guilt or innocence, might provide exculpatory or mitigating evidence of Gregg's guilt and conviction. *Id.* at 716, 976 A.2d at 1009.

Gregg also argued that the lower court erred in not granting him a hearing before dismissing his motion. *Gregg*, 409 Md. at 712, 976 A.2d at 1007. The court did not rule directly on this question because it already decided that the lower court ultimately erred in dismissing Gregg's 2005 motion. *Id.* at 721, 976 A.2d at 1012. By reviewing two prior cases, however, the court determined that, because of the purpose of the statute, a hearing should be held if there is a "*genuine* factual dispute" regarding the evidence. *Id.* at 717-19, 976 A.2d at

1009-11 (citing *Arey v. State*, 400 Md. at 491, 929 A.2d at 501 (2007); *Blake v. State*, 395 Md. at 224, 909 A.2d at 1026 (2006)) (emphasis in original).

This decision bolsters the Legislature's intent that prisoners be afforded the opportunity to clear their name through ever-advancing forensic technology, which may not have been available at the time of their conviction. Additionally, *Gregg* interprets the application of section 8-201(c) of the Criminal Procedure Article and provides that an amendment to the statute, which has a procedural and remedial effect, must be applied retrospectively to petitions for post-conviction DNA testing. Due to the January 2009 amendment of the Post-Conviction DNA Statute, Maryland petitioners seeking to file a motion for post-conviction DNA testing should pay special attention to the amendment's relaxed evidentiary requirements. Also, practitioners representing a client who is filing a motion under the statute should always seek a hearing if there is a genuine factual dispute regarding the evidence.

RECENT DEVELOPMENT

INDEPENDENT NEWSPAPERS, INC. v. BRODIE: MARYLAND REQUIRES A PRIMA FACIE SHOWING OF DEFAMATION AND A BALANCING OF FIRST AMENDMENT RIGHTS BEFORE ORDERING THE RELEASE OF THE IDENTITY OF AN ANONYMOUS INTERNET SPEAKER.

By: Molly Deere

The Court of Appeals of Maryland held that releasing the identity of an anonymous Internet speaker in a defamation action requires a prima facie showing. *Indep. Newspapers, Inc. v. Brodie*, 407 Md. 415, 966 A.2d 432 (2009). In addition, a Maryland court must find that the plaintiff made an adequate effort to notify the anonymous speaker, provided the speaker with a reasonable opportunity to oppose the request, and submitted the exact statements in question to the court. *Id.* at 456, 966 A.2d at 457. Finally, the court must balance the need for identification and the strength of the prima facie case against the speaker's First Amendment right to speak anonymously. *Id.*

Independent Newspapers, Inc. ("Independent Newspapers") maintained a web-based Internet forum that allowed registered users to post comments and opinions for the general public to read. Two discussion threads posted on the Internet forum referenced Queen Anne's County resident, Zebulon Brodie ("Brodie"). The first discussion thread, Centerville Eyesores, accused Brodie of participating in the sale and burning of an antebellum home and a grove of trees. Three usernames were identified in the discussion thread. In expressing their ire toward the person responsible for the antebellum home's demolition, the posters named the developer as the culprit and mentioned that Brodie sold the property to the developer.

The second discussion thread involved two different posters and discussed unsanitary conditions at Brodie's Dunkin' Donuts franchise. The Dunkin' Donuts posters described trash piled up outside the restaurant and their refusal to eat at the establishment. Brodie claimed that these statements injured his profession and his employment.

Brodie filed a claim in the Circuit Court for Queen Anne's County for defamation and conspiracy to defame against the Internet forum host, Independent Newspapers, and the three Centerville Eyesores

posters. Independent Newspapers filed a motion to protect the anonymity of the posters. The circuit court dismissed Independent Newspapers and the Centerville Eyesores' posters from the suit, but compelled the company to divulge the Dunkin' Donuts posters' identities.

Brodie served a subsequent subpoena ordering Independent Newspapers to release documents related to all five posters. Independent Newspapers argued that the posters' anonymity should be maintained because Brodie failed to assert an actionable claim. The circuit court ordered Independent Newspapers to comply with the subpoena. Independent Newspapers appealed to the Court of Special Appeals of Maryland. The Court of Appeals of Maryland granted certiorari prior to any proceedings in the Court of Special Appeals of Maryland.

The Court of Appeals of Maryland reversed the circuit court's judgment because the three posters named as defendants wrote only under the Centerville Eyesores discussion thread, which did not defame Brodie. *Indep. Newspapers, Inc.*, 407 Md. at 442-43, 966 A.2d at 448-49. The second thread, discussing Brodie's Dunkin' Donuts restaurant, involved two posters that Brodie did not sue. *Id.* at 443, 966 A.2d at 449. Additionally, the statute of limitations had expired on Brodie's defamation claim against the Dunkin' Donuts posters. *Id.*

After dismissing the actual claims against all of the defendants, the court elucidated a test meant to guide lower courts in determining when to compel the identification of an anonymous Internet speaker in a defamation suit. *Id.* In doing so, the court considered First Amendment rights and policy arguments for protecting anonymity. *Id.* at 427-28, 966 A.2d at 440.

The court stated that an individual's right to speak anonymously is fundamental to the First Amendment. *Id.* at 428, 966 A.2d at 440. Furthermore, protecting anonymous speech encourages citizens to participate in First Amendment freedoms by dissolving fear of official retaliation or social ostracism. *Indep. Newspapers, Inc.*, 407 Md. at 428-29, 966 A.2d at 440-41. The right to speak anonymously, however, is not absolute. *Id.* at 430, 966 A.2d at 441 (citing *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952)). Defamation considerations are one class of restrictions that courts may place on the anonymity of speech. *Id.* (citing *Beauharnais*, 343 U.S. at 266).

Maryland has not previously considered whether First Amendment protections should apply to Internet speech. *Id.* at 430, 966 A.2d at 442. Other courts, however, have recognized the value in such an

extension, because the Internet affords citizens an opportunity to participate more fully in public discourse. *Id.* (citing *Doe v. Cahill*, 884 A.2d 451, 455 (Del. 2005)).

The Court of Appeals of Maryland conflated state and federal decisions to create an applicable test for Maryland courts. *Id.* at 454, 966 A.2d at 456. The court found the stringent summary judgment threshold too rigorous, because the plaintiff would be required to prove the case without being able to identify the speaker. *Indep. Newspapers, Inc.*, 407 Md. at 455-56, 966 A.2d at 456-57 (citing *Cahill*, 884 A.2d 451). Conversely, the "good faith basis" and the motion to dismiss thresholds were too weak, and threatened to stifle public discourse. *Id.* at 455, 966 A.2d at 456 (citing *In re Subpoena Duces Tecum to AOL*, 52 Va. Cir. 26 (Va. Cir. Ct. 2000)). The court compromised by requiring a plaintiff to make a prima facie showing before compelling the release of an anonymous Internet speaker's identity. *Id.* at 454, 966 A.2d at 456.

In addition to the prima facie showing requirement, a plaintiff must provide: (1) notice to the anonymous speaker on the message board where the allegedly defamatory comments were made; (2) a reasonable opportunity for the anonymous poster to respond to the discovery request; and (3) the exact statements in question. *Id.* at 456, 966 A.2d at 457 (citing *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001). Subsequently, the court must weigh the anonymous speaker's First Amendment rights with the "strength of the prima facie case." *Id.* (citing *Dendrite*, 775 A.2d at 760-61).

The *Independent Newspapers, Inc.* concurring opinion disagreed with the addition of a First Amendment balancing test. *Id.* at 457, 966 A.2d at 457 (Adkins, J., concurring). In particular, the concurrence viewed the balancing test as being implicit in the prima facie showing. *Indep. Newspapers, Inc.*, 407 Md. at 459, 966 A.2d at 460 (Adkins, J., concurring). The concurring opinion stressed that, by also requiring a balancing test, the majority has granted the trial court discretion to dismiss a defamation claim, despite the fact that the plaintiff already made a prima facie showing. *Id.* (Adkins, J., concurring).

