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LETTER FROM THE EDITOR-IN-CHIEF

To the Maryland Legal Community:

The Editorial Board and Staff of the *University of Baltimore Law Forum* is proud to present the first issue of Volume 51. *Law Forum* is dedicated to publishing developing trends unique to the Maryland legal community. This is the first *Law Forum* issue where collaboration occurred in a fully online setting. The global pandemic motivated us to become more creative in our process in order to ensure the quality of our pieces. I am excited and honored to share this publication.

Volume 51.1 opens with an article by Tyler Yeargain in which he analyzes the Maryland legislative appointment process and potential paths to reform. The second article is written by Charles I. Joseph, Esq., Gillian Drake, and Kailey Silverstein, JD. In this article, the authors examine effective storytelling strategies and the connection it has to trial and litigation. Also, included are two student comments. The first, written by Ryan Maher, discusses the evolution of student athlete compensation models and the discord that exists between state legislation and the NCAA. The second, authored by Paulina Taniewski, challenges the current Maryland child pornography statute and its application to teenage consensual sexting. Finally, included are seven recent development pieces which interpret recent decisions made by the Maryland Court of Appeals.

This publication reflects the hard work and commitment of our Editorial Board and Staff Editors. I want to thank the entire *Law Forum* Staff for their diligence, versatility, and creativity throughout the production process. I also want to recognize our Faculty Advisor, Professor Angela Vallario and the Assistant Dean of Academic and Writing Support, Dean Claudia Diamond, for their guidance and support.

On behalf of the *Law Forum*, we thank you, our readers, for your continued interest in our publication.

Sincerely,

Isabel Jorrin Garcia
Editor-in-Chief
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ARTICLE

MARYLAND'S LEGISLATIVE APPOINTMENT PROCESS: KEEP IT AND REFORM IT

By: Tyler Yeargain[1]

I. INTRODUCTION

Starting in the 1930s, Maryland no longer required that state legislative vacancies be filled by special elections, as most states did at the time. Instead, the state provided that legislative vacancies would be filled by gubernatorial appointments. Following several additional constitutional amendments, this system has changed over time, but has largely remained in place. Now, the state party's district committee effectively operates as the body responsible for filling the vacancy, with the governor operating as a *de facto* rubber stamp. Most of the time, this process has quietly operated in the background, churning out replacement legislators as necessary, attracting little attention in the process.

But that's started to change. Though some legislators have pushed in recent years to instead require special elections,[2] the push has intensified in the last year following the nomination of Chanel Branch to fill a State House seat. Branch, the daughter of House Majority Whip Talmage Branch, was narrowly elected by the Democratic Central Committee for the 45th Legislative District to fill the vacancy left by State Delegate Cheryl Glenn, who was charged with bribery and wire fraud.[3] Branch's nomination, already mired by allegations of nepotism, was made worse by the fact that she sat on the central committee in charge of filling the vacancy and cast the deciding vote for herself,[4] and that reporters were removed from the central committee's meeting.[5] Despite the controversy, however, Governor Larry

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[1] Associate Director, Yale Center for Environmental Law and Policy.

[2] *See, e.g.*, Len Lazarick, *Delegates Want Voters to Fill Vacancies in Legislature, But GOP Wants to Keep Party Role*, MARYLANDREPORTER.COM (Jan. 30, 2015), https://marylandreporter.com/2015/01/30/delegates-want-voters-to-fill-vacancies-in-legislature-but-gop-wants-to-keep-party-role/.

[3] Talia Richman, *Chanel Branch Nominated to Replace Baltimore Del. Cheryl Glenn in Maryland House After Corruption Scandal*, BALT. SUN (Jan. 14, 2020, 5:29 PM), http://www.baltimoresun.com/politics/bs-md-pol-cheryl-glenn-replacement-20200114-dtixp6qxibcnbksxa6f5aeeevy-story.html.

[4] *Id.*

[5] Fern Shen, *Reporter Booted Out of Meeting Where Chanel Branch Is Voted in*, BALT. BREW (Jan. 14, 2020, 8:02 AM), https://www.baltimorebrew.com/2020/01/14/reporter-booted-out-of-meeting-where-chanel-branch-is-voted-in/.

Hogan ended up appointing her, and she will hold the seat until the 2022 election.[6]

The response from lawmakers was swift. State Comptroller Peter Franchot, a candidate for Governor in 2022, called for the state to bring back special elections.[7] State Delegate David Moon, who had previously introduced a constitutional amendment in 2015, again pushed for an amendment to change the way that the state fills legislative vacancies.[8] Though Moon's initial proposal was to require immediate special elections, mirroring Franchot's idea, he backed away from that idea in the face of fierce opposition.[9] His current proposal is to preserve the appointment process, but to have the appointee only serve until the next general election—which, for Branch, would have been 2020.[10]

At first blush, Maryland's system seems inherently antidemocratic—a vestige of a time when votes didn't count equally, and decisions were made by men in smoke-filled back rooms—and therefore worthy of a massive overhaul. But the simplicity of that conclusion belies its accuracy. Special elections, though obviously "democratic" events in a literal sense, are almost always low-turnout affairs held at strange times of the year that ultimately deprive communities of representation for the vast majority of legislative sessions. Legislative appointment systems, like Maryland's, reflect a conscientious decision by Progressive Era reformers to push for accurate, consistent representation and to avoid unnecessary and frequent elections. Though Maryland's system is undoubtedly in need of reform, it should be *reformed*—not scrapped.

This Article proceeds in three parts. First, in Part I, it explains how Maryland's appointment system works and briefly recounts its history, beginning with the state's first constitution in the post-Revolutionary Era and continuing to the twenty-first century. Then, Part II argues that appointment systems are inherently preferable to—and are more democratic than—special

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[6] Talia Richman, *Gov. Hogan Appoints Chanel Branch of Baltimore to Replace Cheryl Glenn in Maryland House*, BALT. SUN (Jan. 28, 2020, 4:10 PM), http://www.baltimoresun.com/politics/bs-md-pol-chanel-branch-20200127-5eplz5frqnfktplgwpein2jnoe-story.html; *see* MD. CONST. art. III, § 13 (1936).

[7] Peter Franchot (@peterfranchot), TWITTER (Jan. 14, 2020, 6:21 PM), https://twitter.com/peterfranchot/status/1217270535236792323 ("Enough is enough. It's time to do away with the secretive elections that are decided by a handful of votes and violate every recognized principle of democracy. I will happily support legislation to hold special elections when these vacancies occur.").

[8] Talia Richman, *Maryland Legislators Target Process for Filling General Assembly Vacancies, Say It Needs to Be More Democratic*, BALTIMORE SUN (Jan. 20, 2020, 5:00 AM), http://www.baltimoresun.com/politics/bs-md-pol-filling-assembly-vacancies-20200120-b666psl3bvh33facglcs7qktyy-story.html.

[9] *Id.*

[10] *Id.*

elections because they maximize accuracy and immediacy in representation. Finally, Part III outlines the changes that can, and should, be made to the system that will allow it to better reflect the goals of all legislative appointment systems.

I. MARYLAND'S CURRENT SYSTEM

In 1776, Maryland's first constitution provided for a bicameral legislature, each chamber having different election procedures and different mechanisms for filling vacancies. The House of Delegates was popularly elected, with vacancies filled by special elections called by the House Speaker.[11] The Senate was indirectly elected, by an electoral college composed of county-level electors,[12] and vacancies were filled by the Senate itself.[13]

This bifurcated treatment, both of elections and vacancies, wasn't restricted to Maryland. The Senate's selection process served as an inspiration for the indirect election of U.S. Senators in the federal constitution, evidenced by the contemporaneous accounts of the Framers,[14] and for the use of the Electoral College to select the President.[15] Similarly, when Kentucky was admitted as a state in 1792, its first constitution provided for nearly identical procedures for electing state senators and filling senate vacancies.[16]

But despite the influence and initial popularity of Maryland's system, it quickly broke down. Though one-person-one-vote was a concept that

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[11] MD. CONST. art. II (1776).
[12] See *id.* arts. XIV, XV.
[13] See *id.* art. XIX.
[14] Federalist NO. 63 (Hamilton or Madison) ("The constitution of Maryland furnishes the most apposite example. The Senate of that State is elected, as the federal Senate will be, indirectly by the people, and for a term less by one year only than the federal Senate. It is distinguished, also, by the remarkable prerogative of filling up its own vacancies within the term of its appointment, and, at the same time, is not under the control of any such rotation as is provided for the federal Senate. There are some other lesser distinctions, which would expose the former to colorable objections, that do not lie against the latter. If the federal Senate, therefore, really contained the danger which has been so loudly proclaimed, some symptoms at least of a like danger ought by this time to have been betrayed by the Senate of Maryland, but no such symptoms have appeared. On the contrary, the jealousies at first entertained by men of the same description with those who view with terror the correspondent part of the federal Constitution, have been gradually extinguished by the progress of the experiment; and the Maryland constitution is daily deriving, from the salutary operation of this part of it, a reputation in which it will probably not be rivalled by that of any State in the Union."); *see also* A. Clarke Hagensick, *Revolution or Reform in 1836: Maryland's Preface to the Dorr Rebellion*, 57 MD. HIST. MAG. 346, 347 (1962).
[15] John D. Feerick, *The Electoral College: Why It Was Created*, 54 A.B.A. J. 249, 252 n.34 (1968); Hagensick, *supra* note 14, at 347.
[16] KY. CONST. art. I, §§ 10, 12 (1792).

wouldn't exist for another century and a half, the use of a county-based electoral college necessarily meant that some votes counted more than others. Indeed, it was possible to win the statewide popular vote for state senate electors but to fail to win a majority on the electoral college itself. And being in the minority on the senate's electoral college, even by just a few seats, was devastating. The electoral college picked *every* member of the state senate by majority vote, meaning that a one-vote majority on the electoral college for one political party usually meant a *unanimous* slate of senators for that party.[17] Moreover, the general assembly elected the governor, meaning that the senate's composition directly affected the composition of another branch.[18] And to compound matters, the vacancy-filling procedure was effectively used to alter the composition of the senate altogether—in one term, all but one of the state senators had been selected to fill vacancies and hadn't even been elected by the electoral college.[19]

In the 1836 elections, the Democrats won 53% of the statewide popular vote for senate electors but ended up with only 19 electors to the Whig Party's 21.[20] Hoping to use public pressure to force a more equitable senate composition, the Democratic electors refused to convene, depriving the electoral college of a quorum.[21] Their position eroded, however, the following month in the State House elections, when Whigs won a commanding majority, and the Democratic electors allowed the electoral college to convene, which in turn elected a unanimous Whig Senate.[22] But the new general assembly, though dominated by Whigs, was sympathetic to the process arguments raised by the Democrats. The assembly pushed for transformative constitutional changes, which included making the Governor and State Senate popularly elected and requiring special elections to fill senate vacancies.[23]

This system remained in place for almost a century. But in 1935, the Maryland general assembly decided to switch gears.[24] Beginning two decades prior, a handful of states began amending their constitutions and statutes to

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[17] Hagensick, *supra* note 14, at 347–48. However, in 1826, after the National Republicans won a majority on the senate electoral college based, in part, on their pledge to appoint a bipartisan senate, the Senate was composed of eleven National Republicans and four Federalists. It was the only time that the Senate was not unanimously controlled by one party. Tyler Yeargain, *The Legal History of State Legislative Vacancies and Temporary Appointments*, 28 J.L. & POL'Y 564, 578 n.69 (2020).

[18] MD. CONST. art. XXV (1776).

[19] Hagensick, *supra* note 14, at 347–48.

[20] *Id.* at 350.

[21] *Id.*

[22] *Id.* at 353–56.

[23] MD. CONST. art. III, §§ 6 (amended 1837); HERBERT CHARLES SMITH & JOHN T. WILLIS, MARYLAND POLITICS AND GOVERNMENT: DEMOCRATIC DOMINANCE 137–38 (2012); Hagensick, *supra* note 14, at 357.

[24] Yeargain, *supra* note 18, at, 592–93.

fill legislative vacancies, at least some of the time, through temporary appointments.[25] Many of these appointment procedures had same-party requirements—that is, whomever was granted the power of appointment, be it the governor, county commission, or even local party officials, was required to fill the vacancy with someone of the same party as the previous incumbent.[26] These changes, firmly rooted in the Progressive movement, were adopted with the same vein of thought as the Seventeenth Amendment, the short-ballot movement, unicameralism, proportional representation, and the Model State Constitution.[27]

The Maryland constitutional amendment that was drafted by the general assembly in 1935, and approved by the voters in 1936, provided for a same-party appointment system.[28] When a vacancy occurred, the state party with whom the previous legislator had been "affiliated" was empowered to draft a list of nominees, one of whom would be selected to fill the seat by the Governor.[29] Subsequent amendments in 1966, 1978, and 1986 made small changes to this provision, but largely kept it intact.[30] The 1966 amendment transferred the power from the state party to its county-level central committees,[31] the 1978 amendment clarified what would occur if there was no central committee to draft a list of nominees,[32] and the 1986 amendment clarified that party affiliation was determined "at the time of the last election or appointment."[33]

The procedure is relatively simple. If a legislator vacates their seat, the county-level central committees nominate a replacement, who is then appointed by the governor and serves out the remainder of the term.[34] Though the constitution implies that the committees are only meant to nominate *one* name, the state attorney general has clarified that if they nominate *more* than one name, the governor must pick one of the two.[35] If the district includes

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[25] *Id.* at 588-89, 591.
[26] *Id.* at 589-93.
[27] *Id.* at 588-89, 593.
[28] MD. CONST. art. III, § 13 (1936).
[29] *Id.*
[30] DAN FRIEDMAN, THE MARYLAND STATE CONSTITUTION: A REFERENCE GUIDE 139-40 (2011).
[31] MD. CONST. art. III, § 13 (1967).
[32] MD. CONST. art. III, § 13 (1979).
[33] MD. CONST. art. III, § 13 (amended 1987).
[34] *Id.*
[35] Friedman, *supra* note 30 at 94 (quoting 62 Op. Md. Att'y Gen. 241 (Oct. 19, 1977)). From context, this may or may not be clear. The constitution merely provides, "the Governor shall appoint a person to fill such vacancy from a person whose name shall be submitted to him in writing[.]" MD. CONST. art. III, § 13. That's a relatively vague sentence—it could be read to empower the central committee to select one name ("*a* person") or more than one, with the Governor picking among them ("the Governor shall appoint a person to fill such vacancy *from*"). If taking into account how other states fill

more than one county, the central committees from each county cast one vote in favor of a nominee—if there's a tie, all names are forwarded to the governor for selection.[36] And if the previous legislator was elected as an independent or as a member of a minor party without a central committee, the governor can pick whomever they like, so long as the nominee is "from the same political party, if any, as that of the vacating Delegate or Senator[.]"[37]

Despite this simplicity, however, there's some ambiguity. What happens if the Governor refuses to select the single name submitted to him? Other states, like Kansas and North Carolina, make it clear that the nominee is seated anyway,[38] but Maryland doesn't. This may not end up being a purely hypothetical question. Though Governor Hogan ended up appointing Chanel Branch to fill the vacancy discussed earlier,[39] some groups urged him not to.[40] Sidestepping altogether the debate about Branch's qualifications and the propriety of her appointment, this was likely an astute move on Hogan's part. His public effusiveness about Branch notwithstanding,[41] he may well privately concluded that, despite any doubts about her nomination, it wasn't worth triggering a small constitutional crisis (especially one with no obvious resolution) and upsetting two members of a politically connected family in the process. But even though the Governor opted against declining to appoint the party committee's designee in *this* instance, it's entirely conceivable that another, similar scenario could present itself in the future—especially when there's divided government again.

II. THE MERITS OF LEGISLATIVE APPOINTMENT SYSTEMS

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legislative vacancies through same-party appointments, both interpretations have points in their favor.

[36] *Id.*; Friedman, *supra* note 30 at 94.

[37] MD. CONST. art. III, § 13(a)(3).

[38] KAN. STAT. ANN. § 25-3902(g) ("In the event the governor or lieutenant governor fails to appoint any person as required by this subsection after receiving a lawfully executed certificate hereunder, such person shall be deemed to have been so appointed notwithstanding such failure."); N.C. GEN. STAT. § 163-11(a) ("If the Governor fails to make the appointment within the required period, he shall be presumed to have made the appointment and the legislative body to which the appointee was recommended is directed to seat the appointee as a member in good standing for the duration of the unexpired term.").

[39] Press Release, Office of Governor Larry Hogan, Governor Hogan Appoints Chanel Branch to the Maryland House of Delegates (Jan. 27, 2020), https://governor.maryland.gov/2020/01/27/governor-hogan-appoints-chanel-branch-to-the-maryland-house-of-delegates/; *see also* Richman, *supra* note 6.

[40] Richman, *supra* note 6.

[41] Press Release, *supra* note 40 ("'I am confident that Chanel Branch will represent the citizens of Baltimore City admirably in her new role as state delegate,' said Governor Hogan. 'I offer Ms. Branch my sincere congratulations and look forward to working with her during this legislative session.'").