With the burgeoning field of web-based communication, defamation cases arising out of anonymous Internet speech are likely to increase. This opinion provides valuable instruction on Internet anonymity in the context of a defamation claim. Lawyers preparing a defamation claim must anticipate a thorough balancing of the plaintiff's right to pursue a claim against the defendant's right to First Amendment protections. Lawyers defending an anonymous Internet

speaker against a defamation claim should focus their arguments on the First Amendment violations implicated by releasing the identity of the anonymous poster. Furthermore, practitioners engaged in First Amendment cases should take note of the breadth of this opinion, which provides a foundation for future disputes involving the Internet and free speech.

RECENT DEVELOPMENT

IN RE NAJASHA B.: WHEN A CHILD OBJECTS TO THE DEPARTMENT OF SOCIAL SERVICES' UNILATERAL WITHDRAWAL OF A CINA PETITION, THE JUVENILE COURT MUST HOLD AN ADJUDICATORY HEARING TO CONSIDER THE CHILD'S ALLEGATIONS OF ABUSE OR NEGLECT.

By: Joshua Beale

The Court of Appeals of Maryland held that, when a child objects, the Department of Social Services ("DSS"), notwithstanding the consent of the child's parents, has no unilateral right to dismiss a Child In Need of Assistance ("CINA") petition prior to the statutorily required adjudicatory hearing. *In re Najasha B.*, 409 Md. 20, 972 A.2d 845 (2009). Specifically, the court stated that the policy of the CINA Subtitle is to empower the juvenile courts with the authority necessary to protect and advance a child's best interests, regardless of which party commences a petition. *Id.* at 33, 972 A.2d at 852.

On January 31, 2008, while conducting a drug raid on the home of Najasha B.'s parents, Baltimore City Police recovered marijuana. Five-year-old Najasha was found in the home without adult supervision. Attempts to locate her parents were unsuccessful, and no known relatives were willing to provide care for her. Najasha was subsequently placed in emergency shelter care.

Najasha's parents attended the emergency shelter care hearing on February 1, 2008, where the Circuit Court for Baltimore City, sitting as a juvenile court, denied the DSS's emergency shelter care request. The court granted custody to Najasha's parents, provided that no illegal substances were present in the home and that the DSS could make unannounced visits.

On May 9, 2008, the DSS filed a motion requesting that the juvenile court dismiss the CINA petition. The DSS explained that no further court intervention was necessary because matters prompting the petition were already resolved. Najasha's counsel objected, arguing that Najasha was not attending school on a regular basis. The juvenile court overruled the objection and granted the DSS's dismissal request.

Najasha's counsel filed a timely Notice of Exception and Request for Hearing. On June 23, 2008, the juvenile court held a *de novo* exception hearing. Najasha's counsel was unable to persuade the juvenile court that an adjudicatory hearing was a statutory requirement under section 3-817(a) of the Courts and Judicial Proceedings Article of the Maryland Code. Again, the court dismissed the exception, stating that an adjudicatory hearing was not required when the DSS no longer wished to pursue a petition. Najasha appealed the decision to the Court of Special Appeals of Maryland. The Court of Appeals of Maryland, on its own initiative, issued a writ of certiorari.

The central issue in this case was the underlying procedural effect of section 3-817(a) of the Courts and Judicial Proceedings Article, which provides: "After a petition is filed under [the CINA Subtitle], the court shall hold an adjudicatory hearing." *In re Najasha B.*, 409 Md. at 27, 972 A.2d at 849 (quoting MD. CODE ANN., CTS. & JUD. PROC. § 3-817(a) (2006)). The court examined the purpose of the statute, the role of the court in CINA cases, and the rights of the child. *Id.* at 33, 972 A.2d at 852.

Najasha's parents contended that any alleged improper dismissal by the lower court was harmless because Najasha had another mechanism for invoking the protection of the court: filing a separate complaint. *Id.* at 37, 972 A.2d at 855. The Court of Appeals of Maryland rejected this argument, however, concluding that requiring Najasha to file a separate complaint would needlessly encumber Najasha's access to the juvenile court and would conflict with the purpose of the CINA Subtitle. *Id.* at 38, 972 A.2d at 855. This was consistent with a similar ruling from Illinois, which held that a child is entitled to a hearing on a CINA petition when the child objects to its dismissal. *Id.* at 35, 972 A.2d at 853 (citing *In re J.J.,* 566 N.E.2d 1345, 1349 (Ill. 1991)). Furthermore, a California court ruled that if dismissal was granted, the ensuing re-application procedure for judicial review would be "circuitous and [a] waste of resources . . . where [DSS] has already made clear it will not pursue the . . . petition." *Id.* at 37, 972 A.2d at 855 (quoting *Allen M. v. Superior Court*, 8 Cal. Rptr. 2d 259, 263 (Cal. Ct. App. 1992)).

Next, DSS argued that it had a common law right, as the moving party, to dismiss the petition. *In re Najasha B.*, 409 Md. at 38, 972 A.2d at 855. Urging the court to recognize a plaintiff's absolute right to discontinue a suit at any point, the DSS contended that the dismissal by the lower court recognized a unilateral right to withdraw a petition once it was filed. *Id.* at 38, 972 A.2d at 855 (citing *Ex parte Skinner & Eddy Corp.*, 265 U.S. 86 (1924)). In rejecting the DSS's argument,

the court noted that the Maryland Rule permitting voluntary dismissal does not apply to Juvenile Causes under Title 11. *Id.* at 38, 972 A.2d 855 (citing Md. Rule 1-101(b)). Coupled with the lack of authority in either Title 11 or the CINA Subtitle granting the DSS a unilateral right to dismissal, the court concluded that the provisions better display "clear constraints on DSS's autonomy to act in CINA proceedings." *Id.* at 39, 972 A.2d at 856.

Najasha's parents asserted that it would be in violation of DSS's professional responsibility if it proceeded with an adjudicatory hearing, knowing that it no longer had a good faith argument that Najasha needed protection under the CINA Subtitle. *Id.* The court was not persuaded by this argument, however, noting that the DSS, without violating any professional responsibilities, could argue at the adjudicatory hearing that court intervention was no longer in the child's best interest. *Id.* at 40, 972 A.2d at 856. While maintaining its professional integrity, the DSS would also comply with its statutory obligation to serve the child's best interests by allowing the child, through counsel, to present facts supporting the petition. *In re Najasha B.*, 409 Md. at 40, 972 A.2d at 856.

The DSS also argued that because Najasha did not raise, in the original petition, the argument that her parents were not taking her to school, she should have been precluded from raising it in an adjudicatory hearing. *Id.* at 40, 972 A.2d at 857. According to the DSS, this would expand the purpose of the adjudicatory hearing clearly outlined in the CINA Subtitle. *Id.* at 41, 972 A.2d at 857. The court acknowledged that, although Najasha made reference to the new argument of poor school attendance in the Exception Notice, it was not her only grounds for an exception to the dismissal. *Id.* In rejecting the DSS's argument regarding the purpose of the CINA Subtitle, the court focused on the fact that Najasha continually advocated her original position, taking exception generally to the dismissal, by stating that the adjudicatory hearing was a statutory requirement. *Id.*

This decision commands that, from the outset of an allegation of abuse or neglect, there must be a more purposeful and genuine effort on the DSS's part in filing a CINA petition. *In re Najasha B.* specifically expanded children's rights by mandating an adjudicatory hearing in a CINA petition, despite the DSS's or even the parents' agreement that CINA protection is no longer warranted. While this may make for unnecessary and inefficient adjudicatory hearings, especially from the standpoint of the DSS, the ruling clearly marks the DSS's role as the court's agent as contemplated by the statutory provisions under Title 3-802 of the Courts and Judicial Proceedings

Article. As opposed to a separate party moving for relief in civil matters, the DSS cannot unilaterally revoke a CINA petition over the objection of a child. Further, practitioners representing a child in a CINA proceeding can be assured that, upon an objection to a motion to dismiss, a requested adjudicatory hearing will be granted, regardless of any circumstances that have changed since the original filing of the CINA petition.

RECENT DEVELOPMENT

MASTER FINANCIAL, INC. v. CROWDER: A TWELVE-YEAR STATUTE OF LIMITATIONS APPLIES FOR SPECIALTY ACTIONS TO CLAIMS SEEKING CIVIL PENALTIES UNDER THE STATE SECONDARY MORTGAGE LOAN LAW.

By: Satoko Harada

The Court of Appeals of Maryland held that the applicable statute of limitations period for State Secondary Mortgage Loan Law ("SMLL") violations claiming civil penalties is the twelve-year statute of limitations for specialty actions. *Master Fin., Inc. v. Crowder*, 409 Md. 51, 972 A.2d 864 (2009). The court set forth a standard requiring a statute to be the exclusive source of both enforceable obligations and ascertainable remedies in order to constitute an "other specialty" under Maryland Code, section 5-102(a)(6) of the Courts and Judicial Proceedings Article ("CJP"). *Id*. at 70, 972 A.2d at 875.

This was a consolidated action consisting of nineteen lawsuits, nine of which were class actions. The plaintiffs (collectively, "Borrowers") alleged that the loan transactions, which they used to secure a second mortgage loan, violated the SMLL in several respects. The defendants (collectively, "Lenders") included lender entities alleged to have originated the respective mortgage loans to the Borrowers, and holder-defendants that had purchased those mortgage loans from the lender-defendants. Non-holder defendants were also included as defendants in some of the class action suits. The Borrowers alleged that the non-holder defendants were "juridically linked" to the suit because they purchased from the named Lenders mortgage loans made to unnamed plaintiffs in the class action.

The Borrowers claimed that the Lenders were in violation of the SMLL, defined in sections 12-401 through 12-415 of the Commercial Law Article of the Maryland Code, by not meeting the licensing requirement, charging excessive fees, and failing to provide a disclosure form as mandated. The Borrowers sought application of the twelve-year limitations period under CJP section 5-102(1) or (5), claiming that the loan documents were signed under seal as required. In response to the Borrowers' claim, the lenders filed a motion to

dismiss, arguing that the applicable limitations period precluded these actions.

The Circuit Court for Baltimore City granted the Lenders' motion to dismiss all actions on the ground that the suits were barred by limitations, because they had not been filed within three years of the closing of the respective loans. The court further ruled that the Borrowers' actions were based entirely on the statutes and not on the loan documents, and therefore, were subject to the three-year limitations period.

The Borrowers appealed to the Court of Special Appeals of Maryland, which agreed with the lower court, that the applicable limitations period to claims solely under the SMLL was three years. The intermediate court, however, reversed judgment in part, holding that the Borrowers' claims on the SMLL were not entirely barred by limitations. The court based its ruling on section 12-413 of the Commercial Law Article of the Maryland Code, which allows for recovery of any post-closing costs in excess of the principal amount of the loan, when the lender is in violation of the SMLL. On cross-petition by the Borrowers and the Lenders, the Court of Appeals of Maryland granted certiorari.

The Court of Appeals of Maryland noted that the lower courts and the parties had maintained an undisputed assumption that the limitations period applicable to SMLL violations was three years. During its proceedings, however, the court discovered a line of cases that were contrary to that assumption. The court directed for supplemental memoranda on whether the Borrowers' actions for civil penalties under the SMLL constituted an "other specialty" under CJP section 5-102(a)(6), and were thereby subject to a twelve-year statute of limitations.

The Court of Appeals of Maryland agreed with the lower courts that the Borrowers' claim that the loan documents were under seal, and therefore subject to the twelve-year limitations period, was invalid. *Master Fin.*, 409 Md. at 64, 972 A.2d at 872. The court noted that the actions were based on statutory violations of the SMLL, which were entirely extraneous to the loan documents themselves. *Id*. The court then took the unusual step of raising an additional issue to resolve whether claims based on the SMLL constituted an "other specialty" under CJP section 5-102(a)(6). *Id*. at 65, 972 A.2d at 873 (citing MD. CODE ANN., CTS. & JUD. PROC. § 5-102(a)(6) (2006)). If an SMLL claim was an "other specialty," the applicable limitations period would be twelve years and the Borrowers would be entitled to

bring their claim. *Id*. Otherwise, the three-year limitations period would preclude the Borrowers from recovery.

The Court of Appeals of Maryland discussed its recent decision in *Greene Tree H.O.A. v. Greene Tree Assoc*., which examined the issue of whether a statutory claim constituted a specialty. *Id.* at 66, 972 A.2d at 873 (citing *Green Tree H.O.A. v. Greene Tree Assoc.*, 358 Md. 453, 749 A.2d 806 (2000)). In *Greene Tree*, the court concluded that attempts to draw a bright line rule identifying statutory specialties have yielded inconsistent results, and did not discern a reasonable standard or an exact definition of a statutory specialty. *Master Fin.*, 409 Md. at 66, 972 A.2d at 873 (citing *Greene Tree,* 358 Md. at 481-82, 749 A.2d at 821). The court also looked to *Mattare v. Cunningham*, where a claim to recover death benefits was held to constitute a statutory specialty because the cause of action existed solely by statute and not by common law. *Id.* at 67, 972 A.2d at 873-74 (citing *Mattare v. Cunningham*, 148 Md. 309, 314-15, 129 A. 654, 656 (1925)). The court expanded the *Mattare* principle in *Sterling v. Reecher*, by additionally requiring that the remedy be entirely statutory. *Id.* at 69, 972 A.2d at 874-75 (citing *Sterling v. Reecher*, 176 Md. 567, 6 A.2d 237 (1939)).

In light of the relevant legal history, the court devised a general principle for determining when a statutory action falls within CJP section 5-102(a)(6). *Id.* at 70, 972 A.2d at 875 (citing MD. CODE ANN., CTS. & JUD. PROC. § 5-102(a)(6) (2006)). According to the court, a statutory claim will constitute an "other specialty," subject to the twelve-year limitations period, if: (1) the statute is the exclusive source of the enforceable duty, obligation, prohibition or right not within common law; (2) the statute is the exclusive source of the remedy to be pursued in the event the statute is violated; and (3) any civil damages sought are readily ascertainable. *Id*.

The Court of Appeals of Maryland ultimately found that the Borrowers' actions arising from the enforceable duties, obligations, prohibitions, rights and remedies were derived solely from the SMLL, and that the remedy and specific amounts pursued were readily ascertainable. *Id.* at 72, 972 A.2d at 876. In satisfying the standard of a statutory specialty, subject to the twelve-year limitations period, the court ruled that, subject to producing sufficient evidence, the Borrowers were entitled to recover the statutory civil penalties. *Master Fin.*, 409 Md. at 72, 972 A.2d at 876.

The Court of Appeals of Maryland emphasized that the "other specialty" status under CJP section 5-102(a)(6) of the Maryland Code is to be applied narrowly, and that it is not applicable to every claim

that is related to a statute in some manner. *Id.* at 70, 972 A.2d at 875 (citing MD. CODE ANN., CTS. & JUD. PROC. § 5-102(a)(6) (2006)). The court demonstrated this by distinguishing the Borrowers' actions in which they sought a declaration that the mortgage loans were void or voidable due to SMLL violations. *Id.* at 73, 972 A.2d at 877. The court ruled that these claims did not meet the statutory specialty standard, because the remedy was found solely at common law, and was therefore barred by the three-year statute of limitations. *Id*.