It may seem counterintuitive to argue that legislative appointment systems are *more* protective of the right to vote than *actual* elections where *actual* voters vote. But they are, as this Part argues. One of the best measures of the strength of a country's democratic institutions is whether the results of an election match the intent of the voters. Admittedly, there is no federal constitutional requirement that all election results match voter intent—a conclusion made painfully clear by the Supreme Court's recent abstention in *Rucho v. Common Cause*, when it dismissed partisan gerrymandering as a non-justiciable "political question."[42] But it's significant that international human rights agreements generally frame the right to democratic governance as results matching intent,[43] which reflects "the interconnections between the exercise of individual rights of equal participation in the political process and an outcome of a political process that allows a relatively full, free, and equal participation – the aggregate will of individual participants."[44]

Moreover, landmark Supreme Court cases involving the application of one-person-one-vote, like *Gray v. Sanders* and *Reynolds v. Sims*, have effectively mandated that results match intent, insofar as they require the winner of the popular vote to be the winner of the election.[45] Obviously,

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[42] *See generally* Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

[43] Universal Declaration of Human Rights, art. 21, § 3, G.A. Res. 217 (III)A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("The will of the people *shall be the basis of the authority of government*; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.") (emphasis added). This connection of the "authority of government" to the "will of the people" inherently recognizes, as it must, that a government's authority stems from voter intent.

[44] Jordan J. Paust, *The Human Right to Participate in Armed Revolution and Related Forms of Social Violence: Testing the Limits of Permissibility*, 32 EMORY L.J. 545, 566 (1983); *see also* Steven Wheatley, *Democracy in International Law: A European Perspective*, 51 INT'L & COMPARATIVE L.Q. 225, X (2002) ("The key test for the validity of an electoral system, in the phraseology of the American Convention on Human Rights (1969), is that they must be 'genuine,' in the sense that they accurately reflect the will of the people[.]"); Hallie Ludsin, *Returning Sovereignty to the People*, 46 VAND. J. TRANSNAT'L L. 97, 146 (2013) ("Under classical democratic theory and in line with Rousseau, the will of the people is expressed through elections in which the majority determines the outcome.").

[45] *See* Reynolds v. Sims, 377 U.S. 533, 563 (1964) ("Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor."); Gray v. Sanders, 372 U.S. 368 (1963) ("The Court has consistently recognized that all qualified voters have a constitutionally protected right 'to cast their ballots and have them counted at Congressional elections.' . . . '[T]he right to have one's vote counted' has the same dignity as 'the right to put a ballot in a box.' . . . And these

beyond just the impact of gerrymandering, the continued presence of the Electoral College and the undemocratic nature of the U.S. Senate all-too-frequently means that election results *don't* match voter's intent. But those procedures are spelled out by the Constitution and don't run afoul of the Fourteenth Amendment for that reason—if they were implemented at the state level, they'd almost assuredly be struck down as one-person-one-vote requirements.[46]

So, if the goal of an election outcome is for it to match the intent of the voters, same-party legislative appointment systems do a substantially better job than special elections. On a practical level, appointment systems capture the most important parts of representation: partisan affiliation and ideology. Though it's oft repeated that voters "vote for the person, not the party,"[47] it's an aphorism that simply isn't true. Though ticket-splitting

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rights must be recognized in any preliminary election that in fact determines the true weight a vote will have. The concept of political equality in the voting booth contained in the Fifteenth Amendment extends to all phases of state elections . . . once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded."); *see also*; Gordon E. Baker, *One Man, One Vote, and "Political Fairness"—Or, How the Burger Court Found Happiness by Rediscovering Reynolds v. Sims*, 23 EMORY L.J. 701, 707 (1974)) (discussing the Supreme Court's goal of "representative equality"); Robert G. Dixon, Jr., *The Warren Court Crusade for the Holy Grail of "One Man-One Vote"*, 1969 SUP. CT. REV. 219, 268-69 (1969) (discussing the goal of "voter equality").

[46] *See, e.g.*, *Sims*, 377 U.S. at 574 ("[T]he so-called federal analogy is inapplicable as a sustaining precedent for state legislative apportionments."); *Sanders*, 372 U.S. at 378 ("The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a State in a statewide election."); Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213, 230 (2003) (noting that "the equiproportional standard" of one-person-one-vote "does not apply to many important political institutions," like the Electoral College and the U.S. Senate); James Shinn Graham, Note, *One Person-One Vote: The Presidential Primaries and Other National Convention Delegate Selection Processes*, 24 HASTINGS L.J. 257, 268 (1972–73) ("It is only because the electoral college is engrained in the Constitution that it escapes scrutiny under one person-one vote standards."); Michael J. O'Sullivan, Note, *Artificial Unit Voting and the Electoral College*, 65 S. CAL. L. REV. 2421, 2433–36 (1992) (noting that the "unit system" used by the Electoral College is unconstitutional at the state level). MSNBC host Chris Hayes made a similar point more recently, *see All in with Chris Hayes* (MSNBC television broadcast Aug. 30, 2019) ("The weirdest thing about the Electoral College is the fact that if it wasn't specifically in the Constitution for the presidency, it would be unconstitutional."), and was attacked by some conservative historians for it. *See, e.g.*, Jay Cost, *Chris Hayes and Progressives' Lack of Respect for the Constitution*, NAT'L REV. (Sept. 3, 2019, 3:38 PM), https://www.nationalreview.com/2019/09/chris-hayes-and-progressives-lack-of-respect-for-the-constitution/.

[47] *E.g.*, Paul H. Rubin, *Vote for the Party, Not the Person*, WALL ST. J. (Oct. 27, 2008, 12:01 AM ET), https://www.wsj.com/articles/SB122506895498170731.

increased by *some* measures in the 1980s and 1990s, it unequivocally started decreasing by the early 2000s,[48] and in most recent U.S. elections, it's been virtually nonexistent.[49] This is because party identification is "one of the most important factors, if not the single most important factor, in models of voting behavior in the American public," and voters vote based on their partisanship and ideology in all elections—even in ostensibly nonpartisan ones.[50]

All of this is to say that same-party legislative appointment procedures guarantee, with near-total accuracy, that most voters will be accurately represented in the ways that matter *most* following a state legislative vacancy. If voters voted for a Democrat in the last regularly scheduled general election, they will continue to be represented by a Democrat in the legislature—regardless of whether the specific person for whom they voted lives, dies, or is elected to another office. It is unlikely that the replacement will differ from her predecessor ideologically,[51] though it may be the case that party committees, as in Maryland's case, will sometimes select individual legislators that their primary voters wouldn't pick in a primary. But it's improbable that a party committee would select a replacement legislator that its party's primary voters, or the district's electorate as a whole, would reject as ideologically incompatible.[52] Little data exists on this question, but that which does suggests that party-selected legislative replacements are actually

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[48] David C. Kimball, *A Decline in Ticket Splitting and the Increasing Salience of Party Labels*, *in* MODELS OF VOTING IN PRESIDENTIAL ELECTIONS: THE 2000 U.S. ELECTION 161, 161 (Herbert F. Weisberg & Clyde Wilcox eds., 2004).

[49] *E.g.*, Drew Desilver, *Split-Ticket Districts, Once Common, Are Now Rare*, PEW RES. CTR. (Aug. 8, 2016), https://www.pewresearch.org/fact-tank/2016/08/08/split-ticket-districts-once-common-are-now-rare/; Geoffrey Skelley, *Split-Ticket Voting Hit a New Low in 2018 Senate and Governor Races*, FIVETHIRTYEIGHT (Nov. 19, 2018, 6:00 AM), https://fivethirtyeight.com/features/split-ticket-voting-hit-a-new-low-in-2018-senate-and-governor-races/.

[50] *E.g.*, Chris W. Bonneau & Damon M. Cann, *Party Identification and Vote Choice in Partisan and Nonpartisan Elections*, 37 POLITICAL BEHAV. 43, 44, 61–62 (2015).

[51] *See* Seth Masket & Boris Shor, *Primary Electores vs. Party Elites: Who are the Polarizers?* (May 8, 2013) (unpublished manuscript) (on file with author (concluding that there is no ideological difference between elected and appointed legislators in Colorado and Illinois). A rare case may be seen in the how the vacancy in Illinois's 116th State House District was filled. The incumbent, Jerry Costello II, a conservative Democrat, was appointed to Governor J.B. Pritzker's administration and Nathan Reitz was appointed to replace him. Joseph Bustos, *New State Rep. Nathan Reitz Will Be a Pivotal Vote on the Graduated Income Tax*, BELLEVILLE NEWS-DEMOCRAT (May 24, 2019, 10:38 AM), https://www.bnd.com/news/local/article230748774.html. Reitz ended up supporting a graduated income tax, which Costello had opposed, triggering allegations from the state Republican Party that Reitz was appointed to replace Costello in a "conservative vote replacement." *Illinois Moves Closer to Graduated Income Tax*, WSIL TV NEWS (May 28, 2019, 1:17 AM), https://wsiltv.com/2019/05/28/illinois-moves-closer-to-graduated-income-tax/; Bustos, *supra*.

[52] *See generally* Masket & Shor, *supra* note 47 at 61-62.

likelier to be re-elected than voter-selected candidates.[53] This conclusion is true even when controlling for uncontested elections and even when comparing elected and appointed first-term legislators seeking re-election.[54]

Special elections, meanwhile, are likelier to have results inconsistent with the desires of the district's electorate. When special elections are scheduled, they're usually required to take place within a statutorily established period of time,[55] which places them at bizarre and seemingly random times during the year. Some states have moved to consolidate elections, to provide more predictability as to when elections occur,[56] but these states are far in the minority. Instead, in most cases, special elections are scheduled for otherwise-random Tuesdays.[57] This randomness can be exacerbated by scheduling special elections for days of the week other than Tuesday, as governors in several Midwestern states have done in the past few years.[58]

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[53] *See generally* Seth E. Masket, *Do Voters and Insiders Nominate the Same Sort of Candidates? A Look at Legislative Vacancy Appointments in Illinois and Colorado*, *in* Presentation at the UCLA Department of Political Science (May 11, 2015) (unpublished manuscript) (on file with author). *But see* Keith Hamm & David M. Olson, *Midsession Vacancies: Why Do State Legislators Exit and How Are They Replaced?, in* CHANGING PATTERNS IN STATE LEGISLATIVE CAREERS 127, 144–45 (Gary F. Moncrief & Joel A. Thompson eds., 1992) (noting that, based on 1981–86 dataset, "legislators who first attain office by special election are somewhat more likely to be able to retain the seats than if they acquired them by political appointment"). Masket's dataset is likely preferable here, because it was a twenty-year dataset with newer data and specifically excluded uncontested elections, unlike Hamm's and Olson's.

[54] Masket, supra note 53, at 8–9.

[55] *See, e.g.*, MD. ELECTION LAW CODE ANN. § 8-710 (relating to special congressional elections).

[56] *E.g.*, Connor Phillips, *The Effect of Election Consolidation on Turnout*, MEDIUM (July 12, 2019) ("Several states, including Michigan, California, Kentucky, and Nevada, are considering or have implemented legislation that moves . . . lower-level contests to coincide with the federal elections held in November of even-numbered years.").

[57] *See* Harvey J. Tucker, Low Voter Turnout and American Democracy 2 (Apr. 2004) (on file with the European Consortium for Political Research) ("Most special elections occur at unusual times and are the only contests on the ballot. Turnout is unusually low because contests are poorly publicized and potential voters receive little or no stimulus."); *see also* Marc Meredith, *The Strategic Timing of Direct Democracy*, 21 ECON. & POL. 159 (2009) (discussing the year-round scheduling of special school board elections).

[58] *E.g.*, Briana Bierschbach, *Special Election Results: Keeping the Status Quo at the Minnesota Capitol*, MINN. POST (Feb. 13, 2018), https://www.minnpost.com/politics-policy/2018/02/special-election-results-keeping-status-quo-minnesota-capitol/ (noting that special elections for the Minnesota Legislature were held on Monday, February 12, 2018); Mitchell Schmidt, *Robin Vos Requests Tony Evers Reschedule Special Election, Citing Jewish Holiday*, WIS. ST. J. (Sept. 28, 2019), https://madison.com/wsj/news/local/govt-and-politics/robin-vos-requests-tony-evers-reschedule-special-election-citing-jewish/article_c79696a6-7487-5141-b96f-e8eb927c967d.html (noting that the originally selected primary election date for the special election in Wisconsin's 7th congressional

The randomness of special elections' scheduling is more than just an interesting piece of political trivia—it affects turnout[59] and results. When special elections are held at unusual times of the year, as most are, it increases the potentiality for unexpected, inconsistent results.[60] Consider a few examples. In Georgia, Democrats won special elections for the state House in otherwise-conservative areas in 2015 and 2017,[61] which they promptly lost in the next general election for each seat.[62] Similarly, a Republican narrowly won a special state Senate election in a dark-blue area in 2015, but lost re-election by a wide margin in 2016.[63] Much more notably, Democrats won several heavily-Republican seats in the Oklahoma Legislature in 2017 special elections,[64] but lost several of them in the regularly scheduled 2018 general election.[65]

While a handful of special elections serve more as anecdotes than meaningful data points, the basic principles at play are clear: Low-turnout

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district was Monday, December 30, 2019, the final day of Hanukkah).

[59] *See, e.g.*, Tucker, *supra* note 57, at 2 (noting that special elections see low turnout).

[60] For example, in Minnesota, special elections for school funding projects, like special bonds, are statutorily mandated to occur at certain times of the year, unlike in Wisconsin, where they happen at the local school board's discretion. As a result, turnout in Minnesota special elections for school bonds is higher than it is in Wisconsin. *See* Meredith, *supra* note 53, at 71.

[61] *See* Maya Prabhu, *Georgia Democrats Pick Up Three Legislative Seats in Special Elections*, ATLANTA J. CONST. (Nov. 7, 2017), https://www.ajc.com/news/state--regional-govt--politics/georgia-democrats-pace-pick-three-legislative-seats-special-elections/9KdkpqNX1CrVKyfal4qj7N/ (noting that Deborah Gonzalez and Jonathan Wallace won special elections to the Georgia House in 2017); Mark Woolsey, *Taylor Bennett Wins District 80 Special Election Runoff*, ATLANTA J. CONST. (Aug. 12, 2015), https://www.ajc.com/news/local/taylor-bennett-wins-district-special-election-runoff/tKDtpotdsYMROfDX4sgmVN/ (noting that Taylor Bennett won a special election to the Georgia House in 2015).

[62] Sofi Gratas, *Republicans Retake State House Districts 117, 119 After Just a Year of Democratic Control*, RED & BLACK (Nov. 8, 2018), https://www.redandblack.com/athensnews/republicans-retake-state-house-districts-after-just-a-year-of/article_cad9d68e-e314-11e8-99be-c7cf3c70b2a1.html (noting that Gonzalez and Wallace lost re-election in 2018); Ken Sugiura, *Taylor Bennett Loses State House Race by Narrowest of Margins*, ATLANTA J. CONST. (Nov. 9, 2016), https://www.ajc.com/sports/college/taylor-bennett-loses-state-house-race-narrowest-margins/K08YNG2Iv24UguEQqu8MCL/ (noting that Bennett lost re-election in 2016).

[63] Mark Niesse, *Anderson Unseats Van Ness for Georgia Senate*, ATLANTA J. CONST. (Nov. 8, 2016), https://www.ajc.com/news/local-govt--politics/anderson-unseats-van-ness-for-georgia-senate/98r7ieq2x3fop7MONohaWO/.

[64] *See, e.g.*, David Weigel, *Democrats See Hope in Oklahoma Special Elections*, WASH. POST (July 12, 2017, 6:05 PM EDT), https://www.washingtonpost.com/news/powerpost/wp/2017/07/12/democrats-see-hope-in-oklahoma-special-elections/.

[65] *See, e.g.*, David Blatt, *Oklahoma's 2018 Elections Were Different in Many Ways*, OKLA. POL'Y INST. (Nov. 15, 2018), https://okpolicy.org/oklahomas-2018-elections-were-different-in-many-ways/.

elections are likely to be decided by the *most* intensely interested voters, who may not always reflect the electorate as a whole.[66] When that's the case, and the most interested voters achieve a result that wouldn't have been possible at the most recently scheduled general election—which likelier had higher turnout than the special—the district is effectively misrepresented in the legislature until it can correct the mistake at the next election. Legislative appointment systems don't have that problem. Instead, they guarantee that the results of the *previous* general election remain in place until the *next* general election—and they avoid control of the entire state government coming down to a single special election, as has happened too many times.[67]

Moreover, appointment systems are better than special elections at efficiently guaranteeing representation. When a legislative vacancy occurs in a state with special elections, it can take months to fill it—if it's filled at all prior to the next election.[68] If the vacancy occurs while the legislature is in session, it's possible that the vacancy won't be filled until it's adjourned—resulting in a total deprivation of representation for the vacant district's constituents during that time.[69] This delay in scheduling special elections can be done vindictively or to score political points. For example, Republican Governors in Michigan and North Carolina delayed scheduling special congressional elections to fill safely Democratic seats to deprive House Democrats of two additional members.[70] Governors in Missouri, New York,

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[66] *See* SARAH F. ANZIA, TIMING AND TURNOUT: HOW OFF-CYCLE ELECTIONS FAVOR ORGANIZED GROUPS 82 (2013).

[67] *See, e.g.*, Ralph Jimenez, *With Election Defeat, N.H. Democrats Lose Majority in Senate*, BOSTON GLOBE, Dec. 9, 1999, at B19 (noting that a special election for the New Hampshire State Senate resulted in Democrats losing control of the chamber); *See also* Joseph O'Sullivan, *With Manka Dhingra's Washington State Senate Win, Democrats Plot Ambitious Course in Olympia*, SEATTLE TIMES (Nov. 8, 2017), https://www.seattletimes.com/seattle-news/politics/manka-dhingras-double-digit-lead-in-45th-district-senate-race-sends-message-to-trump-gov-inslee-says/ (noting that a special election for the Washington State Senate resulted in Democrats gaining full control of the state government).

[68] In neighboring Virginia, for example, a special election can take months to schedule, if it ever happens at all. *See, e.g.*, VA. CODE ANN. §§ 24.2-226, 24.2-228.1, 24.2-682 (2014). In Maryland, it can take up to 5 months to fill a congressional vacancy if a special election is called; *see also* MD. ELEC. LAW CODE ANN. § 8-710 (2020).

[69] *E.g.*, Jim Turner, *Vacant Seats Will Dot Florida Legislature During Session*, ORLANDO WEEKLY (Dec. 30, 2017, 7:38 AM), https://www.orlandoweekly.com/Blogs/archives/2017/12/30/vacant-seats-will-dot-florida-legislature-during-session ("More than 1.1 million Florida voters won't have a representative in one of the legislative chambers when the 2018 session begins next month. Resignations and a recent death have created six open seats, with most expected to remain vacant through the 60-day session because of scheduling requirements for special elections.").

[70] Gus Burns, *Judge Orders State to Explain Why Election to Replace Conyers Won't Be Sooner*, MICH. (Mar. 16, 2018), https://www.mlive.com/news/detroit/2018/03/

and Wisconsin have engaged in similarly manipulative behavior when calling special elections to fill state legislative vacancies. New York Governor Andrew Cuomo held off on scheduling *eleven* special elections to the state legislature to avoid adding uncertainty into budget negotiations and to avoid upsetting the power-sharing arrangement between State Senate Republicans and Independent Democrats.[71] Following an unexpected loss in a special election to the Wisconsin State Senate in 2018, which narrowed the Republican majority in that chamber, then-Governor Scott Walker announced that he wouldn't hold any special elections to fill two additional vacancies,[72] only relenting when ordered to do so by the Wisconsin Court of Appeals.[73] And Missouri Governor Mike Parson appointed two Democratic State Senators to his administration, triggering vacancies in the State Senate, which he announced that he would not fill—perhaps to further reduce the Democratic minority.[74]

This sort of gamesmanship can work in the opposite direction, too, where governors deliberately schedule special elections months or weeks before general elections. This sort of decision wastes millions of dollars, burdens county election offices, and increases voter fatigue—so why do it? The most compelling answer is partisan gain. When U.S. Senator Frank Lautenberg, a Democrat from New Jersey, died in 2013, Governor Chris Christie was required to schedule a special election to replace him. Despite the fact that the state was having its regularly scheduled gubernatorial election in November 2013, Christie scheduled the election for *October*, incurring nearly $24 million in election administration costs.[75] Democrats alleged that Christie, who was running for re-election and was favored to win, wanted to

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lawsuit_says_gov_snyder_is_del.html; Jim Morrill, *Mel Watt's Seat in Congress to Sit Empty Until November*, NEWS & OBSERVER (Jan. 6, 2014, 5:08 PM), https://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article10289234.html.

[71] Bill Mahoney, *More Legislative Vacancies: Nothing Special for Cuomo*, POLITICO N.Y. (Feb. 16, 2017, 5:22 EST), https://www.politico.com/states/new-york/albany/story/2017/02/the-past-is-no-guide-for-cuomo-and-special-elections-109655; John Nichols, *Republicans Have an Ingenious Plan to Stop Losing Special Elections*, THE NATION (Feb. 22, 2018), https://www.thenation.com/article/archive/republicans-have-an-ingenious-plan-to-stop-losing-special-elections/.

[72] *Id.*

[73] Shawn Johnson, *Walker Won't Ask Wisconsin Supreme Court to Block Special Elections Order*, WIS. PUB. RADIO (Mar. 28, 2018, 3:40 PM), https://www.wpr.org/walker-wont-ask-wisconsin-supreme-court-block-special-elections-order.

[74] *See* Jason Hancock, *Group Vows Lawsuit if Gov. Parson Won't Call Special Election for KC Senate Seats*, KANSAS CITY STAR (Jan. 21, 2020, 3:56 PM), https://www.kansascity.com/news/politics-government/article239493293.html.

[75] Emily Schultheis & Maggie Haberman, *Christie Slammed for Special Election*, POLITICO (June 4, 2013, 2:09 EDT), https://www.politico.com/story/2013/06/chris-christie-frank-lautenberg-special-election-092211.

avoid sharing the ballot with then-Newark Mayor Cory Booker, which would gin up Democratic turnout and imperil his re-election.[76]

Similarly, in 2018, Texas Governor Greg Abbott opted to schedule a special election for the Texas State Senate for late July rather than on the regularly scheduled Election Day in November.[77] When no candidate received a majority, Abbott scheduled the runoff election for September 18—less than two months before the general election.[78] The result was a surprise Republican victory, which padded the Republican Party's majority in the Texas Senate until 2021, when the seat was next scheduled to be up.[79]

This sort of gamesmanship—both in declining to schedule special elections at all and in scheduling them for inconvenient times—could be remedied with constitutional amendments or laws that *require* the calling of special elections within a certain period of time and that require consolidation with regularly scheduled general elections.[80] But most states (and the Constitution) lack these sort of procedures and protections, instead granting their governors standardless discretion for scheduling elections.[81] And in any event, temporary legislative appointments followed by special elections scheduled for the next general election solve almost all of those problems.

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[76] *Id.*

[77] Patrick Svitek, *Gov. Greg Abbott Announces July 31 Special Election for State Sen. Carlos Uresti's Seat*, TEX. TRIB. (June 20, 2018), https://www.texastribune.org/2018/06/20/abbott-announces-july-31-special-election-uresti-seat/.

[78] Patrick Svitek, *Abbott Sets Runoff to Replace State Sen. Carlos Uresti for Sept. 18*, TEX. TRIB. (Aug. 13, 2018), https://www.texastribune.org/2018/08/13/gov-greg-abbott-sets-sd-19-runoff-sept-18-lawyers-say/.

[79] Patrick Svitek, *Republican Pete Flores Upsets Democrat Pete Gallego in Race for Uresti Seat*, TEX. TRIB. (Sept. 18, 2018), https://www.texastribune.org/2018/09/18/republican-pete-flores-track-upset-race-democratic-friendly-uresti-sea/.

[80] The State of Washington, for example, automatically schedules special elections for the next regularly scheduled general election, which is in November of each year. *See generally* WASH. REV. CODE § 29A.04.321 (2015).

[81] *See, e.g.*, Rhodes v. Snyder, 302 F. Supp. 3d 905, 909-10 (E.D. Mich. 2018) ("This statute provides broad discretion to the governor. It does not contain any particular requirement when the special election is to be held; it only mandates that the governor 'shall call a special election' when a vacancy occurs. Relevant here, the statute expressly allows the governor to schedule the special election 'at the next general election,' provided that the general election is held at least thirty days after the vacancy occurs.") (citing MICH. COMP. LAWS § 168.633); Fox v. Paterson, 715 F. Supp. 2d 431, 442 (W.D.N.Y. 2010) ("[The Constitution] provides that the Governor must call for a special election, but that the timing of that election is up to the Governor and the state to decide. Although there may be cases in which such an extraordinary amount of time passes from the existence of the vacancy to the issuance of the proclamation that it amounts to a de facto refusal to call a special election at all, that is not the situation before me. The winner of the November 2 special election will presumably take office almost immediately after that date, and although plaintiffs might prefer that to occur sooner, I do not believe that the delay here is so long as to amount to a constitutional violation.").

III. How to Reform Maryland's System

All of this is to say that Maryland's current system likely functions better than a special-election system would—all Marylanders are fully represented during legislative sessions; the state avoids the inconvenience and cost of special elections; and the ideological differences between appointed and elected legislators are likely minimal.

But that doesn't mean that changes aren't needed. Maryland's current system is unlike most others in the country in terms of the absolute power given to local party committees, the lack of practical oversight by any elected official, and the permanency of the appointment. These characteristics make the current system sometimes veer concerningly close to the eighteenth and nineteenth century system that the state abolished in 1837 and are worthy of change. Several pragmatic solutions, some of which mirror what already works in other states, would satisfactorily improve these failings and create an even more representative system.

First, under Maryland's current constitution, party committees have virtually unchecked and absolute power. For all practical purposes, they are the ones making appointments to fill legislative vacancies. Though, as mentioned previously, the constitution is ambiguous as to whether the governor is *required* to accept the party committees' single nominee,[82] that appears to be the agreed-upon interpretation. If that is the case, it's wrong—it inappropriately consolidates power in an unelected and unaccountable organization. Party committees having *some* say in same-party legislative appointment systems isn't unusual—most states grant them at least some power—but absolute control is rare.

This characteristic of Maryland's current system should be changed. It's possible to maintain the current system's deference to party members without granting them *total* power. For example, the power doesn't have to be concentrated in the party committee members themselves. Some states, like Kansas and Wyoming, instead require that a district-wide convention, attended by the party's precinct committee members, be held to select a replacement.[83] Moving to this sort of system, while depriving voters in the legislative district of representation for a short period of time, would introduce more democratic accountability to the process—and would make the process more public and transparent.[84]

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[82] See *supra* text accompanying notes 34-39.

[83] Kan. Stat. Ann. § 25-3902 (2020); Wyo. Stat. § 22-18-111(iii)(A) (2020). Though Kansas calls this process a "convention," *see* § 25-3902, Wyoming doesn't, instead referring to it as a "meeting of [the party's] precinct committeemen and committeewomen," *see* § 22-18-111(iii)(A). Nonetheless, the procedure is essentially the same.

[84] *Cf.* Shen, *supra* note 5.

Second, regardless of which division of the party has the power to nominate a replacement, the party's nominee should be approved by another political actor. Under Maryland's current system, the party doesn't pick a *nominee*; it picks a *designee*. In so doing—unless it can't agree on a single name and sends the governor more than one name[85]—the party's decision is virtually unreviewable. Very few other states have such a party-focused system,[86] and most grant the formal and practical selection power to an elected actor. Some states allow the governor to make the final selection from a small group of nominees,[87] while others allow the county commissions where the district was located to make the final selection.[88]

Maryland should implement a similar system. It makes little sense to grant the governor an effectively illusory power—namely, to make an appointment—if he has no *practical* power. Moreover, adding another layer of review to the established procedure can help prevent abuses and insider-driven selection processes. Under the current system, if a party committee selected a candidate to fill a vacancy who was otherwise-constitutionally eligible to serve in the general assembly, but was corrupt, or had repeatedly been rejected by the district's voters, or held ideologically extreme and unpalatable views, it is unclear what recourse *anyone*, much less a dissatisfied voter in the district, would have. But if another step were added to the process, dissatisfied voters could appeal to the governor or county commission to reject the nominee.[89]

Third, Maryland should provide for a system that combines legislative appointments *and* special elections by providing that an appointee only serves until the next regularly scheduled general election. Such a system pulls the best of both systems—immediate, effective representation and popular

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[85] See *supra* text accompanying notes 38-39.

[86] MD. CONST. art. III, § 13; N. MAR. I. CONST. art. II, § 9; KAN. STAT. ANN. § 25-3902 (2020); N.C. GEN. STAT. § 163-11 (2020); UTAH CODE ANN. §§ 20A-1-503 (2020); V.I. CODE ANN. tit. 2, § 111 (2020).

[87] HAW. REV. STAT. ANN. §§ 17-3, 17-4 (2020); IDAHO CODE § 59-904A (2020); W. VA. CODE § 3-10-5 (2020). In New Mexico's system, the county commission usually has appointment power—but if the legislative district encompasses more than one county, then each county commission nominates a replacement to the governor, who makes the final selection. However, this is not a same-party appointment system. *See* N.M. STAT. ANN. §§ 2-7C-5, 2-8D-4 (2020).

[88] WASH. CONST. art. II, § 15; ARIZ. REV. STAT. ANN. § 41-1202 (2020); MONT. CODE ANN. § 5-2-402 (2020); OR. REV. STAT. §§ 171.060 (2020); WYO. STAT. § 22-18-111(a)(iii) (2020).

[89] On a practical level, it likely makes the most sense to add county commissions, not the governor, to this process. County commissions are closer to the voters and are more likely to be representative of district voters' views. A county commission in western Maryland or on the Eastern Shore, for example—both of which being places that don't regularly elect governors or have power in state government—is likelier to be attuned to the conservative views of districts in their communities than the governor of an otherwise-liberal state.

input—while pulling from the worst of neither. One of the biggest complaints with Maryland's current system has been the permanency of the appointments. If a vacancy occurs, say, a day after a legislator is sworn into her four-year term, her replacement will serve the remainder of the term. By that point, any antipathy toward the process used to appoint the replacement legislator may well have dissipated, and by that point, the replacement will have all of the benefits of incumbency. It is likely for that reason that most states with legislative appointments make them *temporary*—the replacement only serves until the next general election, unless the vacancy occurs too close to then.[90]

Though the permanency of the appointment has *some* appeal to it—Maryland is one of only two states to elect its legislators to four-year terms,[91] so consolidating all legislative elections on the same day *may* be defensible—it effectively neuters one of the most compelling justifications for same-party legislative appointments. The principle behind these sorts of appointments is that the voters' preference from the most recent general election should be respected.[92] But gliding over an opportunity to solicit the voters' preference at the *next* general election, regardless of whether the legislative seat would ordinarily be up for election, is simply illogical. If nothing else, in Maryland's case, voter turnout is usually *higher* in presidential elections,[93] when *no* legislators are elected,[94] so it makes *more* sense to have legislative

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[90] NEV. CONST. art. IV, § 12; N.J. CONST. art. IV, § 4, para. 1; WASH. CONST. art. II, § 15; COLO. REV. STAT. § 1-12-203 (2020); HAW. REV. STAT. ANN. §§ 17-3, 17-4 (2020); MONT. CODE ANN. § 5-2-406 (2020); N.M. STAT. ANN. §§ 2-7C-5, 2-8D-4 (2020); UTAH CODE ANN. §§ 20A-1-503(3) (2020); WYO. STAT. ANN. § 22-18-111(a) (2020); *see* Nev. Op. Att'y Gen. No. 1955-84 (1955). Maryland is one of only four states or territories—the others being Indiana, Kansas, and Puerto Rico—where legislative appointees "serve the full remainder of the term in all circumstances." Yeargain, *supra* 24 note at 31.

[91] *Number of Legislators and Length of Terms in Years*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/about-state-legislatures/number-of-legislators-and-length-of-terms.aspx (last accessed Jan. 27, 2020).

[92] *Supra* PART II.

[93] Turnout is generally higher in presidential elections than midterm elections. See generally Robert A. Jackson, Differential Influences on Participation in Midterm Versus Presidential Elections,37 SOC. SCI. J. 385 (2000). This is true for Maryland as well. Compare, e.g., Official Turnout (By Part and County), Election: 2016 Presidential General Election, MD. ST. BD. OF ELECTIONS, https://elections.maryland.gov/elections/2016/turnout/general/Official%20by%20Party%20and%20County.pdf (statewide turnout for the 2016 election was 71.98%) (last accessed Jan. 27, 2020), with Official Turnout (By Part and County), Election: 2018 Gubernatorial General Election, MD. ST. BD. OF ELECTIONS, https://elections.maryland.gov/elections/2018/turnout/general/Official%20by%20Party%20and%20County.pdf (statewide turnout for the 2018 election was 59.06%). (last accessed Jan. 27, 2020).

[94] MD. CONST. art. III, § 7 ("The election for Senators and Delegates shall take place on the Tuesday next, after the first Monday in the month of November, nineteen hundred and fifty-eight, and in every fourth year thereafter.").

appointments expire in presidential-election years if that's the next general election.

Indeed, this third recommendation is the same proposal crystallized in State Delegate David Moon's proposed constitutional amendment, which requires "a special primary and a special general election [] be held at the same time as the regular statewide primary election and the regular statewide general election" if a vacancy occurs prior to the next general election.[95] However, Delegate Moon's proposal goes no further—it does not alter the party committees' nomination and appointment power and provides no meaningful confirmation or appointment power to any other political actor. Piecemeal approaches are understandable in other contexts, but given the difficulty of amending the state constitution,[96] it makes substantially less sense here. While public attention is focused on the issue, the general assembly should use this opportunity to go big and enact meaningful structural change to the appointment process.