The court also denied joinder of the non-holder defendants in the class action suits, finding the "juridical link" doctrine inapplicable. *Id*. at 80, 972 A.2d at 881. The juridical link doctrine would allow a class representative, on behalf of unnamed class members, to enjoin a defendant with whom they lack a direct connection. *Id*. at 74, 972 A.2d at 877. The court held that under Federal Rules of Civil Procedure Rule 23 and Maryland Rule 2-231(a), the Borrowers, having no connection with the non-holder defendants, lacked standing and could not sufficiently represent the interests of the unnamed class members who may otherwise have a direct connection and a cause of action against the non-holder defendants. *Master Fin.*, 409 Md. at 81, 972 A.2d at 882.

With this decision, the Court of Appeals of Maryland articulated a workable standard for determining the specialty status of claims for civil remedies under the SMLL. In light of the economic difficulties of recent years, many people have resorted to a second mortgage loan for additional funds. With both financial institutions and borrowers facing economic hardships, conflicts over issues, such as obligations of the lenders and excessive costs associated with the loan, are bound to arise. Practitioners must be attentive to the statutory nature of a borrower's claim, which could significantly increase the time in which to file it. Additionally, the extended limitations period could dramatically increase the potential liability that lenders face. Maryland attorneys must also take notice of the court's new standard, which may extend the statute of limitations on other statutes that lack a defined limitations period.

RECENT DEVELOPMENT

MCDOWELL v. STATE: ABSENT PROBABLE CAUSE, FOR A SEARCH OF A CONTAINER TO BE CONSTITUTIONAL, A POLICE OFFICER MUST ARTICULATE A REASONABLE SUSPICION THAT THE CONTAINER HOLDS A WEAPON AND WHY A *TERRY*-TYPE PAT-DOWN OF THE CONTAINER WOULD BE INSUFFICIENT TO DETERMINE WHETHER THERE ARE WEAPONS IN THE CONTAINER.

By: Matthew Powell

The Court of Appeals of Maryland held that a police officer conducting a search of a container must articulate reasonable suspicion that the container holds a weapon. *McDowell v. State*, 407 Md. 327, 965 A.2d 877 (2009). Moreover, the court held that the police officer must state why a *Terry*-type pat-down of the container would be insufficient to confirm or dispel the suspicion. *Id.* at 330, 965 A.2d at 879. If the police officer does not meet the two requirements, the search violates the Fourth Amendment of the United States Constitution. *Id.* at 332, 965 A.2d at 880.

Trooper Gussoni ("Gussoni") stopped a vehicle around midnight after observing the vehicle weave between lanes. Ernest McDowell ("McDowell"), the owner of the vehicle, sat in the passenger seat. Gussoni observed that both McDowell and the driver seemed nervous and "appeared to be out of it." While checking the status of the driver's license and vehicle registration, Gussoni saw McDowell reach underneath his seat. Gussoni approached the vehicle and saw McDowell reach toward a gym bag large enough to hold a weapon. Gussoni ordered McDowell to exit the vehicle and bring the gym bag with him. Once McDowell exited the vehicle, Gussoni ordered McDowell to open the gym bag, which contained a plastic bag holding a white powdery substance. Gussoni confiscated the gym bag and arrested McDowell. A further search conducted at the police station uncovered 55.5 grams of heroin in the gym bag.

Subsequent to his arrest, McDowell was charged in the Circuit Court for Queen Anne's County with several drug-related offenses. McDowell moved to suppress the evidence seized from the gym bag.

After a hearing, the circuit court denied the motion to suppress based on its finding that Gussoni's search of the gym bag was permissible. On an agreed statement of facts, the court found McDowell guilty of importing a controlled dangerous substance into the state and sentenced him to twenty years imprisonment. McDowell timely noted an appeal on the ground that Gussoni did not have a reasonable articulable suspicion to believe that McDowell was armed and dangerous. The Court of Special Appeals of Maryland affirmed the circuit court's decision, and the Court of Appeals of Maryland granted McDowell's petition for a writ of certiorari.

In reviewing the permissibility of Gussoni's search, the court relied on *Terry v. Ohio* and its progeny. *McDowell*, 407 Md. at 332, 965 A.2d at 880 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). *Terry* established a police officer's limited right to stop and frisk a person for weapons when the officer has a reasonable suspicion that criminal activity is occurring and that the person engaged in such activity may be armed and dangerous. *Id.* at 332-35, 965 A.2d at 880-81 (citing *Terry*, 392 U.S. at 23-29). As noted in *Terry*, however, a stop and frisk is limited to a "pat-down of the suspect['s] outer clothing" for the limited purpose of determining whether the suspect is armed. *Id.* at 334-35, 965 A.2d at 881 (citing *Terry*, 392 U.S. at 21). Moreover, the *Terry* court noted that a police officer must have a reasonable suspicion based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Id.* at 334, 965 A.2d at 881 (quoting *Terry*, 392 U.S at 21).

The court further noted that, in *Michigan v. Long*, the Supreme Court extended the *Terry* doctrine to the interior of vehicles to address the especially dangerous situations that can arise between suspects and police officers during vehicular stops. *Id.* at 335-36, 965 A.2d at 881-82 (citing *Michigan v. Long*, 463 U.S. 1032, 1049 (1983)). The Supreme Court reasoned that a *Terry*-like protective search for weapons in the interior of a vehicle without probable cause, did not violate the Fourth Amendment. *Id.* at 336, 965 A.2d at 882 (citing *Long*, 463 U.S. at 1049). Thus, if the police officer discovers incriminating evidence during the course of a *Terry* stop, that evidence is admissible against the suspect so long as the officer complies with the dictates of *Terry*. *McDowell*, 407 Md. at 336, 965 A.2d at 882 (citing *Long*, 463 U.S. at 1050).

Although McDowell conceded that the traffic stop was lawful and that Gussoni was authorized to order him out of the vehicle, McDowell claimed that Gussoni did not have a reasonable articulable

suspicion that McDowell was armed or had weapons in his bag. *Id.* at 336-37, 965 A.2d at 882. Furthermore, McDowell argued that Gussoni's actions were based solely on his nervous appearance, which was not sufficient to suggest criminal activity. *Id.* (citing *Ferris v. State*, 355 Md. 356, 389, 735 A.2d 491, 509 (1999)).

In determining whether Gussoni possessed a reasonable suspicion that the bag contained a weapon, the court applied a "totality of the circumstances" standard. *Id.* at 337, 965 A.2d at 882 (quoting *United States v. Sokolow*, 490 U.S. 1, 8 (1989)). The court concluded that Gussoni was potentially facing two armed men, alone, without immediate backup. *Id.* at 337-38, 965 A.2d at 883. In light of the situation, and the bag being large enough to contain a weapon, the court held that Gussoni was justified in examining the bag. *Id.* at 338, 965 A.2d at 883 (citing *Matoumba v. State*, 162 Md. App. 39, 873 A.2d 386 (2005)).

Next, the court determined whether Gussoni was justified in demanding that McDowell open the bag without first articulating why a pat-down of the bag would have been insufficient in discovering the presence of a weapon. *McDowell*, 407 Md. at 338, 965 A.2d at 883. Acknowledging that this was an issue of first impression yet to be addressed by the Supreme Court, the court considered authority from the federal circuits. *Id.* The Court of Appeals for the Ninth Circuit held that a police officer conducting a *Terry* stop had no reason to open a briefcase that was soft and thin enough that, by feeling it, any weapon could have been detected. *Id.* at 339, 965 A.2d at 883-84 (quoting *United States v. Vaughn*, 718 F.2d 332, 335 (9th Cir. 1983)). Conversely, the Eighth Circuit, in a situation similar to that presented in *McDowell* and *Vaughn*, held that a "pat-down was not a necessary precursor under *Terry* before opening and searching a pouch" found in a properly stopped vehicle. *Id.* at 339, 965 A.2d at 884 (citing *United States v. Shranklen*, 315 F.3d 959 (8th Cir. 2003)).