CONCLUSION

Maryland's method of filling legislative vacancies has come a long way—from an inherently undemocratic system that stifled public accountability over the State Senate to a system that seeks to balance both the desires of the electorate and the need for efficient, accurate representation. But as Chanel Branch's nomination has shown, the current approach needs rebalancing. Maryland can borrow what works from other states—spreading out the power currently held by the party committees in an absolute monopoly, adding a meaningful step of review to the appointment process, and making appointments temporary—and breathe democratic life into a system that has largely remained unaltered since its adoption in 1936.

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[95] H.B. 103, 2019 Leg., 438th Sess. (Md. 2019).

[96] *See generally* MD. CONST. art. XIV, § 1 (noting that the Maryland Constitution requires a three-fifths majority vote in both houses of the assembly and approval from the electorate).

ARTICLE

"THE TESTAMENT OF MY WANDERINGS IN THE WEARY LAND"[1] A TRIAL ATTORNEY AND THE SEARCH FOR A STORY

By: Charles I. Joseph, Esquire[2]
Gillian Drake[3]
Kailey Silverstein, JD[4]

**** This Article is the result of its three authors working together to craft the final product. It was a team effort. For stylistic reasons, the authors chose to write the Article in the first person from Mr. Joseph's perspective.****

I. PROLOGUE

It was the second day of a medical malpractice trial, and the defense attorneys, John King and Jack Wily, waited for court to start. Each had a different plan to win the case. Mr. King was a dynamic Storyteller, and therefore, his trial strategy focused entirely on his client and telling their Story.

Jack Wily was a well-known, but traditional litigator, and his trial strategy primarily involved making a sales pitch to the jury (although they considered it Storytelling). This entailed teaching the jury about the medicine, exposing the holes in plaintiff's case, demonstrating that plaintiff was exaggerating their injuries, and undermining plaintiff's experts by showing that they were hired guns. Mr. Wily's plan also included filing an

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[1] THE WATERBOYS, *My Wanderings in the Weary Land*, *on* GOOD LUCK, SEEKER (Cooking Vinyl 2020).

[2] Charles I. Joseph is a Fellow of the American College of Trial Lawyers and partner at Baxter Baker, P.A., in Baltimore, Maryland. He represents parties in a variety of complex civil litigation matters and focuses a majority of his practice defending health care providers in in medical malpractice cases.

[3] Gillian Drake is an accomplished theatre Director in Washington, DC and has a Masters Degree in Directing. Since 1985 Ms. Drake has been the President of On Trial Associates, Inc, where she specializes in preparing witnesses for trial and working with lawyers in her nationally recognized course "Acting for Lawyers."

[4] Kailey Silverstein is an associate at Jones Day in Washington, DC. In 2020, Ms. Silverstein graduated from the University of Maryland School of Law summa cum laude. In law school, Ms. Silverstein was a member of the Law Review, the National Mock Trial Team, and the National Moot Court Team.

array of motions in limine and continuing the legal battle during trial with timely objections.

As plaintiff's counsel called their expert to the stand, Mr. King pulled out a yellow legal pad from his trial bag, turned to Mr. Wily, and asked, "Excuse me, may I borrow a pencil?"

Mr. Wily gave Mr. King a pencil and asked, "Mr. King, where are your depositions, expert reports, articles, exhibits, investigatory materials, and pleadings? How are you going to cross-exam this expert? How can you sell your case to the jury without these materials?"

Mr. King peered over their reading glasses, smiled, and explained, "We do not care about what the other side has to say. Remember, if our Story is better than their story, we will win."[5]

II. INTRODUCTION

It has become increasingly popular for attorneys to discuss the need to tell a Story for the jury. The increased attention is well-founded given that Storytelling is one of the most effective tools to persuade and help people make sense of information. Throughout time, all societies have used Stories not only to entertain, but also as "a tool to help both storyteller and listener to make sense of the world."[6] Stories have been and continue to be one of the most popular vehicles to educate and persuade others.

Given the persuasive appeal of Storytelling, it is easy to see why it is popular with trial attorneys and litigators. Storytelling takes on added importance at trial because as the jury is trying to make sense of the evidence, a Story allows an attorney to present a case that is both easy to understand and answers the jury's questions. Untapping the persuasive power of Storytelling, however, involves more than educating the jury about the facts via a narrative.

Storytelling is not a natural gift given to everyone, and thus, it is often misunderstood. I have experienced far too many attorneys pontificate and espouse about Storytelling without understanding its true nature. Based on my observations, the prevailing, yet misplaced, view amongst attorneys equates a Story with an agglutinative collection of hand-picked facts and opinions that the attorney finds important. This is what I call the attorney

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[5] John King was a legendary trial attorney and a Fellow of the American College of Trial Lawyers. Mr. King trained and influenced many great attorneys, including three who directly impacted my career: Dale Adkins and Philip Franke, both Fellows of the American College, and Brad Hallwig, who is one of the smartest lawyers and best problem solvers I have ever met.

[6] Jacob Mohr, *Exploring the Monomyth: 6 Lessons from Joseph Campbell's Theory of "The Hero's Journey*," TCK PUBL'G, https://www.tckpublishing.com/what-is-the-heros-journey/ (last visited Aug. 20, 2020).

narrative. For followers of this approach, the articulation of their narrative is not Storytelling, but instead a sales pitch that promotes the same self-identified highlights. Misinformed phrases like "You must sell your story," and "A trial is like a job interview," among others, are the vernacular for the attorney confused about the difference between selling and Storytelling.

A sales pitch is not a Story and selling a narrative is not Storytelling. So there is no confusion, developing a narrative, in and of itself, does not create a Story. Attorneys who want to craft a Story and employ Storytelling must appreciate these distinctions and understand that the differences have a quantifiable impact on an attorney's ability to persuade and reach their audience.

In this Article, the authors discuss what constitutes a Story, why Storytelling is an effective strategy, and how to apply it in trials and litigation. We are not advocating that attorneys must follow one set of rules in creating their Story. An attorney seeking to employ the persuasive power of Storytelling, however, must understand that all Stories share specific characteristics and are more than a collection of hand-picked facts, information, and themes. The persuasive power of Storytelling derives from these special characteristics.

Storytelling is art and, therefore, takes on countless forms. Therefore, each attorney must find their own voice and approach for crafting a Story. The authors hope this Article helps in that quest.

III. A STORY - THE HERO'S JOURNEY

A Story is more than just describing and recounting events. Instead, a Story has characters and involves a hero figure, a plot, conflict, and resolution. For audiences, a Story instructs, engages the imagination, entertains, and illustrates a moral lesson. Storytelling, in turn, is "the interactive art of using words and actions to reveal the elements and images of a [S]tory while encouraging the listener's imagination."[7]

Contrary to a prevailing belief held by a mainstream contingent of litigators, standing in front of a jury and stating, "Let me tell you my client's story," does not magically transform what comes out of your mouth into a Story. Instead, crafting a Story requires an appreciation of several fundamental components, the most important being an understanding of the classic elements of Storytelling that have existed for generations.

There are numerous literary works that have analyzed the Story and Storytelling. All of these efforts derive from Aristotle's *Poetics* and his

[7] NAT'L STORYTELLING NETWORK, *What Is Storytelling?*, https://storynet.org/what-is-storytelling/ (last visited Sept. 20, 2019).

theory of tragic Storytelling.[8] In *Poetics*, Aristotle memorialized the rules of the Hero's Journey: (1) the introduction of the hero in their circumstances; (2) the hero goes on a journey and encounters challenges; (3) at some point one of the challenges results in the hero changing irrevocably; (4) the hero comes home; and (5) the hero experiences a new beginning.[9] These five broad stages lay at the core of dramatic Storytelling. Aristotle explained that every element of the Story must promote the hero and their journey because the Story is about the hero.

There are several modern writings that have analyzed the art of Storytelling and expanded on Aristotle's *Poetics*. The two I find most influential are *The Hero with a Thousand Faces* by Joseph Campbell[10] and "A Practical Guide to Joseph Campbell's *The Hero with a Thousand Faces*" by Christopher Vogler.[11]

In his famous book *The Hero with a Thousand Faces,* Joseph Campbell examined the framework of Storytelling by analyzing myths and stories from a variety of cultures.[12] Campbell's analysis revealed that all tales and stories contain a similar structure.[13] He coined this narrative structure the Journey of the Hero or the Monomyth.[14] The Journey of the Hero contains three chapters (Departure, Initiation, and Return) with seventeen distinct stages.[15] These stages are the building blocks for our Stories and used to enhance the tension and emotional impact of the dramatic turning points.

In 1985 Christopher Vogler, inspired by Campbell, wrote "A Practical Guide To Joseph Campbell's *The Hero With A Thousand Faces*" that re-interpreted Campbell's seventeen stage Journey of the Hero and

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[8] *See* LITCHARTS, *Tragic Hero*, https://www.litcharts.com/literary-devices-and-terms/tragic-hero (last visited Sept. 20, 2019).
[9] *See* Aristotle, *Poetics* (S. H. Butcher trans.) (350 B.C.E.) http://classics.mit.edu/Aristotle/poetics.1.1.html (last visited Sept. 20, 2019).
[10] JOSEPH CAMPBELL, THE HERO WITH A THOUSAND FACES (3d ed., New World Library 2008) (1949).
[11] Christopher Vogler, *A Practical Guide to Joseph Campbell's* The Hero with a Thousand Faces, https://web.archive.org/web/20161026112937/http://www.thewritersjourney.com/hero's_journey.htm#Memo (last modified Oct. 26, 2016).
[12] CAMPBELL, *supra* note 10, at 1.
[13] *See id.*
[14] *Id.* at 23.
[15] *See id.* at vii-ix. The Departure - 1) The Call to Adventure, 2) The Refusal of the Call, 3) Supernatural Aid, 4) The Crossing of the First Threshold, and 5) The Belly of the Whale; The Initiation - 6) The Road of Trials, 7) The Meeting with the Goddess, 8) Woman as the Temptress, 9) Atonement with the Father, 10) Apotheosis, and 11) The Ultimate Boon; and the Return - 12) Refusal of the Return, 13) The Magic Flight, 14) Rescue from Without, 15) The Crossing of the Return Threshold, 16) The Master of Two Worlds, and 17) Freedom to Live.

synthesized it into twelve stages.[16] With his take on the Hero's Journey, Vogler highlighted how to build suspense through the hero's thoughts, words, and actions.

Vogler's Twelve Stages are as follows:

(1) Ordinary World – Before the adventure begins.
(2) Call to Adventure – Hero presented with a problem.
(3) Refusal of the Call: Initial reluctance.
(4) Meeting with the Mentor – Introduced to a wise person.
(5) Crossing the First Threshold: Leaving the ordinary world for the adventure.
(6) Tests, Allies, Enemies: Meets helpers and allies.
(7) Approach the Inner Most Cave: Encounters danger.
(8) Ordeal: Crisis (death) or the hero reaches bottom, but the hero survives.
(9) Seizing the Sword, Reward: After surviving, the hero earns reward.
(10) The Road Back: The journey back.
(11) Resurrection Hero - The final test and emerges transformed.
(12) Return with Elixir: Return to ordinary world with reward.[17]

In summarizing Campbell's seminal work, Vogler wrote:

> In [their] study of world hero myths Campbell discovered that they are all basically the same story – retold endlessly in infinite variations. [They] found that all story-telling, consciously or not, follows the ancient patterns of myth, and that all stories, from the crudest jokes to the highest flights of literature, can be understood in terms of the hero myth; the "monomyth" whose principles [they] lays out in the book.

The theme of the hero myth is universal, occurring in every culture, and in every time; it is as infinitely varied as the human race itself; and yet its basic form remains the same, an incredibly tenacious set of elements that spring in endless repetition from the deepest reaches of the mind of man.[18]

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[16] Vogler, *supra* note 11.
[17] *Id.*
[18] *Id.*

Vogler's version of the Hero's Journey has become one of the standards for modern Storytelling. For example, it serves as the foundation for movie blockbusters like the *Star Wars* trilogies, the *Lion King*, the *Lord of the Rings*, *The Matrix*, and the Marvel Universe (*Thor*, *Black Panther*, et al.). In my opinion, it also exists in varying forms in less obvious movies and stories like Zach Braff's *Garden State*, Spike Lee's *Do the Right Thing*, John Cusack's *Grosse Pointe Blank*, and Prince's *Purple Rain*.

Putting facts and opinions together into a beginning, middle, and end does not by itself create a Story no matter how compelling the facts or entertaining the narrative. A collection of facts and opinions that do not, in some form, follow Campbell and Vogler, i.e., keep the perspective of the Hero and develop challenges along the Hero's path, maybe persuasive and even entertaining, but it is not a Story in the tradition of Aristotle, Campbell, and Vogler, and thus, it runs the risk of falling short.

Although employing Campbell and Vogler's Storytelling roadmap is a critical step in creating a Story for a case or trial, it is not the only one. For attorneys trying to maximize the persuasive power of Storytelling, it is not enough to plug your case's facts and theories into the Hero's Journey's Stages. Instead, to reach the jury, an attorney also must understand what strategies, tactics, and approaches enhance the Story's persuasive appeal and which do the opposite. Let me explain.

IV. "MY WANDERINGS IN THE WEARY LAND"[19]

A. ACT I - "PEACE WILL COME IN TIME"[20]

1. Luke Receives a Message from R2-D2 (A Call to Adventure)

Even before starting law school, I wanted to be a trial attorney. After graduating law school and completing a clerkship with the Honorable Robert F. Fischer on the Court of Special Appeals of Maryland, I was fortunate enough to land a job at a Baltimore Firm, which, at the time, was known for training trial attorneys.

I started at the Firm on November 11, 1996, and immediately began learning about being a trial attorney. Like most aspiring trial attorneys, I was introduced to one of the more popular schools for litigation and trial strategy. I call it the Traditional Approach.

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[19] THE WATERBOYS, GOOD LUCK, SEEKER (Cooking Vinyl 2020).

[20] NICK CAVE AND THE BAD SEEDS, *Spinning Song*, *on* GHOSTEEN (Ghosteen Ltd. 2019).

2. The Traditional Approach (The Ordinary World)

Attorneys have multiple theories about how civil juries decide cases. The Traditional Approach dictates that juries make their decisions by weighing the emotional and sympathetic appeal of the plaintiff against the factual and scientific strength of the defense case. Thus, at its core, the Traditional Approach is stubbornly binary where defense attorneys assume jurors can turn off their emotions and feelings whereas plaintiffs' attorneys assume that jurors make their decision based largely on emotion and sympathy. The attorneys base their litigation and trial strategies on this dichotomy.

Under the Traditional Approach, plaintiff's case revolves around the plaintiff themselves. This strategy depends, in part, on the plaintiff's attorney using sympathy to create a connection between plaintiff and the jury. The facts and science are not prioritized and take a back seat to the emotional plea. For plaintiff's attorneys adopting this approach, their client and the sympathy generated by their injury become the focus of the case. The plaintiff's attorney sells their client's sympathy.

Defense attorneys following the Traditional Approach craft their cases around the facts and science. They emphasize logic and reasoning in their case. They also stress the Burden of Proof and Impartiality Jury Instructions in an effort to keep the courtroom sterile of emotion. The defense attorney identifies their strongest facts and theories for their case and sells these focal points to the jury. In this strategy, the defense attorney becomes the focus for the defense, and they push upon the jury the specific facts and opinions that they deem most important.

One of the main components of the Traditional Approach is a focus on tearing down the other side. The strategy presumes that if you can establish that the other side is wrong, the jury will find in your client's favor. With the focus on proving that the other side is wrong, attorneys adopting this strategy do not spend enough time explaining why their client is right. Thus, the proclivity for tearing down the opposing side exposes one of the inherent weaknesses with the Traditional Approach - it is difficult to answer what questions matter to the jury if you are primarily focused on tearing down the other side.

Another component of Traditional Approach is the, at times, illogical fixation with venue. Plaintiffs crave jurisdictions with a less educated population, and the defense more. Pursuant to this belief, juries with more education are more likely to accept the defense's fact/science-based sales pitch, and the less educated jurors are more likely to be swayed by plaintiff's emotional plea.

Because an attorney following in the Traditional Approach is a salesperson, the venue quandary resembles the search for a target market.

The question "can I sell my story in that venue (market)," presumes that some venues are wrong for the sales pitch. Although each venue has its own general characteristics and some maybe friendlier to one side or another, depending on the case, the obsessional nature of many attorneys engulfed in the Traditional Approach leads to near defeatism if one's case ends up in the "wrong" venue.

Even though the Traditional Approach is favored by many attorneys, there are those who reject the Traditional Approach and instead look for ways to reach the jury at a different level and with different means. Most of these nontraditional outliers incorporate some form of Storytelling.

3. Luke Meets Obi-Wan (Meeting the Mentor)

My fortunes changed forever in the summer of 1998 when one of the associates on the medical malpractice team suddenly left the Firm. Dale Adkins, the lead attorney for the medical malpractice group, asked me to start working with him. Although I was initially hesitant, I agreed.

Immediately, I started learning about a different way to work-up and try cases. Dale emphasized that there were jury issues that many times were not part of the central claims or defenses, but impacted a juror's perception of the evidence, influenced a juror's decision-making process, and thus, were decisive. Therefore, because these issues mattered to the jury and the answer to a jury issue affected the jury's final decision, we had to address and answer them for the jury. Dale called this process issue spotting.

Like most attorneys who reject the Traditional Approach, Dale appreciated that jurors are not automatons who can turn off their emotions and feelings. Dale, like other select trial attorneys, believed that issues that resonate with jurors at both a logical and emotional level, regardless of whether they relate to an element in the case, are, more often than not, going to shape a juror's decision-making process.

Jury issues work both ways. For example, there are jury issues that help your case, which an attorney should incorporate into their central themes. There are also jury issues that are potentially harmful to your case. With these negative jury issues, you must identify them and then address them for the jury.

Admittedly, it is difficult to attach a specific definition or criteria for what constitutes a jury issue. To borrow an observation from United States Supreme Court Justice Potter Stewart, there is an element of "I know it when I see it" when it comes to jury issues.[21] As a trial attorney, however, it is our job to identify what issues are important for the jury and then answer them for the jurors.

Some examples of jury issues that I have encountered include:

[21] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

> (1) A surgeon having their physician assistant, instead of themselves, examine the surgeon's patient during that patient's four-day post-operative recovery;
> (2) An obstetrician not having a pediatrician in the delivery room for a delivery when there was, by any objective measure, a reassuring fetal heart tracing;
> (3) A surgeon and their office not bringing a patient in for an earlier post-op checkup when the patient called every other day about benign drainage from their incision; and
> (4) In a lead-based paint lawsuit, a landlord not removing lead-based paint from their rental properties when there was no obligation under the law to do so.

These are jury issues from four cases where I represented the defendant and lost at trial. Plaintiff did not claim any of these issues constituted a negligent act, but I and others had no doubt that they played a part in the eventual outcomes.

Along with issue spotting, Dale instilled in me the discipline of knowing the details of the case better than anyone else in the courtroom. Dale's demand for attention to detail revealed an interesting dichotomy: I had to know the case inside and out, but my focus remained on the identified jury issues and the facts and opinions that we planned to use to support our narrative. Most of the time I ignored facts or opinions unrelated to one of our jury issues or central themes. Therefore, I had to know every fact of the case, have the discipline to stay on message, and know when and how a fact or opinion may become important to the case.

Regardless of the strategy employed, our goal as trial attorneys or litigators is to persuade and influence in a positive way the jury's decision-making. For example, Dale's jury issue approach, with its emphasis on both logical and emotional elements, was his way of trying to influence the complex nature of the human decision-making process. The science behind how people make decisions not only highlights the wisdom of attorneys who try to reach the jury by different means, but also reveals one of the underlying weaknesses in the Traditional Approach, i.e., pursuing a fact or emotional approach alone, but not both, many times leaves the audience and its followers wanting.

4. Explanation of the Force

Contrary to the Traditional Approach and other related trial strategies, the assumption that jurors can either turn off their emotions and feelings while deciding a trial or completely ignore facts and science in

reaching a decision is inconsistent with studies examining our natural decision-making process. These studies and papers describe the individual decision-making process as involving two aspects of the brain: (1) the cerebral cortex - deliberative logic and reason; and (2) the evolutionary brain – instinctual and emotional. These two parts of the brain work together in the decision-making process.

In its informative paper "Improving Jury Deliberations Through Jury Instructions Based on Cognitive Science," the Jury Committee for the American College of Trial Lawyers summarized the decision-making analysis as follows:

With this closing instruction ringing in their ears, jurors across the country are sent off to their deliberation rooms to reach a verdict:

> *"Free your minds of all feelings of sympathy, bias and prejudice and let your verdict speak the truth, whatever the truth may be."*

For decades we believed this instruction was effective and its goals attainable. People could simply "free their minds of all feelings" and reach a verdict based on reason and objective facts—or so we thought.

Recent advances in the science of decision-making, however, undercut our assumptions about how jurors make decisions. Science now teaches that our cerebral cortex (and its deliberate, logical power) does not either solely or separately rule the day. Instead, logic or reason (described below as "System 2" thinking) operates alongside and in conjunction with the evolutionary brain and its quick, instinctual impulses (described below as "System 1" thinking). Thus, instructing someone simply to shut down part of their brains and "free their minds of all feelings . . ." is as effective as telling a child perched on a garage roof to ignore gravity.[22]

In discussing Jonathon Haidt's book, *The Righteous Mind: Why Good People Are Divided by Politics and Religion,* the American College included this instructive quote that summarizes the issue for trial attorneys and highlights the interrelationship between both components of our decision-making brain:

Jonathan Haidt similarly explains human decision-making as a combination of two interrelated types of cognition: (1) intuition, which runs automatically and efficiently, and (2) reasoning, which requires effort and attention. [They] describes these two types of cognition through the metaphor of an elephant lumbering down a road (representing automatic

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[22] AM. COLL. OF TRIAL LAWYERS, IMPROVING JURY DELIBERATIONS THROUGH JURY INSTRUCTIONS BASED ON COGNITIVE SCIENCE 1 (2019), https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/improving-jury-deliberations-final.pdf?sfvrsn=6.

processes such as intuition and emotion) while the rider atop the elephant attempts with varying degrees of success to control the large beast (representing conscious and effortful reasoning).[23]

One take away from the decision-making science is that an attorney who creates a case strategy that encompasses both components of the dual decision-making modality stands a better chance of persuading the jury compared to an attorney who ignores one half of the equation. A Story's persuasive power rests in its structure, and therefore, allows an attorney to present facts and themes that resonate with both the logical and emotional halves of a juror's brain, thereby conforming with their decision-making process. Additionally, with its familiar path, turns, and drama, the Journey of the Hero provides a mechanism to organize information in a way that is familiar to a juror, and thus, makes it easier for them to process the evidence. Therefore, combining the inherent dramatic tension and emotional impact of the Hero's Journey with the evidence creates a powerful persuasive vessel to reach your audience. That is a Story's persuasive appeal.

5. Luke Leaves Tatooine (Crossing the First Threshold)

Although Dale's nontraditional approach to being a trial attorney appealed to me and was something I tried to emulate, I recognized that I could not simply copy his approach. Instead, I had to find my own voice. Therefore, with new skills, good intentions, but also an at times naïve arrogance that often accompanies up and coming trial attorneys who think they know it all because they know a little, I turned from the Traditional Approach and I ran.[24]

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[23] *Id.* at 3.

[24] One of my favorite descriptions for this stage of the Hero's Journey comes from Mike Scott's lyrics in the Waterboys's song "Wanderings in the Weary Land." THE WATERBOYS, *My Wanderings in the Weary Land*, *on* GOOD LUCK, SEEKER (Cooking Vinyl 2020). The song also serves as the title for this Article. Mike Scott writes as follows:

Suddenly a chorus of lamentations arose,
the air dense with complaint, anger, victimhood
I felt their voices seeping into my head,
my own thought-voice raised in bitterness too
I could become one of Them!
I turned towards the only bright light,
a shard of silver in the dim distance
as if at the end of a tunnel
And I ran.

B. ACT II "A TIME WILL COME FOR US"[25]

1. Han Solo and Chewbacca (Allies and Approach to the Inner Most Cave)

During my career, multiple people helped shape my progress as a trial attorney. One such figure was Wes Foster, who was Head of Claims for the largest medical malpractice insurance carrier in Maryland. Wes was not an attorney, did not think like an attorney, and demanded that his attorneys follow suit. Wes required that his attorneys to stand-up for the physicians and fight for them as if it was personal.

I interpreted Wes's emphasis on the physician as a call to make the doctor the center of the case. By combining Wes's physician-centric defense with Dale's issue-spotting approach, I expanded my ability to reach the jury. Because the defense revolved around the physician, I now linked the answers to the jury issues with the centralized physician defense. I also incorporated this approach in my nonmedical malpractice cases. In my mind, ensuring that my client answered the jury issues enhanced their connection with the jury because they directly answered what concerned they jury.

As my career progressed, Wes gave me a chance to try more complicated medical malpractice cases. With the increased opportunities, I had some success and started to develop my own approach. In retrospect, however, even though I was making progress, I had not completely abandoned the vestiges of the Traditional Approach. Therefore, although I thought I was on the right path and envisioned myself becoming the next John King or Dale Adkins, I was wrong. Instead, at this stage of my journey I met challenges that tested me and highlighted my shortcomings.

2. The Failure in the Cave (The Ordeal)

"You know you should have won that case," Wes exclaimed with the signature combination of humor and scorching realism that was the trademark for one of his invaluable yet slightly feared teaching moments. Three days earlier, in January 2010, I had suffered a bad loss in a medical malpractice case. The jury deliberated twenty-three minutes before returning its verdict and giving plaintiff everything they asked for: $1,682,751.93. I was meeting with Wes and others to discuss our options.

At the time, I was surprised by the loss because, in my mind, I had executed my trial plan to perfection. I had identified key issues, taught the jury about the medicine, presented my client as a competent, caring, and

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[25] NICK CAVE AND THE BAD SEEDS, *supra* note 20.

compassionate physician, and highlighted the inconsistencies in plaintiffs' case.

The loss produced the usual collection of excuses: the jury ignored the judge's instructions, the jury got swept up in plaintiffs' emotional appeal, the judge made several bad legal findings, and it was the wrong venue.

We decided to file post-trial motions, and I ordered the trial transcript. It arrived in March 2010. When I read the transcript, it revealed a difficult truth: neither the jury nor the judge or any witness was responsible for this loss. The fault lay entirely with me.

Although I had prided myself as being a different type of trial attorney, the transcript showed anything but. I argued the science and facts and paid little attention to the issues that mattered to the jury, e.g., why my client did not see plaintiff in the hospital during post-op recovery and instead had his physician assistant handle the exams. My issue spotting and theme development existed in name only. My presentation of the case was a flat sales pitch.

As the humbling reality sank in, I muttered, "How could I have screwed up so badly? There must be a better way."

3. Luke and Company at the Death Star (Approach to the Inner Most Cave)

I had no choice but to regroup. In one month, I was scheduled to start the biggest trial of my relatively short career. I represented Dr. Knight, a board-certified anesthesiologist. Plaintiff underwent a complicated femoral bypass procedure that lasted over seven hours and resulted in her losing more than their total blood volume. Because of the fluid and blood loss, plaintiff experienced prolonged periods of lower than expected blood pressure. She survived the surgery, but suffered a spinal cord injury that left her paralyzed from the waist down. Plaintiff sued the two vascular surgeons and Dr. Knight. Plaintiff claimed that Dr. Knight failed to maintain their blood pressure within the acceptable range.

The case was high stakes for several different reasons. Most importantly, my client was facing a verdict in excess of his insurance policy as plaintiff claimed over $4,000,000 in damages. Additionally, on a personal level, at this stage in my career I could not afford to lose another million-dollar case.

4. Meeting the Oracle (The Reward)

In 2007 Wes had introduced me to Gillian Drake, who works with attorneys to prepare their clients for deposition and trial. Gillian is an accomplished theatre director, studied for three years with the famous Stella

Adler in New York City, and has a Masters in Directing. In 1985 Gillian started applying her theatre and directing skills to help lawyers in a course called Acting for Lawyers. Soon thereafter, Gillian started working with attorneys to prepare witnesses to testify.

Due largely to her years in theater and production, Gillian is steeped in the tradition of Storytelling. She stresses the need to create an emotional connection with the jury by using the structure of the Story to shape the Hero's Journey. I called Gillian to help me with Dr. Knight's case.

My initial conversations with Gillian unearthed a major flaw in my approach. Although issue spotting and a client centric defense are important tools in both crafting and enhancing a Story, my current approach remained too disorganized and lacked the emotional connection and dramatic tension that is the core of the Hero's Journey. This disorganization decreased the persuasive value of my case and my ability to connect the jury with my client.

With Gillian's help I realized that the Hero's Journey could bring structure to my client's narrative, thereby creating a true Story.

Although I did not have the opportunity to think about our case during Discovery in the context of the Hero's Journey, I recognized that Dale's jury issue technique, with its emphasis on both logical and emotional items, and Wes's physician centric approach folded perfectly into Dr. Knight's Story guided by the Hero's Journey. Therefore, combining and molding the Hero's Journey, with its structure and organization, with Dale's issue spotting and Wes's client centric defense finally allowed me to put all the pieces together and craft a strategy that capitalized on the persuasive power of Storytelling.[26]

5. Creating the Story (The Road Back)

During the initial stages of the case, I had decided that our primary defense themes would involve Dr. Knight's efforts to help plaintiff and his ability to keep plaintiff alive during her difficult surgery. These differed from the more specific and technical allegations made by plaintiff involving the maintenance of plaintiff's blood pressure or specific the type of recitation given at any moment. In my mind, if the jury evaluated Dr. Knight's care through the lens of helping plaintiff and trying to keep her alive, as opposed to keeping her blood pressure above an arbitrary line drawn by plaintiff's

[26] Usually, the attorney should start figuring out their case themes and how they plan on winning the case the moment they either first meet with their client (plaintiff) or receive the Complaint (defendant). Discovery serves as the opportunity to collect evidence, soundbites, literature, and other tangible evidence to bolster your themes. For the Storyteller, Discovery is the chance to build your client's Story and look for ways to develop themes or secure information that enhance that Story.

attorneys, then we had a chance. Creating a Story around these two themes, however, proved to be complicated.

a. Organizing the Story (Not a time to be Justice Scalia)

After discovering the missing component in my trial strategy, I started building Dr. Knight's Story by incorporating the Hero's Journey. During my initial efforts, however, I realized that although the Hero's Journey has a specific number of stages in a specific order, the facts and opinions of the case limited my ability to craft a Story that strictly followed Campbell's or Vogler's model. Some stages did not apply (or at least not fully) and other events occurred in a different order. For example, Dr. Knight's mentor figure appeared later in the Story than listed by Campbell and Vogler. Additionally, Dr. Knight met friends and allies important for the Story at multiple points. Finally, given the length of the surgery, it was difficult to line-up Dr. Knight's heroic actions in keeping plaintiff alive with Vogler's Stages that represent the core of the heroic confrontations.

Fortunately, as I learned, Storytelling has flexibility. As Vogler observed, "Every story-teller bends the myth to [their] own purpose." [27] Therefore, for attorneys Storytelling is not the literary equivalent of Originalism, and Vogler's or Campbell's Stages are not Constitutional text to be followed dogmatically. As Vogler explained:

As with any formula, there are pitfalls to be avoided. Following the guidelines of myth too rigidly can lead to a stiff, unnatural structure, and there is the danger of being too obvious. The hero myth is a skeleton that should be masked with the details of the individual story, and the structure should not call attention to itself. The order of the hero's stages as given here is only one of many variations – the stages can be deleted, added to, and drastically re-shuffled without losing any of their power.[28]

Unlike fiction writers, who are only limited by their imaginations, an attorney's ability to build a Story is limited by the facts and evidence. Those limitations, however, do not prevent us from utilizing the persuasive value of Storytelling. We can bend the myth to our own purpose, but we must ensure that our Story contains the emotional and dramatic tension inherent in the Hero's Journey.

b. Crafting the Story

In building Dr. Knight's Story, I made two tactical decisions that reinforced the structure of Dr. Knight's journey. In my opinion, these two

[27] Vogler, *supra* note 11.
[28] *Id.*

steps are critical for any attorney wanting to build a case around the Hero's Journey.

i. Build around the center

I committed to Dr. Knight being the center of our Story. It may seem like an obvious choice, but I had other options. For example, I could have chosen a more Traditional Approach, made a scientific pitch to the jury, and focused primarily on the medicine, which was a strong issue for us. Under this approach, Dr. Knight would have been part of the scientific pitch, but the science and the experts would be the center of the case.

One of the benefits of making Dr. Knight the center of the case was that it ensured we focused on our Story and remained proactive. By telling our Story instead of reacting to plaintiff, we made ourselves less dependent on the outcome of pretrial motions and other legal rulings. Additionally, it helped insulate our defense from the impact of new expert theories or arguments. My focus was making our Story better than their Story.

In crafting Dr. Knight's Story, I had to identify the jury issues and determine how to address them for the jury. Early on I identified the logical and emotional appeal surrounding Dr. Knight's heroic efforts in helping plaintiff and keeping her alive. In terms of negative jury issues, there were two matters that bothered me - (1) I was worried about the jury's perception of Dr. Knight having only four years experience working next to two experienced surgeons. The optics were not ideal. (2) Dr. Knight's medical degree was a DO, not an MD. In the real world it made no difference, but I was concerned about plaintiff's attorneys' efforts to undercut Dr. Knight's credibility based on the distinction.