The Court of Appeals of Maryland did not find the Eighth Circuit's reasoning persuasive. *Id.* at 340, 965 A.2d at 884. Rather, the court found that the Eighth Circuit speculated instead of ruling on the evidence presented. *Id.* The court agreed with the Ninth Circuit's rationale, however, noting that *Terry* only permitted measures necessary to determine whether the person was armed. *McDowell*, 407 Md. at 340, 965 A.2d at 884. These measures must be limited in scope to an intrusion reasonably designed to discover weapons that could threaten the police officer. *Id.* (citing *Terry*, 392 U.S. at 29).

The court refused to speculate as to whether a pat-down of the bag would have been adequate in this situation. *Id.* at 341-42, 965 A.2d at

885. Thus, the court held that Gussoni was not justified in requiring McDowell to open the bag without articulating why a *Terry*-like pat-down of the exterior of the bag would have been insufficient to determine whether the bag contained a weapon. *Id.* Accordingly, the court held that the trial court should have granted McDowell's motion to suppress. *Id.* at 342, 965 A.2d at 885.

In *McDowell v. State*, the Court of Appeals of Maryland extended the dictates of *Terry* to containers. In doing so, the court determined that, to search a container during a *Terry* stop, police officers must state a reasonable and articulable basis for why a pat-down of the container would be insufficient to confirm or dispel the suspicion that the container held a weapon. As a result, *McDowell* requires police officers, prosecutors, and defense attorneys to be particularly attentive to the factual circumstances surrounding a *Terry* stop and any subsequent container searches. If a police officer obtains evidence from a container without meeting the requirements set forth in *McDowell*, any seized evidence will likely be suppressed as a violation of the Fourth Amendment.

RECENT DEVELOPMENT

MCQUITTY v. SPANGLER: A CLAIM FOR BREACH OF DUTY TO OBTAIN INFORMED CONSENT DOES NOT REQUIRE EVIDENCE OF A PHYSICAL INVASION.

By: Heather Pensyl

The Court of Appeals of Maryland held that it is not necessary to prove that a physical invasion occurred in order to bring a claim for breach of informed consent. *McQuitty v. Spangler*, 410 Md. 1, 976 A.2d 1020 (2009). Specifically, the court held that a sufficient claim for lack of informed consent arose when a physician failed to provide the patient with material information necessary to make a treatment decision, regardless of the presence of any physical invasion. *Id*. at 5, 976 A.2d at 1022.

On March 30, 1995, while twenty-eight weeks pregnant, Peggy McQuitty experienced a premature separation of the placenta from the uterus, known as a partial placental abruption. Mrs. McQuitty's attending physician, Dr. Donald Spangler, advised Mrs. McQuitty that a scheduled Cesarean Section delivery would be necessary. The timing of such posed a dilemma, however, because any further delay would increase the risk of additional separation of the placenta, and a complete abruption would cause the death of the fetus. Yet, if Dr. Spangler delivered the baby immediately, the fetus' lung immaturity also posed a risk of death. Accordingly, Dr. Spangler developed a management plan to delay the delivery, and Mrs. McQuitty consented to this plan.

About a week and a half later, a new abruption occurred, which was followed by further complications. Dr. Spangler never presented the option of delivering the baby, nor did he advise Mrs. McQuitty of the additional risks associated with the new complications. On May 8, 1995, a complete abruption occurred and Dr. Spangler conducted an emergency Cesarean Section. The complete abruption caused the child's severe cerebral palsy, which, according to testimony at trial, could have been avoided had the baby been delivered sooner.

On September 5, 2001, Mrs. McQuitty and her husband filed a complaint in the Circuit Court for Baltimore County against Dr. Spangler for malpractice and breach of the duty to obtain informed

consent. During the trial, the jury reached a verdict regarding the malpractice claim, but failed to do so regarding the informed consent claim. Two years later, at a second trial, addressing only the issue of informed consent, the jury returned a verdict in favor of the McQuittys and awarded damages of $13,078,515. However, the judge granted Dr. Spangler's motion for judgment notwithstanding the verdict on the basis that there was no "affirmative violation of Mrs. McQuitty's physical integrity." The McQuittys appealed to the Court of Special Appeals of Maryland, which affirmed the trial court's holding. The McQuittys then petitioned the Court of Appeals of Maryland for a writ of certiorari, which the court granted.

In its analysis of the case, the Court of Appeals of Maryland addressed the following issues related to informed consent: (1) whether a physician's withholding of material information from his patient, concerning changes in medical status, would give rise to an informed consent claim by negating any prior consent given regarding treatment, and (2) whether, under Maryland law, an informed consent claim could exist in the absence of damages caused by battery. *McQuitty*, 410 Md. at 4, 976 A.2d at 1022.

First, the court noted that in order to be effective, consent must be informed. *Id*. at 19, 976 A.2d at 1031. Informed consent requires that a physician provide all information material to the patient's decision to pursue a particular line of treatment. *Id*. (citing *Sard v. Hardy*, 281 Md. 432, 444, 379 A.2d 1014, 1019-20 (1977)). Additionally, informed consent includes a duty to warn the patient of any material risks or dangers that correlate with such treatment. *Id.* at 21, 976 A.2d at 1032. This duty does not require that the physician inform the patient of all risks; the physician must only disclose those that the physician knows, or ought to know, that a reasonable patient would find important in making his or her decision. *Id*. (quoting *Sard*, 281 Md. at 444, 379 A.2d at 1022). Thus, as in Mrs. McQuitty's case, when a physician fails to inform the patient of changes in circumstances and how those changes affect the risks inherent in a course of treatment, an informed consent claim arises. *Id.* at 3, 5, 976 A.2d at 1021-22.

The court then addressed whether a physical invasion requirement exists under the doctrine of informed consent. *McQuitty*, 410 Md. at 17, 976 A.2d at 1029. Dr. Spangler argued that the duty to obtain informed consent arises only when a physician proposes a treatment involving an "affirmative violation of the patient's physical integrity." Id. at 18, 976 A.2d at 1030 (quoting *Land v. Zorn*, 389 Md. 206, 230, 884 A.2d 142, 156 (2005); *Reed v. Compagnolo*, 332

Md. 226, 242, 630 A.2d 1145, 1153 (1993)). In rejecting Dr. Spangler's argument, the court relied on the historical common law basis for an informed consent claim. *Id.* at 26, 976 A.2d at 1035. As early as 1767, an informed consent claim could be pled on the case. *Id*. at 26, 976 A.2d at 1035 (citing *Slater v. Baker & Stapleton*, 95 Eng. Rep. 860 (K.B. 1767)). This cause of action was a precursor to negligence, rather than an action in battery. *Id.* (citing *Slater*, 95 Eng. Rep. 860). Thus, traditionally, the gravamen of a claim for lack of informed consent rested in the physician's duty to obtain consent to treatment. *Id.* at 28, 976 A.2d at 1036. Subsequent courts have interpreted this as a duty to provide the patient with all material information relevant to the patient's decision to pursue treatment. *McQuitty*, 410 Md. at 31, 976 A.2d at 1038 (citing *Sard*, 281 Md. at 444, 372 A.2d at 1022).

Next, the court analyzed *Reed v. Campagnolo*, wherein it held that a physician's failure to offer diagnostic tests should be analyzed under the professional standard of care, not the doctrine of informed consent. *Id.* at 25, 976 A.2d at 1034-35 (citing *Reed v. Campagnolo*, 332 Md. 226, 242-43, 630 A.2d 1143, 1152-53 (1993)). Additionally, the court in *Reed* held that the duty to obtain informed consent only arose when a physician failed to obtain consent to some treatment. *Id.* at 23, 976 A.2d at 1033 (citing *Reed*, 332 Md. at 241, 630 A.2d at 1152). In an attempt to distinguish the situation under which the doctrine of informed consent applied from a medical malpractice claim, the *Reed* court referenced *Karlsons v. Guerinot*, which held that an informed consent claim could not exist without "'an affirmative violation of the patient's physical integrity.'" *Id*. at 22, 976 A.2d at 1032-33 (quoting *Karlsons v. Guerinot*, 57 A.D.2d. 73, 82, 394 N.Y.S.2d 933, 939 (N.Y. App. Div. 1977)). This reference to *Karlsons* departed from the common law basis for an informed consent claim, and resulted in the view that an informed consent claim necessitated the additional element of a physical invasion. *Id.* at 26, 976 A.2d at 1035.