I determined that the most effective way to address the negative jury issues was to have Dr. Knight discuss them during his direct examination. This ensured that Dr. Knight himself addressed the issues that mattered to the jury. The jury's concerns became Dr. Knight's concerns. Additionally, I prepared Dr. Knight for his cross-examination, and we identified specific strategies to expose plaintiff's counsel's transparent efforts to question Dr. Knight's experience.

ii. Use small steps

Gillian advocated that to draw the jury in and make the Story persuasive, I had to ensure that each stage of the Story had both logical and emotional components. In retrospect, this makes sense given the dual nature of our decision-making process. Gillian stressed that building the Story incrementally helped promote inclusion of both components while also drawing the jury into the Hero's Journey.

For Dr. Knight's case, Gillian's incremental approach meant that Dr. Knight's background, decision to go to medical school, experience in medical school, decision to go into anesthesiology, residency training, relationship with his mentors, completion of residency, passing his board examination, and experience practicing in the real world represented not just information that highlighted his credentials, but stages in Dr. Knight's journey. The knowledge obtained, lessons learned, people met, and experiences undertaken all brought Dr. Knight to plaintiff's surgery and that moment when events beyond Dr. Knight's control placed plaintiff's life at risk and Dr. Knight acted to save her life.

c. Telling the Story

Along with crafting the Story, I had to determine how to tell the Story. This involved more than preparing witness examinations, obtaining demonstrative exhibits and illustrations, and preparing a PowerPoint (although all are important). I had to make specific tactical decisions that benefited the Story and our ability to tell the Story.

i. Establish the cast

Telling a Story at trial involves more than relying on a single narrator. When employing Storytelling as a trial strategy, attorneys must recognize that the witnesses tell the Story in parts. Therefore, an attorney must determine who will narrate or present each element of the Story. This involves determining how each witness fits into the Story, and how they can provide testimony to support or advance issues and elements for the Story. Each new witness that adds to the Story or re-affirms part of the Story brings their own voice and emotion to the Hero's Journey. Attorneys must appreciate this fact and consider it when determining how to tell the Story.

ii. Define the narrator's role

At trial, the attorney is the Storyteller-narrator. They are neither the protagonist nor the focal point. Unlike a salesperson, who is the center of attention trying to convince people of a point by using predetermined issues to sell the product or idea, the Storyteller's focus always remains on the hero and their journey. Our job is to get the jury to see the Story, connect to the hero, experience the hero's challenges and journey, and share in the lessons learned. It is not about us. It is about our client and their journey.

Many attorneys want the focus of the case to be on themselves. The logic follows that if a juror trusts the attorney who stands up for the plaintiff or defendant, then this trust will transfer to that attorney's client. The

attorney-centric mindset, however, is inconsistent with Storytelling's core elements. Because the Story is about the hero and their journey, the attorney cannot be the focus. Therefore, attorneys who understand their role will be able to keep the focus on our client, which in turn, makes the Story more persuasive.

For me, assuming the role of the Storyteller-narrator required the discipline to know the case and understand what issues, facts, and opinions mattered for the Story. I did not abandon the vigorous cross-examination of plaintiffs' experts, teaching of the medicine, and pursuing legal defenses. These activities, however, were a means to tell Dr. Knight's Story rather than a trial strategy by themselves. I chose the areas of focus carefully, and if an issue did not further our Story, more often than not, I would let it go. Most of the time, that meant not fighting every fight or making every objection. I had to determine what issues mattered and stay focused on those issues.

iii. Heroes own what they do

In preparing Dr. Knight for his testimony, Gillian and I stressed that he could not be defensive or make excuses. Dr. Knight had to own everything he did and explain to jury what he did, why he did it, and what he was thinking when he tried to help plaintiff. That was Dr. Knight's journey – trying to help plaintiff. This involved bringing the jury to the moment just before Dr. Knight accepted the case and then carefully taking the jury through the care step by step. This was an area where Gillian's emphasis on telling the Story incrementally was particularly important.

Having Dr. Knight own what he did and use active language, as opposed to passive language, sounds obvious. Yet in my experience, it is astounding how many witnesses, fact or expert, do the opposite. Passive language connotes defensiveness, which in turn, decrease the witness's ability to connect with and persuade the jury. For example, a witness using the pronoun "we" instead of "I" (when we is not appropriate) or referring to the opposing party as plaintiff or defendant instead of their name connotes a subtle failure to take responsibility and avoid the process. Additionally, a witness saying, "I would have done x" instead of "I did x" screams defensiveness for the jury.

iv. Resist the traditional

I concluded that to narrate the Story successfully, I needed to resist the urge to employ certain Traditional Strategies. For example, in Maryland it has become increasingly popular for a defendant to point the finger at other

co-defendants or third-parties.[29] In Dr. Knight's case, I could have employed this strategy and blamed the vascular surgeons for Dr. Knight's situation. In my experience, blaming others rarely works and would not have worked in my case.

Within the context of the Hero's Journey, the "blame someone else approach" is counterproductive. First, blaming another party detracts from your client's Story. If you are blaming someone else, you are not telling your client's Story. Second, heroes do not blame others for their situation. Instead they take responsibility, embrace their situation, and overcome.[30]

Another common practice amongst the Traditional is using a combination of motions in limine and an aggressive objection strategy to frustrate the opposing side and block the introduction of evidence. On one hand, there are times when a trial attorney must object and fight the good legal fight. Objecting when required or strategically beneficial, however, is different than actively trying to block every piece of evidence and important opinion. There is only so much a trial attorney can do in a trial, and in my opinion, it is impossible to be the Storyteller-narrator while also obstructing and fighting every legal battle. You are either a Storyteller or obstructionist. Not both. The constant objecting and fighting detracts from the Story and make it more difficult to keep the jury engaged.

C. ACT III: "IT'S A LONG WAY TO FIND PEACE OF MIND"[31]

1. Luke Destroys the Death Star (The Resurrection)

The trial lasted three weeks. Even though there were a couple of surprises and some very anxious moments, we stuck to our plan. I was the Storyteller-narrator and the jury heard in detail about Dr. Knight and his journey. During his testimony, Dr. Knight took the jury through the first part of his journey, which included his growing up, decision to go to medical school, training, experience, learning from his mentors, and working with allies. This helped build an emotional connection with the jury while also demonstrating Dr. Knight's competence as an anesthesiologist. For the surgery, Dr. Knight did not just discuss his care, he explained why everything he did was done to help plaintiff and to keep her alive as the

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[29] Both Martinez v. The Johns Hopkins Hosp., 212 Md. App. 634, 70 A.3d 397 (2013) and Copsey v. Park, 228 Md. App. 107, 137 A.3d 299 (2016) provide excellent examples regarding the applicable law and the growing trend.

[30] There are specific situations when one has no choice but to blame another party. When I have encountered these rare situations, I have worked to incorporate this alternative defense into the main Story, and I made sure that the battle with codefendant did not take away from my main focus, i.e., my client and their journey.

[31] NICK CAVE AND THE BAD SEEDS, *Hollywood*, *on* GHOSTEEN (Ghosteen Ltd. 2019).

surgeons attempted to repair their aorta. Dr. Knight owned everything he did and made no excuses.

Combining Dale's issue spotting, Wes's physician centered tactic, and Gillian's incremental approach allowed me to craft a Story and case strategy that resonated with the jury on both a logical and emotional level. With this approach, Dr. Knight and I answered the jury's questions. Additionally, by focusing on our Story and being proactive in telling that Story, I found it easier to control the overall narrative. For example, plaintiff's efforts to pitch the case as merely requiring some fresh frozen plasma or red blood cells to increase the blood pressure appeared as picayune, retrospective complaining that missed the larger issue of plaintiff's life being at risk for several hours and the primary person responsible for keeping her alive was Dr. Knight.

The jury deliberated for two days. In the end, they found in favor of Dr. Knight, against the vascular surgeons, and awarded plaintiff over three million dollars in damages. Although disappointed that the jury found against the vascular surgeons, Dr. Knight and I were proud of what we had accomplished.

The exclamation point on the experience occurred about one week after the verdict. Dr. Knight received a gourmet gift basket from plaintiff with a note that read, "I am glad the jury got it right."

2. First Steps to Becoming a Jedi and the Medal (Return with the Elixir)

The verdict in Dr. Knight's case crystalized for me the importance of Storytelling. The case illustrated that a Story structured around the Hero's Journey, focused on the client, and built around jury issues and related themes has the potential to be a persuasive strategy for trial and litigation. Additionally, adapting and re-tooling established strategies, techniques, and methods to build and enhance the Story represented a critical element that maximized the Story's persuasive appeal. For example, I did not cast away the trial techniques and methods I learned and adopted over my career. Instead, I used my techniques and methods for a shared unifying purpose to ensure that my client's Story was persuasive.

At some level, the verdict represented the completion of my journey: Dale, Wes, and Gillian had taught me the Storytelling fundamentals; Campbell and Vogler provided the foundational building blocks to craft the Story; and the science established why Storytelling is persuasive and effective in trial. Moving forward, it was up to me to apply what I had learned to help my clients.

Since Dr. Knight's case, I have employed Storytelling techniques in variety of cases, including medical malpractice lawsuits, usurpation of

corporate opportunity disputes, lead-based paint cases, business lease disputes, disagreements over noncompete agreements, and a catastrophic bus accident case. Each case required me find its unique Story path. My experiences have led me to one conclusion: Storytelling and its building blocks can work in all types of cases (large or small), for either plaintiff or defense, and in any venue.

V. CONCLUSION

There are countless attorneys who have employed a variety of trial strategies, including the Traditional Approach or some form of it, and had success. As a trial strategy, the Traditional Approach and its many deviations are not as reliable as strategies that recognize the complexities of decision-making and look for ways to reach jurors via a different path. It is more difficult to win a case if you ignore a large component of the decision-making process. The science reveals that an attorney cannot ignore what jurors are thinking and feeling and expect them to follow solely what the attorney deems important. What you the attorney finds important maybe different than what a juror finds important.

The authors do not intend this Article to be an introduction to the next big thing in trial and litigation. For example, we do not claim to have invented the next *Rules of Road*,[32] Reptile Theory,[33] or other litigation strategy for success. And we most certainly neither invented nor are the first to discover the value of Storytelling. We are, however, advancing an option based on sound references and observations that, when employed a certain way, we believe provides opportunities for success.

A Story's persuasive power rests in its structure, which allows an attorney to present facts and themes that resonate with both the logical and emotional halves of a juror's brain, and thus, confirms with a juror's decision-making process. Additionally, with its familiar path, turns, and drama, the Hero's Journey provides a mechanism to organize information in a way that makes it easier for a juror to process. This is a Story's persuasive appeal.

For those of us who recognize Storytelling's persuasive realities, we have the obligation to teach the up and coming trial attorneys how to apply

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[32] RICK FRIEDMAN & PATRICK MALONE, RULES OF THE ROAD: A PLAINTIFF LAWYER'S GUIDE TO PROVING LIABILITY (2d ed. 2010).

[33] *See* DAVID BALL & DON KEENAN, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION (2009). The Reptile Theory attempts to forge a case around a defendant's actions and link those with alleged violations in safety issues. The goal of the Reptile Theory is to overwhelm a juror's decision-making process and instead focus the jury on safety concepts and why defendant's actions are unsafe.

it in their trial and litigation work. For those looking to learn about Storytelling as a trial and litigation tool, we hope this Article helps.

VI. EPILOGUE

Not long ago, I attended an expert deposition with a junior attorney from our office. The defense attorney taking lead was trying to extract testimony from the deponent to set up a complicated motion in limine involving a causation issue. At a break in the deposition, the defense attorneys met, and the attorney taking lead proclaimed that a complicated Motion was the best way to win the case. Not everyone agreed.

When we went back into the room, the junior attorney leaned over and quietly asked me what, in my opinion, was the most important thing we needed do to win the case? I peered over my reading glasses, smiled, and explained, "Do not worry too much about what the others have to say. Remember, if our Story is better than their story, we will win."

Deus Benedicat.

COMMENT

TURNOVER ON DOWNS: HOW THE NCAA'S MISHANDLING OF STUDENT-ATHLETE COMPENSATION HAS PUNTED THE BALL TO STATE AND FEDERAL LEGISLATORS

By: Ryan Maher

I. Introduction

At the intersection of tradition, state and federal law and the National Collegiate Athletic Association ("NCAA"), a resolution needs to be reached as to the compensation of student-athletes. The compensation of student-athletes has long been ignored in college athletics, but it appears 2020 will be the year that it rises to the forefront.[1] Under the current system, student-athletes are not permitted to receive additional compensation outside of any scholarship they received from their school.[2] This has led to some consequences and punishments that many deem unfair.[3] From a college basketball player who was suspended from his team because he purchased a bedframe and mattress from his coach to football players that were banned for a year because they held an illegal autograph session, the NCAA is finally being challenged on this issue.[4]

In 2019, California became the first state to officially challenge the

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[1] Thomas Barrabi, *NCAA Athlete Pay Debate: Why a Political Showdown is Coming in 2020*, FOX BUS. (Jan. 3, 2020), https://www.foxbusiness.com/sports/ncaa-athlete-pay-debate-2020-expert-predictions.

[2] Andy Uhler & Tony Wagner, *What You Need to Know About the NCAA and Paying Student Athletes*, MARKETPLACE (Nov. 13, 2019), https://www.marketplace.org/2019/11/13/what-you-need-to-know-about-the-ncaa-and-paying-student-athletes/.

[3] Matt Norlander, *NCAA's Unfair 2-year Suspension for Silvio De Sousa Shows that Players, Not Coaches or Schools, are Treated Harshest*, CBS SPORTS (Feb. 1, 2019, 9:13 PM ET), https://www.cbssports.com/college-basketball/news/ncaas-unfair-2-year-suspension-for-silvio-de-sousa-shows-that-players-not-coaches-or-schools-are-treated-harshes (Student-athletes have lost scholarships and eligibility over NCAA infractions oftentimes out of their control. For example, a University of Kansas basketball star who lost two years of eligibility because his guardian sought financial gain for his basketball services).

[4] Nick Dimengo, *Dumbest Examples of Rules Violations in Sports*, BLEACHER REP. (Sept. 12, 2014), https://bleacherreport.com/articles/2193344-dumbest-examples-of-rule-violations-in-sports.

student-athlete compensation model.[5] Governor Gavin Newsom signed the landmark "Fair Pay to Play Act" into law in September 2019.[6] It did not take long for other states to hear about this victory and quickly propose their own legislation – including Maryland.[7] However, Delegate Brooke Lierman went even further.[8] Delegate Brooke Lierman created a bill that reflected her view of how to properly protect student-athletes.[9] The bill included extended insurance coverage, the right to collectively bargain for scholarship terms, and the addition of an independent advocate.[10]

The NCAA responded, in turn, with eight guidelines and the promise of a more inclusive rule by the end of 2020.[11] The seriousness in which it views the legislation and the changing model of college athletics remains to be seen.[12] While the NCAA chose to delay its decision until 2021,[13] lawmakers in Washington appear poised to draft legislation themselves.[14] Student-athlete compensation is an issue with bipartisan interest, as members of both major political parties have suggested passing a bill to allow student-athletes the right to profit off of their image and likeness.[15]

Finally, there is a risk that the NCAA will go to court to prevent such legislation from being enacted.[16] The NCAA will almost certainly attempt to use the dormant commerce clause in its defense. Already, the NCAA has threatened to disqualify athletes that receive compensation under California's new law.[17] Federal legislation appears to be the best

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[5] Jack Kelly, *Newly Passed California Fair Pay to Play Act Will Allow Student Athletes to Receive Compensation*, FORBES (Oct. 1, 2019, 12:36 PM ET), https://www.forbes.com/sites/jackkelly/2019/10/01/in-a-revolutionary-change-newly-passed-california-fair-pay-to-play-act-will-allow-student-athletes-to-receive-compensation/#5e3641ab57d0.

[6] *Id.*

[7] H.B. 548, Gen. Assemb., Reg. Sess. (Md. 2019) [hereinafter "H.B. 548"].

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] Steve Almasy, Wayne Sterling & Angela Barajas, *NCAA Says Athletes May Profit from Name, Image and Likeness*, CNN (Oct. 29, 2019, 5:19 PM ET), https://www.cnn.com/2019/10/29/us/ncaa-athletes-compensation/index.html.

[12] *Id.*

[13] See *id.*

[14] Jenna West, *Congressman Anthony Gonzalez Proposes Federal Fair Pay to Play Act*, SPORTS ILLUSTRATED (Oct. 2, 2019), https://www.si.com/college/2019/10/02/anthony-gonzalez-federal-bill-pay-college-athletes.

[15] *Id.*

[16] *See infra* Part III.

[17] *See* Peter O'Dowd, *NCAA Threatens to Bar California Colleges From Competitions Over Student Athlete Pay*, WBUR (Sept. 13, 2019),

solution since it is highly unlikely that the NCAA is willing to change its own rules and even more unlikely that the NCAA accepts and supports a system where each state has its own version of how to compensate student-athletes.[18]

Part II of this comment details a historical background of college athletics, the evolution of the student-athlete, and the landmark cases that discuss how the NCAA and student-athletes interact in 2020.[19] Part III illustrates various student-athlete compensation models and the conflict between state legislation and the NCAA.[20] It will also provide an explanation for how this problem relates specifically to Maryland law.[21] Finally, Part IV analyzes possible solutions, such as state or federal legislation or an overhaul of NCAA policy.[22]

II. Historical Development

A. A Historical Background of College Athletics and the "Student-Athlete"

While athletic competition at the collegiate level began in 1852, the NCAA did not become the regulatory body for college sports until 1906.[23] Despite the NCAA's existence for nearly forty years, it did not gain enforcement powers[24] until 1942.[25] A fundamental principle of the NCAA was coined in the 1950s to combat workmen's compensation

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https://www.wbur.org/hereandnow/2019/09/13/ncaa-california-college-athletics.

[18] *See generally* Justin W. Aimonetti & Christian Talley, *Why and How Congress Should Preempt State Student-Athlete Compensation Regimes*, 72 STAN. L. REV. 28 (2019).

[19] *See infra* Part II.

[20] *See infra* Part III.

[21] *See infra* Part III.B.

[22] *See infra* Part IV.

[23] Richard Johnson, *Even the First College Sporting Event in the United States Involved Cheating*, SB NATION (Feb. 24, 2018), https://www.sbnation.com/college-basketball/2018/2/24/17042498/first-ncaa-college-sporting-event-cheating (President Theodore Roosevelt oversaw the establishment of an investigative body to explore the deaths of several college football players. This body was originally called the Intercollegiate Athletic Association of the United States before it was renamed the National Collegiate Athletic Association in 1910).

[24] *Id.*

[25] Dan Treadway, *Why Does the NCAA Exist?*, HUFFPOST (Aug. 06, 2013, 1:39 PM ET), https://www.huffpost.com/entry/johnny-manziel-ncaa-eligibility_b_3020985 (NCAA participation is entirely voluntary and at the discretion of each individual school. Participating schools gave enforcement powers and stayed in the NCAA in large part due to massive television revenue shares distributed to each member institution.).

claims: the use of the term "student-athlete."[26] Pursuant to the NCAA bylaws, this term is defined as "one who engaged in athletics for the education, physical, mental, and social benefits he derives therefrom, and to whom athletics is an avocation."[27]

The use of the term "student-athlete" would prove fruitful for the NCAA, beginning with a case involving a college football player's widow filing for workmen's compensation death benefits.[28] In this case, Ray Dennison, a football player for Fort Lewis A&M College, was fatally injured in the course of a football game on September 24, 1955.[29] As a scholarship athlete, his widow consequently filed under the Workmen's Compensation Act seeking death benefits.[30] The Supreme Court of Colorado ultimately ruled against the plaintiff and held that Ray Dennison's widow was unable to recover because the college was "not in the football business."[31] A later case, *Waldrep v. Texas Employers Ins. Ass'n*, granted an award of workers' compensation benefits to a Texas Christian University football player who had suffered a paralyzing injury in a 1974 football game.[32] The Court of Appeals reversed the lower court's award of workers' compensation benefits and reinforced student-athletes as amateurs.[33] The court ruled that the acceptance of a scholarship is not sufficient to show an employer-employee relationship.[34] It is clear that the use of this term has allowed the NCAA to dance around potential liability in cases which relied on an employer-employee relationship, such as workers' compensation.[35]

The use of the term "student-athletes" as a defense for the NCAA

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[26] Jon Solomon, *The History Behind the Debate Over Paying NCAA Athletes*, ASPEN INST. (Apr. 23, 2018), https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/.
[27] Waldrep v. Texas Emp'r Ins. Ass'n, 21 S.W.3d 692, 695-98 (Tex. App. 2000).
[28] State Comp. Ins. Fund v. Indus. Com'n, 314 P.2d 288 (Colo. 1957).
[29] *Id*. at 289.
[30] *Id.*
[31] *Id.* at 290.
[32] *See Waldrep*, 21 S.W.3d at 695-97.
[33] *Id.* at 700 ("To maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by doing so, retain a clear line of demarcation between college athletics and professional sports.").
[34] *Id.* at 702.
[35] Jared Wade, *How the NCAA Has Used the Term "Student-Athlete" to Avoid Paying Workers' Comp Liabilities*, RISK MANAGEMENT MONITOR (Sept. 13, 2011), https://www.riskmanagementmonitor.com/how-the-ncaa-has-used-the-term-student-athlete-to-avoid-paying-workers-comp/.

has sparked debate among critics.[36] One such critique, by author Taylor Branch, asserts the term was intentionally ambiguous and coined so:

> College players were not students at play (which might understate their athletic obligations), nor were they just athletes in college (which might imply they were professionals). That they were high-performance athletes meant they could be forgiven for not meeting the academic standards of their peers; that they were students mean they did not have to be compensated, ever, for anything more than the cost of their studies. *Student-athlete* became the NCAA's signature term, repeated constantly in and out of courtrooms.[37]

While the NCAA has prevented student-athletes from becoming employees, revenue is growing at a tremendous rate.[38] In the ten years between 2005 and 2015, revenue from the "Power Five Conferences" has grown 266 percent.[39] This growth has led to an increase in coaching salaries where football coaches earned a combined $405.5 million across the five conferences for 503 employees, and yet the 4,979 football players "earned" a total of only $179.8 million in scholarship money.[40]

In light of this, there have been attempts to provide student-athletes with a larger share of the massive revenue.[41] Recent measures have allowed stipends to cover the full cost of attendance, unlimited meals and the PAC-12 Conference now allows for medical expenses to be covered by institutions for up to four years following an injury in competition.[42] While seen as a step in the right direction, state legislatures took notice of this apparent exploitation and began to look at possible legislative solutions.[43]

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[36] Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/.
[37] *Id.*
[38] *Archives of NCAA Revenues and Expense Reports by Division*, NCAA (2019), http://www.ncaa.org/about/resources/research/archives-ncaa-revenues-and-expenses-reports-division.
[39] Solomon, *supra* note 26, ("Power Five Conferences" – SEC, Big Ten, Big 12, ACC, PAC-12).
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] Mackenzie Mays & Andrew Atterbury, *How States Forced the NCAA's Hand on Student Athlete Endorsements*, POLITICO (Oct. 29, 2019), https://www.politico.com/states/california/story/2019/10/29/how-states-forced-the-ncaas-hand-on-student-athlete-endorsements-1226080.

Two other recent cases are integral to understanding the dynamic between state and federal law, the NCAA and its athletes. The first of these cases is *O'Bannon v. Nat'l Collegiate Athletic Ass'n*.[44] In *O'Bannon*, college basketball and football athletes brought suit because their name, image, and likeness had been used in video games without their approval and without compensation.[45] The plaintiffs argued that restricting the ability to be compensated for their name, image, and likeness was not in accordance with the Sherman Act and therefore, an antitrust violation.[46] However, the Ninth Circuit held that the NCAA's rules were more restrictive than necessary to preserve the spirit of amateurism but that athletes were to only be compensated for the full cost of attendance.[47] Finally, *Bd. of Regents of Univ. of Okla.*, is largely considered to be the governing case on issues involving amateurism in college sports.[48] The underlying issue in this Supreme Court case was whether the NCAA could limit the number of games a school could license for broadcast on television.[49] The Supreme Court held that rules and restrictions made in the interest of preserving amateurism are consistent with the Sherman Antitrust Act.[50] The Sherman Antitrust Act of 1890 is a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition."[51] "Athletes must not be paid, must be required to attend class, and the like," to "preserve the character and quality of the product."[52] Over the past thirty years, courts have shown great deference to the NCAA when it comes to rules and regulations that deal with the compensation of athletes and the preservation of amateurism.[53]

B. California's "Fair Pay to Play Act"

California became the first state to pass legislation to compensate

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[44] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015).
[45] *Id.*
[46] *Id.* at 1055.
[47] *Id.* at 1053.
[48] *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984); *see also O'Bannon*, 802 F.3d at 1061-62.
[49] *See Bd. of Regents of Univ. of Okla.*, 468 U.S. at 104.
[50] *Id.* at 120.
[51] FED. TRADE COMM'N, *The Antitrust Laws* (2020), https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.
[52] *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 102.
[53] Paul Haagen, *Sports in the Courts: The NCAA and the Future of Intercollegiate Revenue Sports*, 103 JUDICATURE 2 (Summer 2019), https://judicature.duke.edu/articles/sports-in-the-courts-the-ncaa-and-the-future-of-intercollegiate-revenue-sports/.

student-athletes.[54] After years of research, California state senator Nancy Skinner drafted Senate Bill 206 with the intention of creating a "more equitable environment for college athletes."[55] This bill, colloquially referred to as the "Fair Pay to Play Act", allows for student-athletes to hire agents and receive payment for endorsements.[56] In other words, this bill bypasses the NCAA's prohibition of compensation for "name, image, and likeness."[57] The Fair Pay to Play Act passed through the California Senate and Assembly and was signed by Governor Gavin Newsom in the fall of 2019 and goes into effect in 2023.[58] Despite this victory, Senator Skinner was disappointed as her ultimate goal was to allow the college athletes to collect a share of the revenue that they helped generate.[59]

C. The Maryland Approach to Compensating Student-Athletes

Perhaps inspired by Senator Nancy Skinner's efforts in California, Delegate Brooke Lierman served as lead sponsor for the introduction of House Bill 548.[60] Maryland House Bill 548 ("H.B. 548") would provide college athletes the ability to profit off of their name, image, and likeness, much like its Californian counterpart.[61] The bill was proposed in response to the tragic death of University of Maryland football player Jordan McNair.[62] Del. Lierman's bill adds an interesting twist; student-athletes would also be given the ability to collectively bargain in the form of scholarship term negotiations. Additionally, student athletes would receive short and long-term health

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[54] Alan Blinder, *N.C.A.A. Athletes Could be Paid Under New California Law*, N.Y. TIMES (Sept. 30, 2019), https://www.nytimes.com/2019/09/30/sports/college-athletes-paid-california.html.

[55] Tyler Tynes, *The Ripple Effects of California's Fair Pay to Play Act*, THE RINGER (Oct. 11, 2019), https://www.theringer.com/2019/10/11/20909171/california-sb-206-ncaa-pay-college-players.

[56] Jack Kelly, *Newly Passed California Fair Pay to Play Act Will Allow Student Athletes to Receive Compensation*, FORBES (Oct. 1, 2019, 12:36 PM EST), https://www.forbes.com/sites/jackkelly/2019/10/01/in-a-revolutionary-change-newly-passed-california-fair-pay-to-play-act-will-allow-student-athletes-to-receive-compensation/#1920b7f157d0.

[57] *Id.*

[58] Tynes, *supra* note 55.

[59] *Id.*

[60] H.B. 548.

[61] *Id.*

[62] Rick Maese, *Maryland, Virginia Latest States to Consider Legislation to Compensate Student Athletes*, THE WASH. POST (Jan. 10, 2020, 6:38 PM ET), https://www.washingtonpost.com/sports/2020/01/10/maryland-virginia-latest-states-consider-legislation-compensate-college-athletes/.

and disability insurance benefits and they would gain an independent student-athlete advocate.[63]

The bill itself does not mandate that universities pay their student-athletes beyond their scholarships.[64] However, critics say that giving the athletes the ability to negotiate would open the door to negotiations for money from the school.[65] Unlike the "Fair Pay to Play" Act, H.B. 548 did not pass in its first attempt through the General Assembly. However, Del. Lierman remains positive [66] as she and eighteen cosponsors will continue to advocate for college athletes in the state of Maryland through legislative action.[67]

D. How Other States Have Handled Similar Legislation

A large number of states have introduced or are working on bills to provide a more equitable approach to student-athlete compensation.[68] Florida has introduced House Bill 251, New York has been applauded for its aggressive Senate Bill 6722 which was introduced in 2019, Washington's proposal is titled House Bill 1084 and Illinois has House Bill 3904.[69] As for the 2020 session, Colorado, Kentucky, Minnesota, Nevada, Pennsylvania, South Carolina and Connecticut are all expected to introduce legislation that replicates or extends further than the "Fair Pay to Play Act".[70]

New York, in particular, has been aggressive in its approach to provide compensation resources for athletes.[71] This bill would require that institutions establish an injured athletes fund for students that suffer career ending or long-term injuries during a game or practice, paid out

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[63] H.B. 548.
[64] *Id*.
[65] Bruce DePuyt, *Delegate Wants Collective Bargaining Rights for Student-Athletes*, MARYLAND MATTERS (Feb. 15, 2019), https://www.marylandmatters.org/2019/02/15/delegate-wants-collective-bargaining-rights-for-student-athletes/.
[66] *Id.*
[67] *Id.*
[68] Andrew Smalley, *Pay for Play for College Athletes?*, NAT'L CONF. OF STATE LEGIS. (Sept. 30, 2019), https://www.ncsl.org/blog/2019/09/30/pay-for-play-for-college-athletes.aspx.
[69] Matt Norlander, *Fair Pay to Play Act: States Bucking NCAA to let Athletes be Paid for Name, Image, Likeness*, CBS SPORTS (Oct. 3, 2019, 5:43 PM ET), https://www.cbssports.com/college-football/news/fair-pay-to-play-act-states-bucking-ncaa-to-let-athletes-be-paid-for-name-image-likeness/.
[70] *Id.*
[71] Jabari Young, *Florida and NY Push Bills to Compete with California's New "Pay to Play" Law*, CNBC (Oct. 24, 2019, 2:29 PM ET), https://www.cnbc.com/2019/10/24/florida-and-ny-push-bills-to-compete-with-californias-ncaa-pay-to-play-law.html.

upon graduation.[72] Further, the bill would require colleges take fifteen percent of all revenue from ticket sales and disperse it equally among the student-athletes at the school.[73]

E. Federal Action on Name, Image, and Likeness

Rep. Anthony Gonzalez, a former Ohio State football player and current Ohio Congressman, has expressed interest in bringing federal legislation that would apply to college athletes across the country with an expedited activation plan.[74] Rep. Gonzalez is not the only Congressman with a plan for federal change. Rep. Mark Walker, of North Carolina, is working on H.R. 1804 (the "Student-Athlete Equity Act") that would allow for athletes to profit off of their name, image, and likeness.[75] Although supporters believe that state action is important and meaningful, the best course of action uses federal pressure on the NCAA.[76]

F. The NCAA's Response to Legislative Movements

The NCAA contends that the Fair Pay to Play Act is unconstitutional and would result in the disqualification of California athletic programs from NCAA competition.[77] Further, in an October 29, 2019 press release, the NCAA outlined its approach to designing a more modern rule for compensating its athletes.[78] A committee will reconvene on January 1, 2021 to create a rule that abides by their eight parameters.[79]

These parameters are:

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[72] Tim Riordan, *"New York Collegiate Athletic Participation Compensation Act" Gets Amended*, UB BULL RUN (Oct. 4, 2019, 1:15 PM ET), https://www.ubbullrun.com/2019/10/4/20898881/new-york-collegiate-athletic-participation-compensation-act-gets-amended.
[73] *Id.*
[74] Norlander, *supra* note 69.
[75] Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019).
[76] Norlander, *supra* note 69.
[77] Chris Bumbaca and Steve Berkowitz, *NCAA Send California Governor Letter Calling Name, Likeness Bill 'Unconstitutional'*, USA TODAY (Sept. 11, 2019, 2:38 PM ET), https://usatodayhss.com/2019/ncaa-letter-california-fair-pay-to-play-bill-unconstitutional.
[78] Phil Harrison, *NCAA Votes to "Enhance" College Athletes Ability to be Compensated for Name, Image and Likeness*, BUCKEYES WIRE (Oct. 29, 2019, 4:30 PM ET), https://buckeyeswire.usatoday.com/2019/10/29/ncaa-enhance-name-image-likeness-compensation-pay-college-athletes/.
[79] *Id.*

> 1) assure student-athletes are treated similarly to non-athlete students unless a compelling reason exists to differentiate, 2) maintain the priorities of education and the collegiate experience to provide opportunities for student-athlete success, 3) ensure rules are transparent, focused and enforceable and facilitate fair and balanced competition, 4) make clear the distinction between collegiate and professional opportunities, 5) make clear that compensation for athletics performance and participation is impermissible, 6) reaffirm that student-athletes are student first and not employees of the university, 7) enhance the principles of diversity, inclusion and gender equity, and 8) protect the recruiting environment and prohibit inducements to select, remain at or transfer to a specific institution.[80]

This release can be interpreted as the NCAA's response to enormous outside pressure both from state and federal legislatures, as well as from the general public.[81] While the actual rule developed by the NCAA is unknown, these parameters provide sufficient guidance and instruction as to what rule the public can expect in 2021. Maryland is at a crossroads with how to comply with the NCAA's guidelines on name, image, and likeness while also adding measures to protect its own student-athletes.