The court in *McQuitty* clarified this uncertainty and delineated the correct approach: a claim for lack of informed consent rests in negligence, rather than battery. *Id*. at 29, 976 A.2d at 1036-37. The court indicated that to require a physical invasion would contradict the underlying basis for the informed consent doctrine, which is to promote the patient's choice and personal autonomy. *McQuitty*, 410 Md. at 31, 976 A.2d at 1038. Accordingly, the court held that there exists no requirement of a physical invasion in the informed consent doctrine. *Id*. at 33, 976 A.2d at 1039.

By clarifying contradictory precedent, the court in *McQuitty* reconnected the informed consent doctrine with its common law origins in the law of negligence. The court reaffirmed the informed consent doctrine's strength with regard to ensuring the patient's right to make informed decisions about procedures and treatments that personally affect the patient. Requiring a patient to show evidence of battery in order to sustain an informed consent claim would have severely limited the doctrine's power. Thus, without the requirement of a physical invasion, a lower threshold exists for patients to bring claims for lack of informed consent, allowing legal practitioners to assert the patients' rights more readily. As a result of this decision, the amount of successful informed consent cases may increase.

RECENT DEVELOPMENT

PINES POINT MARINA v. REHAK: UPON FORFEIT OF A CORPORATE CHARTER, AN INCORPORATED COUNCIL OF CONDOMINIUM UNIT OWNERS DEFAULTS TO AN UNINCORPORATED ASSOCIATION, BUT RETAINS ITS RIGHT TO SUE AND BE SUED.

By: Robert Miller

The Court of Appeals of Maryland held that, upon forfeit of a corporate charter, an incorporated council of condominium unit owners defaults to the status of an unincorporated association, but does not lose its power to bring suit on behalf of the unit owners. *Pines Point Marina v. Rehak*, 406 Md. 613, 961 A.2d 574 (2008). Further, once it has defaulted to an unincorporated association, the council must file an amended complaint and sue as an unincorporated association. *Id*. at 638, 961 A.2d at 589.

In July of 1999, Pines Point Marina, a Condominium Council of Unit Owners ("Pines Point"), incorporated as a non-stock, non-close corporation. Between 1999 and 2005, Pines Point contracted with M.V. Ocean Pines Limited Partnership ("Ocean Pines") to develop a marina and install condominium unit boat slips. Ocean Pines subcontracted with Rehak Floating Docks ("Rehak") to construct floating docks for the project. Topper Industries, Inc. manufactured and supplied the flotation devices used for the floating docks.

On October 4, 2003, after a severe hurricane season, Pines Point noticed that the flotation devices for many of the floating docks were loose. Consequently, Pines Point filed a complaint against Rehak and the other contractors in the Circuit Court for Worchester County on August 30, 2006, alleging breach of contract and negligence.

Rehak filed a motion for summary judgment, asserting that, due to the forfeiture of its corporate charter on October 7, 2005, Pines Point no longer had standing to sue as a corporation. The circuit court granted summary judgment, and Pines Point appealed to the Court of Special Appeals of Maryland. Before the intermediate appellate court could hear the appeal, the Court of Appeals of Maryland issued a writ of certiorari on its own initiative.

The main issue addressed by the Court of Appeals of Maryland was whether a council of condominium unit owners, upon loss of corporate status, forfeits its ability to sue on behalf of the council of unit owners. *Pines Point Marina*, 406 Md. at 616, 961 A.2d at 576. The court first examined the ambiguities and inconsistencies between section 11-109 of the Real Property Article of the Maryland Code ("section 11-109") and Titles 3 and 5 of the Corporations and Associations Article of the Maryland Code ("Corporations Article"). *Id.* at 620, 961 A.2d at 578. The court explained that a certified corporation under Title 3 of the Corporations Article may be stripped of all powers conferred by law, including the right to file suit, for noncompliance with the Title. *Id*. at 624, 961 A.2d at 581 (quoting MD. CODE ANN., CORPS. & ASS'NS § 3-503(d) (2008)). In contrast, section 11-109 provides that a council of condominium unit owners constitutes a legal entity for all purposes—"even if unincorporated." *Id.* at 625, 961 A.2d at 581 (quoting MD. CODE ANN., REAL PROP. § 11-109(a) (2008)). The court noted that nothing in section 11-109 indicates whether the section applies to only councils of unit owners that never incorporated, or if it applies to councils unincorporated by forfeiture. *Id.*

To interpret the statutory language, the court looked to secondary sources. *Id.* at 626, 961 A.2d at 581. The court compared the Uniform Condominium Act ("UCA") to section 11-109 and determined that the General Assembly intended to allow councils of unit owners to function as legal entities despite corporate status. *Pines Point Marina,* 406 Md. at 630, 961 A.2d at 584. The court bolstered its interpretation, explaining that the UCA had been influential on the General Assembly, as evidenced by an amendment to section 11-109 patterned on the UCA. *Id*. at 632, 961 A.2d at 586. The court concluded that the General Assembly had chosen to adopt certain language from the UCA and declined to adopt the UCA approach that councils of unit owners must incorporate before having standing to sue. *Id*. at 633, 961 A.2d at 586. According to the court, by adopting certain language of the UCA and declining to adopt others, the General Assembly intended that incorporated and unincorporated councils of unit owners are governed by section 11-109. *Id*. at 633-34, 961 A.2d at 586.

The Court of Appeals of Maryland further explained that section 11-109 should be interpreted in light of the General Assembly's intent to govern condominium communities in a way that maximizes the value of unrelated people with a mutual property interest. *Id*. at 634, 961 A.2d at 586. For that reason, in exercising its governing authority,

the council of unit owners must be able to sue and be sued on its own behalf or on behalf of the unit owners on matters affecting the condominium. *Id*. at 636, 961 A.2d at 587-88. Accordingly, when an incorporated council of unit owners forfeits its corporate charter, the council becomes an unincorporated association with the power to bring and defend suit under section 11-109. *Pines Point Marina,* 406 Md. at 636, 961 A.2d at 587-88. As a result, the court determined that Pines Point was not barred from bringing suit after the forfeiture of its corporate charter. *Id.* at 637, 961 A.2d at 588.

The court next addressed the issue of whether Pines Point's amended claim, filed on October 2, 2007, was still viable with regard to the three-year statute of limitations. *Id*. The court noted that because Pines Point's corporate status had changed, Pines Point should have amended its complaint and sued as an unincorporated association. *Id*. at 638, 961 A.2d at 589. Under Maryland law, any amended complaint filed by Pines Point after the statute of limitations tolled on October 4, 2006, must relate back to its original complaint filed on August 30, 2006. *Id*. at 639-40, 961 A.2d at 590. The Court of Appeals of Maryland remanded the issue of whether Pines Point's amended complaint related back to the original complaint. *Id*. at 641, 961 A.2d at 591.

The court's holding in *Pines Point Marina* established that councils of condominium unit owners are legal entities regardless of their corporate status. Incorporated councils of unit owners are subject to Titles 3 and 5 of the Corporations Article to the extent of incorporation and forfeiture of corporate status. This exception is based on the necessity of councils of unit owners being able to sue in situations where it would be too costly for each unit owner to sue on behalf of the council individually, and a council's unique position as being the only entity with standing to sue on matters affecting only common areas. This is important in Maryland because the legal standing requirements of incorporated and unincorporated councils of unit owners are the same. Maryland practitioners should be aware of the decision in *Pines Point Marina* because a change in the corporate legal status of a council of condominium unit owners does not affect the council's legal standing, but the change must be reflected in an amended complaint if the change occurs after the council files its claim.

RECENT DEVELOPMENT

RIVERA v. STATE: A CORAM NOBIS PETITION, RESTING ON A PROBATION BEFORE JUDGMENT, WHERE DEPORTATION IS A POTENTIAL COLLATERAL CONSEQUENCE, MAY BE DENIED IF THE GUILTY PLEA WAS MADE KNOWINGLY AND VOLUNTARILY, IN SATISFACTION OF CONSTITUTIONAL DEMANDS.

By: K. Alice Young

The Court of Appeals of Maryland held that, although standing for a coram nobis petition may rest on probation before judgment when deportation is a potential collateral consequence, the court may deny relief if the plea otherwise satisfies the demands of the Maryland Rules. *Rivera v. State*, 409 Md. 176, 973 A.2d 218 (2009). Specifically, when the record illustrates a knowing and voluntary guilty plea, the coram nobis court may deny relief without looking beyond the record to the assurances relied on by the defendant in making his plea. *Id.* at 195-96, 973 A.2d at 230.

The State arrested Juan Rivera ("Rivera") during divorce proceedings after his wife alleged that he committed child sexual abuse. The State presented evidence that Rivera engaged in anal intercourse with his daughter. Rivera admitted to becoming aroused on one occasion when his daughter was in her parents' bed, but denied any other sexual behavior toward his daughter. The State charged Rivera, a citizen of Peru and a lawful permanent resident of the United States, with child abuse, second-degree sexual offense, and third-degree sexual offense. Rivera and the State negotiated a guilty plea.

Mary Herdman ("Herdman"), Assistant State's Attorney for Montgomery County, wrote a letter to Rivera's counsel, in which she acknowledged Rivera's concerns and addressed his deportation risks. According to Herdman's letter, a Special Agent for Immigration and Customs Enforcement ("ICE") verified that ICE would not "look behind" the charge of "contributing to acts, omissions, or conditions rendering a child in need of assistance" for deportation purposes. Relying on these specific assurances in Herdman's letter, Rivera pleaded guilty to that charge on January 24, 2005, in the Circuit Court

for Montgomery County, and was subsequently sentenced to 360 days incarceration and two years of supervised probation.

Rivera filed a timely motion to reconsider his sentence. The sentencing modification court struck his guilty plea and entered a probation before judgment on January 16, 2007. Within three months, ICE arrested Rivera, who then petitioned for coram nobis relief.

The coram nobis court denied Rivera's petition on the merits, and alternatively, for lack of jurisdiction. The Court of Special Appeals of Maryland affirmed the denial of coram nobis on the merits, but disagreed with the lower court's holding that it lacked jurisdiction to grant the petition. The Court of Appeals of Maryland granted Rivera's petition for writ of certiorari and the State's conditional cross-petition for certiorari on the jurisdiction issue.

The Court of Appeals of Maryland first addressed the threshold jurisdictional issue. *Rivera*, 409 Md. at 191-92, 973 A.2d at 227-28. A petitioner for coram nobis relief seeks to correct a fundamental or constitutional error in his conviction, particularly when facing a significant collateral consequence from the conviction. *Id.* at 190-91, 973 A.2d at 227 (citing *Skok v. State*, 361 Md. 52, 75, 760 A.2d 647, 659 (2000)). Relying on precedent, the court explained that a probation before judgment can be considered a conviction for coram nobis purposes, when supported by the circumstances of the case. *Id.* at 191-92, 973 A.2d at 228. The court reasoned that eligibility for coram nobis relief rests not on the method of sentencing, but on the consequences that arise from the conviction itself. *Id*. at 192, 973 A.2d at 228 (quoting *Abrams v. State*, 176 Md. App. 600, 616-17, 933 A.2d 887, 897 (2007)).

Relying on this rationale, the court considered the critical issue of whether Rivera's conviction itself would result in significant collateral consequences, notwithstanding the form of sentencing. *Id.* at 192-93, 973 A.2d at 228-29. In 2000, the court held that deportation proceedings are a significant collateral consequence of a conviction, thereby critically expanding the availability of coram nobis relief in Maryland. *Id*. at 193, 973 A.2d at 229 (citing *Skok*, 361 Md. at 77, 760 A.2d at 660-61). Therefore, the court explained, Rivera's probation before judgment allowed standing for coram nobis relief, because even that sentence put him at risk for deportation. *Rivera*, 409 Md. at 193, 973 A.2d at 229.

The court then analyzed whether the colloquy on the record supported Rivera's voluntary entry into the guilty plea. *Id*. at 195, 973 A.2d at 230. Rivera contended that he pleaded guilty based on the

State's Attorney's written assurance that ICE would not use the lesser charge as a foundation for deportation proceedings. *Id*. Prior to the plea colloquy, Rivera's counsel requested that the court seal and incorporate into the court file the plea negotiation documents. *Id.* at 181, 973 A.2d at 221. Rivera's counsel noted that the referenced documents related to Rivera's potential immigration consequences. *Id.* at 181, 973 A.2d at 221-22. Rivera's plea colloquy immediately thereafter included questions about his understanding of the immigration consequences of a guilty plea. *Id.* at 193-94, 973 A.2d at 229.

The Court of Appeals of Maryland held that Rivera's plea colloquy comported with Maryland Rule 4-242(e) because the plea judge informed Rivera about the possibility of immigration consequences. *Rivera*, 409 Md. at 194, 973 A.2d at 229. The court reasoned that, despite Rivera's reliance on assurances from ICE in Herdman's correspondence, the letter did not provide Rivera a guarantee against deportation. *Id.* at 195-96, 973 A.2d at 230. The court determined that Rivera pleaded guilty voluntarily and that, although neither the State nor Rivera expected his deportation, the record failed to validate his reliance on Herdman's letter as a guarantee. *Id*.

Finally, the court analyzed the denial of coram nobis relief based on the sufficient factual foundation for Rivera's knowing entry into his guilty plea. *Id.* at 194-95, 973 A.2d at 229-30. Rivera contended that his guilty plea was unknowing and fundamentally flawed because the charge to which he pleaded guilty was not substantiated by the facts to which he averred. *Id.* at 187, 973 A.2d at 225. In Maryland, a court may accept a guilty plea after an examination of the defendant in a colloquy on the record, conducted either by the court, the State's Attorney, or the defendant's attorney. *Id.* at 195, 973 A.2d at 230 (quoting Md. Rule 4-242(c)). The court reasoned that a court derives the factual support underlying a guilty plea from either the defendant's testimony or opposing allegations. *Rivera*, 409 Md. at 194-95, 973 A.2d at 229-30 (citing *Methany v. State*, 359 Md. 576, 601, 755 A.2d 1088, 1103 (2000)). The court held that the statement of facts proffered by the State, which alleged that Rivera engaged in an act of anal intercourse with his daughter, sufficiently supported Rivera's knowing guilty plea. *Id.* at 195-96, 973 A.2d at 230.

Rivera emphasizes the need for defense counsel to critically view offers the State puts forth in order to obtain a guilty plea. A reviewing court may choose not to consider the assurances underlying a guilty plea as guarantees made by the State. Although *Rivera* preserves

coram nobis to protect defendants from collateral consequences, the ruling underscores the risk of relying on assurances put forth by the State to entice the defendant's plea. Maryland practitioners should take great care when counseling defendants who risk deportation as a collateral consequence of a conviction, because deportation can result even from a probation before judgment. Maryland practitioners should also ensure that the plea colloquy includes both a description of the State's assurances upon which the defendant bases his voluntary plea, and an acknowledgement by the court of the effect of those assurances. A thorough colloquy will create a record upon which the defendant may rely, in order to show the foundation for his knowing and voluntary plea.

RECENT DEVELOPMENT

UNIVERSITY SYSTEM OF MARYLAND v. MOONEY: THIRD-PARTY ASSIGNEES TO A CONTRACT WITH THE STATE OF MARYLAND OR ITS UNITS, WHEN SEEKING TO RECOVER FUNDS DUE UNDER THE CONTRACT, MUST EXHAUST ADMINISTRATIVE REMEDIES PRIOR TO SEEKING JUDICIAL RELIEF.

By: Kristin Drake

The Court of Appeals of Maryland held that third-party assignees to a contract with the state or any of its units, who are looking to recover funds due to them under the contract, are required to exhaust all available administrative remedies prior to seeking relief in the courts. *Univ. Sys. of Md. v. Mooney*, 407 Md. 390, 966 A.2d 418 (2009). Specifically, the court held that assignees of a contract governed by the State Finance and Procurement Article were persons within the meaning of the Article and thus required to follow the same administrative procedures as original contracting parties. *Id.* at 412, 966 A.2d at 430-31.

In October 2002, Kevin and Teresa Mooney ("Mooneys") lent Chesapeake Cable, LLC ("Chesapeake") $250,000 in exchange for two promissory notes and a security agreement. In April 2003, after Chesapeake defaulted on the loan, the Mooneys perfected their security interest and became the assignee of Chesapeake's accounts receivable. Shortly thereafter, the University System of Maryland ("University") issued a check to Chesapeake for services previously rendered.

On June 4, 2004, the Mooneys filed suit against the University in the Circuit Court for Prince George's County. The suit alleged that the University violated section 9-406(a) of the Commercial Law Article of the Maryland Code, which requires an account debtor to discharge his or her obligation by paying the assignee directly after receiving notification that an amount due has been assigned. The circuit court held that, because there was no written contract between the Mooneys and the University, the Mooneys' claim was a tort action. The Mooneys appealed to the Court of Special Appeals of Maryland, which held that the circuit court erred and remanded the case.

On remand, the circuit court held that the Mooneys could not sue the University because of the principle of sovereign immunity. The Mooneys again appealed to the Court of Special Appeals of Maryland, which held that the Mooneys could enforce Chesapeake's contractual rights. The judgment of the circuit court was vacated and the case was remanded. The University then petitioned the Court of Appeals of Maryland for a writ of certiorari, which the court granted.

Before the Court of Appeals of Maryland, the University argued that, before the Mooneys could bring their contract action to court, they were required to seek administrative relief by filing an appeal with the Maryland State Board of Contract Appeals ("Appeals Board"). *Mooney*, 407 Md. at 400, 966 A.2d at 424. The court determined that, despite the University raising it for the first time in its petition for certiorari, the issue of exhaustion of administrative remedies is treated like a jurisdictional question, and thus may be raised by the court *sua sponte*. *Id.* at 401-02, 966 A.2d at 425 (citing *Sec'y, Dep't of Human Res. v. Wilson*, 286 Md. 639, 645, 409 A.2d 713, 717 (1979)).

The Court of Appeals of Maryland began its analysis by discussing *Zappone v. Liberty Life Insurance Co.*, which provided the factors for determining whether the administrative remedies under a statute are exclusive, primary, or concurrent. *Id.* at 403, 966 A.2d at 426 (citing *Zappone v. Liberty Life Ins. Co.*, 349 Md. 45, 60-61, 706 A.2d 1060, 1067-68 (1998)). *Zappone* held that, in the absence of statutory language to the contrary, there exists a rebuttable presumption that administrative remedies are intended to be primary. *Id.* at 404, 966 A.2d at 426 (citing *Zappone*, 349 Md. at 63, 706 A.2d at 1069). The court relied on factors used in *Zappone* to evaluate when the presumption is refuted. *Id.* (citing *Zappone*, 349 Md. at 64-65, 706 A.2d at 1070). These factors included the comprehensive nature of the administrative remedy, the agency's view of the breadth of its jurisdiction, and the nature of the separate judicial cause of action sought by the plaintiff. *Id.*

The Court of Appeals of Maryland first looked at Title 15, Subtitle 2 of the State Finance and Procurement Article, which governs contract disputes with the University. *Mooney*, 407 Md. at 406, 966 A.2d at 427. In particular, the court analyzed four sections: section 15-211, which grants the Appeals Board jurisdiction over all appeals; section 15-217, which provides that a person awarded a procurement contract may submit a claim to a procurement officer; section 15-220, which states that a contractor may appeal a final action to the appeals

board; and section 15-223, which allows for judicial review of final decisions of the Appeals Board. *Id.* at 407, 966 A.2d at 428. (citing MD. CODE ANN., STATE FIN. & PROC. §§ 15-211, 15-217, 15-220, 15-223 (2006)).

In applying the *Zappone* factors to this statutory scheme, the court noted that it had considered these four sections in an earlier decision, wherein it deemed that the remedy was either exclusive or primary, but not concurrent. *Id.* at 408, 966 A.2d at 429 (citing *SEFAC Lift & Equip. Corp. v. Mass Transit Admin.*, 367 Md. 374, 788 A.2d 192 (2002)). The court determined that, although the use of the words "all appeals" in section 15-211 seemed to grant exclusive jurisdiction to the appeals board, no such inference could be drawn from section 15-217 or section 15-220. *Id.* at 407-08, 966 A.2d at 428. The court found that the language in these sections did not explicitly require that claimants exhaust administrative remedies prior to seeking judicial relief, in part because the language is discretionary ("may appeal") rather than mandatory ("shall appeal"). *Id*. The court determined that the language used in these sections indicated that the remedy for contract disputes was not intended to be exclusive. *Id.*

In finding that the remedy under the statute was not exclusive, the court determined that the statutory language in question did not support a rebuttal of the presumption that the remedies were primary. *Mooney*, 407 Md. at 408, 966 A.2d at 428. The court reasoned that the Appeals Board viewed its jurisdiction as primary because it was able to decide all contractual disputes with any state agency. *Id.* (quoting MD. CODE REGS. 21.02.02.02 (2009)). The language giving the Appeals Board jurisdiction over all disputes, taken together with the statutes considered by the court, led the court to conclude that the administrative remedy for contract disputes with state agencies was primary. *Id.* at 409, 966 A.2d at 429.

Next, the court considered whether the Mooneys were "a person" for the purpose of section 15-217. *Id.* at 410-12, 966 A.2d at 429-30 (citing MD. CODE ANN., STATE FIN. & PROC. § 15-217). The court noted that section 15-217 used the definition found in section 11-101, which defined a "person" as "an individual, receiver, trustee, guardian, personal representative, fiduciary, or representative . . . ." *Id.* at 411, 966 A.2d at 430 (quoting MD. CODE ANN., STATE FIN. & PROC. § 11-101 (2006)). The court determined that this language indicated that section 15-217 should be applied to third parties representing the interests of original contracting parties. *Id.* The court reasoned that the Mooneys were "a person" as defined by the statute because the

Mooneys were collecting funds that were originally due to another party. *Mooney*, 407 Md. at 411, 966 A.2d at 430.

The court then analyzed the Mooney's rights as assignees. *Id*. The court relied on section 9-404(a) of the Commercial Law Article of the Maryland Code, which states that assignees of a contract are subject to the terms of the original agreement. *Id.* (citing MD. CODE ANN., COM. LAW § 9-404(a) (2002)). Expanding on this concept, the court determined that, because an assignee was subject to the same contract terms as the original parties, the assignee was also subject to the same procedural requirements. *Id.* at 412, 966 A.2d at 430-31. Therefore, the court held that the Mooneys were required to follow the same procedure that Chesapeake would have been required to follow, and exhaust all administrative remedies prior to seeking judicial relief. *Id.* at 412, 966 A.2d at 431.

In holding that assignees are subject to the same procedural requirements as original contracting parties in state contracts, the court has clarified where assignees should seek relief. Under the State Finance and Procurement Article, both original and third-parties must first file their claim administratively before seeking a judicial remedy. In cases where an attorney is uncertain as to whether a statute requires an exhaustion of administrative remedies, the safest practice is to file the claim both administratively and judicially. If necessary, the trial court can stay the claim pending an administrative decision.