III. Problem: Maryland Finds itself at an Intersection Between NCAA Rules, Pending Federal Action and Its Own Legislation

A. Maryland's Current Position with House Bill 548 and its Potential to Impact Student-Athlete Eligibility in NCAA Sanctioned Events

The state of Maryland and its institutions competing in NCAA athletics, finds itself in a precarious position. The problem they face surrounds the proposed student-athlete compensation bill, H.B. 548 and its divergence from current NCAA rules.[82] On its face, H.B. 548 appears to be in clear violation of the NCAA's guidelines and policies, thus jeopardizing its standing in NCAA sanctioned sporting events.[83]

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[80] *Id.*

[81] Andy Kroll, *Don't Cheer the NCAA's New Player Compensation Announcement Just Yet*, ROLLING STONE (Oct. 29, 2019, 4:16 PM ET), https://www.rollingstone.com/politics/politics-news/ncaa-student-athlete-compensation-california-football-basketball-905380/.

[82] H.B. 548.

[83] Steve Berkowitz, *If California Bill Goes Into Effect, One AD Says Schools in State 'won't be Members of the NCAA'*, USA TODAY (Sept. 26, 2019, 5:57 PM

The problem is that Maryland's institutions may wind up disqualified, unable to participate in NCAA sanctioned events if the necessary precautions are not taken.[84]

The NCAA has threatened to disqualify institutions from competition if the state legislature passes laws in conflict with their rules and regulations.[85] As discussed, the NCAA will be announcing its new rules for student-athletes at the beginning of 2021.[86] At this time, it is unclear what will happen to state legislation that has been passed and conflicts with this NCAA decision.[87] It is likely that the NCAA will challenge these actions in court and through expulsion or banishment from the institution and its sport competitions.[88] Maryland must take certain precautions, such as drafting a student-compensation bill with fair consideration of the NCAA's intentions in light of its guidelines, while delaying the enaction of such a bill, to ensure Maryland institutions are not barred from competition. The solution section of this comment will set forth the potential pitfalls of legislative action by individual states, including Maryland, how federal legislation is the most logical solution and provides a potential example of such action.[89]

B. Maryland Must Prepare for, and Expect the Worst From the NCAA

A satisfactory resolution of this problem from the NCAA seems highly unlikely. Despite setting the groundwork for a rule that loosens restrictions on the rights of student-athletes, NCAA president Mark Emmert referred to California's "Fair Pay to Play Act" as "unconstitutional" and remained committed to disqualifying student-athletes who received compensation under the freedoms granted by the

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ET), https://www.usatoday.com/story/sports/college/2019/09/26/ohio-state-athletic-director-ncaa-drop-california-if-bill-passes/3778683002/.

[84] Marc Edelman, *NCAA's Threat to Ban California Colleges Could Lead to Antitrust Lawsuit Reminiscent of 1984*, FORBES (Oct. 1, 2019, 8:30 AM ET), https://www.forbes.com/sites/marcedelman/2019/10/01/ncaas-threat-to-ban-california-member-colleges-could-lead-to-antitrust-lawsuit-reminiscent-of-1984/#1f9f21a91af3.

[85] *Id.*

[86] Erin Jordan, *New NCAA Pay-For-Play Rules Could Spur Opportunities, Former Iowa Athletes Say*, GAZETTE (Nov. 15, 2019), https://www.thegazette.com/subject/sports/pay-for-play-ncaa-fair-pay-to-play-act-pay-college-athletes-iowa-university-20191115.

[87] Michael McCann, *California's New Law Worries the NCAA, but a Federal Law is What They Should Fear*, SPORTS ILLUSTRATED (Oct. 4, 2019), https://www.si.com/college/2019/10/04/ncaa-fair-pay-to-play-act-name-likeness-image-laws.

[88] *Id.*; *see also* Edelman, *supra* note 84.

[89] *See infra* Part IV.

new legislation.[90] That being said, the NCAA has contacted California lawmakers and singled out specific parts of the bill that it sees as a problem.[91] Maryland, much like California, has legislation that appears in conflict with the NCAA rules for member organizations.[92] Obscurity and ambiguity of the NCAA's press release in October of 2019 only complicates the issue and puts athletic teams in jeopardy whether the legislation is challenged in court or teams are outright banned from competition.[93] The NCAA published eight guidelines for its potential 2021 resolution to this problem, but these guidelines are vague and ambiguous, providing proactive states with little help.[94]

C. The Fundamental Disparity Between the NCAA's Guidelines and the Current Language of H.B. 548 Would Likely Result in a Conflict with the NCAA

When assessing H.B. 548, it is likely the NCAA will first scrutinize the right of the student-athlete to use his/her image and likeness as means for compensation.[95] As non-student athletes are currently able to profit off of their image and likeness, it stands to reason that this will not be an issue in terms of how students are treated.[96] A primary concern could be whether this blurs the proverbial line as to what constitutes a "collegiate" or "professional" opportunity.[97] If H.B. 548 were more specific as to where these activities could take place, such as off campus only, or if the bill specified that such ventures could only happen during the offseason of the student-athletes' sport, there is a

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[90] Dennis Dodd, *NCAA Prez Calls Name, Image and Likeness Rights an 'Existential Threat' to College Sports*, CBS SPORTS (Sept. 25, 2019, 9:35 AM ET), https://www.cbssports.com/college-football/news/ncaa-prez-calls-name-image-and-likeness-rights-an-existential-threat-to-college-sports/.

[91] *Id.*

[92] Nick Bromberg, *Bill in Maryland State Legislature Would Give Athletes Right to Collectively Bargain, Unionize*, YAHOO SPORTS (Feb. 8, 2019, 9:38 AM ET), https://sports.yahoo.com/bill-maryland-state-legislature-give-athletes-right-collectively-bargain-unionize-143852403.html.

[93] *Id.*; *see also* Edelman, *supra* note 84.

[94] Nick Bromberg, *NCAA to 'Immediately Consider Updates' to Rules Surrounding Athletes' Image Rights*, YAHOO SPORTS (Oct. 29, 2019), https://sports.yahoo.com/ncaa-to-immediately-consider-updates-to-rules-surrounding-athletes-image-rights-174721612.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAJ7JNWcKne5Z8EWNWst25LwPZKcSVbEQ_e6g3_gjc3XTr3XHGn4Ug4s7L6AN_OLvk5ejfSFXLSiZzLPEuWxeGRnbfP_iDyBeOBulBrF_CfsWFlSw2hABsxPhhn3E7CjWzGowFD-Bpb1Ime7-zQ7gjOP2aC1HqjpCEXuvll8-6Uu4.

[95] *Id.*

[96] Dodd, *supra* note 90.

[97] *Id.*

chance the NCAA may be more amenable on this measure.

When looking at H.B. 548, there appears to be two other areas of concern with granting student-athletes the right to use their image and likeness for profit: recruiting fairness and gender equity.[98] Enhancing the principles of diversity, inclusion, and gender equity is a derivative of Title IX.[99] Allowing student-athletes to profit off of name, image, and likeness is a Title IX concern, as most of the compensation will be given to the superstar players of the most popular sports.[100] While the "most popular sports" vary by institutions, the vast majority of college sports programs are dominated by football and men's basketball.[101] As such, the endorsements will likely be largely focused on players in these sports. This could be detrimental to the gender equity seen in the current landscape of college athletics. A lesser concern is the recruiting advantage that could be gained by institutions in larger markets and the available endorsement money.[102] Should student-athletes be given the right to profit off of their image and likeness, it stands to reason that they will factor into their decision the amount of potential sponsors in the market they will spend the next few years.[103] University of Maryland's Athletic Director, Damon Evans, downplays this benefit and says that recruiting advantages are inherent under any system, as schools across the country operate under different budgets, sometimes separated by tens of millions of dollars.[104]

Notably, H.B. 548 also proposes the installation of an independent student-athlete advocate.[105] On its face, this creative part of the bill raises little to no concern when compared with the NCAA's

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[98] Harrison, *supra* note 78.
[99] *Gender Equity and Title IX*, NCAA, http://www.ncaa.org/about/resources/inclusion/gender-equity-and-title-ix.
[100] Kristi Dosh, *Name, Image and Likeness Legislation May Cause Significant Title IX Turmoil*, FORBES (Jan. 21, 2020, 1:22 PM EST), https://www.forbes.com/sites/kristidosh/2020/01/21/name-image-and-likeness-legislation-may-cause-significant-title-ix-turmoil/#101525867625.
[101] Ivan Johnson, *The Most Popular College Sports in 2019*, SPORTS DAILY (July 17, 2019, 3:43 PM), https://thesportsdaily.com/2019/07/17/the-most-popular-college-sports-in-2019/.
[102] Amelia Jarecke, *A Maryland Perspective on the NCAA Name, Image and Likeness Debate*, TESTUDO TIMES (Dec. 12, 2019, 9:01 AM EST), https://www.testudotimes.com/features/2019/12/12/21012187/ncaa-name-image-likeness-debate-damon-evans-ellis-mckennie-taylor-mikesell-perspective.
[103] Steve Berkowitz & Dan Wolken, *NCAA Board of Governors Opens Door to Athletes Benefiting from Name, Image and Likeness*, USA TODAY (Oct. 29,2019), https://www.usatoday.com/story/sports/college/2019/10/29/ncaa-board-opens-door-athletes-use-name-image-and-likeness/2492383001/.
[104] Jarecke, *supra* note 102.
[105] H.B. 548.

guidelines.[106] The chief concern that may be raised on this issue is that non-athlete students are not given their own advocates. The rebuttal from Del. Lierman would likely be in the form of student government opportunities and other campus representative groups. Overall, it is unlikely that the independent student-athlete advocate causes any issues as the principle feature of the NCAA's guidelines is the equal treatment of all college students, athletes or otherwise.[107]

The next concern with H.B. 548 is short and long-term disability insurance.[108] While there are no diversity or gender issues to be discussed, this extended insurance could raise concerns about student-athletes being employees of the institution, the treatment of non-athletes when compared to student-athletes, and in the event that all schools across the country do not have this policy, creating an unfair recruiting advantage.[109] Because the focus of the NCAA appears to be on competitive fairness and recruiting plays a significant role in the level of talent on college teams, the NCAA may take exception to this aspect of H.B. 548.[110] However, improving health care for college athletes is already an important issue getting national recognition.[111] It is likely that this aspect of the bill will also be considered by the NCAA and ultimately poses little concern for the eligibility of Maryland student-athletes.[112]

Finally, the NCAA will likely concern itself with H.B. 548's provision to give student-athletes the right to the collective bargaining of scholarship terms.[113] This subsection may cause the greatest concern for athlete eligibility. First, it appears to be a direct violation of the NCAA's policy to keep student-athletes from being treated as employees of the institution — a policy affirmed through the courts.[114] The right to collective bargaining will eventually lead to student-athletes demanding to be paid directly by the university.[115] This concern is something many consider to be an unintended, but unavoidable consequence of H.B. 548.[116] While California's "Fair Pay to Play Act" allows for student-athletes to be paid for their image or

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[106] DePuyt, *supra* note 65.
[107] McCann, *supra* note 87.
[108] H.B. 548.
[109] Jarecke, *supra* note 102.
[110] McCann, *supra* note 87.
[111] Steve Berkowitz, *Sen. Chris Murphy Calls for NCAA to Improve Athletes' Health Care; Meeting with Emmert Set*, USA TODAY (Dec. 16, 2019, 11:02 AM ET), https://www.usatoday.com/story/sports/college/2019/12/16/report-ncaa-should-pay-complete-health-care-coverage-athletes/2661767001/.
[112] *Id.*
[113] H.B. 548.
[114] *Waldrep*, 21 S.W.3d at 700.
[115] DePuyt, *supra* note 65.
[116] Jarecke, *supra* note 102.

likeness, this part of Maryland's bill would call for institutions to pay its players directly.[117] This destroys the amateurism model and is something that the NCAA will almost certainly never approve.[118] Because of this concern, it is unlikely that Maryland institutions will remain eligible to compete in NCAA events should H.B. 548 be passed in 2020.

D. In the Event of Individual State Legislation, The NCAA Must Avoid Dealing Punishments Too Hastily

As the governing body for collegiate athletics, the NCAA finds itself in a position to change the entire atmosphere of college sports.[119] The NCAA's release on the subject suggests that there is some willingness by the organization to take a somewhat proactive approach to the issue.[120]

However, the NCAA's president, Mark Emmert, warns of the troubles associated with the sponsorship models that these bills advocate for.[121] If the NCAA was unhappy with the results of individual states, there are several avenues of recourse for it to consider. Perhaps the most favorable would be the dormant commerce clause which prohibits state actors from enacting legislation that would disrupt or discriminate against interstate commerce.[122] In *NCAA v. Miller*, the NCAA challenged a Nevada law that extended due process protections for student-athletes accused of NCAA rules violations.[123] Ultimately,

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[117] *Id.*
[118] Greta Anderson, *NCAA Votes for Athlete Payment*, INSIDE HIGHER ED (Oct. 30, 2019), https://www.insidehighered.com/news/2019/10/30/college-athletes-permitted-be-paid-name-image-likeness.
[119] Barrett Sallee & Adam Silverstein, *NCAA Takes Big Step Toward Allowing Name, Image and Likeness Compensation for Athletes*, CBS SPORTS (Apr. 29, 2020, 9:52 AM ET), https://www.cbssports.com/college-football/news/ncaa-takes-big-step-toward-allowing-name-image-and-likeness-compensation-for-athletes/.
[120] Andy Kroll, *Don't Cheer the NCAA's New Player Compensation Announcement Just Yet*, ROLLING STONE (Oct. 29, 2019, 4:16 PM ET), https://www.rollingstone.com/politics/politics-news/ncaa-student-athlete-compensation-california-football-basketball-905380/.
[121] *See* Jeremy Mauss, *NCAA President Wants Help from Congress Regarding Name, Image and Likeness*, KSL SPORTS (Dec. 13, 2019, 10:08 AM ET), https://kslsports.com/424286/ncaa-president-wants-help-from-congress-regarding-name-image-likeness/.
[122] Timothy Z. LaComb & Jennifer M. Oliver, *California's College Athletes May Profit From Their Positions, Kicking off a National Wave and a Bout with the NCAA*, THE NAT'L LAW REVIEW (Oct. 5, 2019), https://www.natlawreview.com/article/california-s-college-athletes-may-profit-their-positions-kicking-national-wave-and.
[123] *Id.*

the Court of Appeals for the Ninth Circuit deemed the Nevada law unconstitutional under the dormant commerce clause.[124]

The NCAA can point to the impact of game broadcasting, merchandise sales, and interstate travel for games and events as examples of interstate commerce being disrupted by state legislation.[125] One example of this is California's "Fair Pay to Play" Act.[126] The NCAA has taken this approach before and has done so with moderate success.[127]

The NCAA should be mindful, however, that the individual states are also armed with defense mechanisms. Maryland's law could be a problem as it could turn into a legal battle.[128] For example, should Maryland's H.B. 548 pass and the NCAA challenged its legitimacy, or if the NCAA tried to disqualify athletes from Maryland institutions, Maryland has the weapon of an antitrust lawsuit. One of the most established methods for challenging private entities with immense power, the antitrust lawsuit, stems from the Sherman Antitrust Act of 1890.[129] By enacting a ban on a states' athletes, the NCAA is participating in monopolistic action.[130] An antitrust lawsuit in this situation would likely carry a similar outcome to that of *Bd. of Regents of the Univ. of Okla*.[131] In *Bd. of Regents of the Univ. of Okla.*, the Supreme Court held that the NCAA's control over television rights violated the Sherman Antitrust Act.[132] The Supreme Court does make note that the NCAA has the power to make rules related to its mission of promoting amateur athletics.[133]

The NCAA ultimately does have the power to disqualify athletes from

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[124] National Collegiate Athletic Ass'n v. Miller, 10 F.3d 633 (9th Cir. 1993) (The court held that extended due process protections violated the commerce clause of the Constitution as "Procedural changes at the border of every state would as surely disrupt the NCAA as changes in train length at each state's border would disrupt a railroad").

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] Barry Svrluga, *NCAA Should Hear State Lawmakers' Message on Amateurism Instead of Fighting It*, WASH. POST (Sept. 20, 2019, 6:06 AM ET), https://www.washingtonpost.com/sports/colleges/ncaa-should-hear-state-lawmakers-message-on-amateurism-instead-of-fighting-it/2019/09/19/128b3ee8-dae8-11e9-a688-303693fb4b0b_story.html.

[129] Timothy Z. LaComb & Jennifer M. Oliver, *supra* note 122 (While an antitrust lawsuit under the Sherman Act is an avenue for state recourse against the NCAA, the minutia of an Antitrust lawsuit is beyond the scope of this comment.)

[130] *Id.*

[131] *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 85.

[132] *Id.*

[133] *Id.*

states with compensation rules that it does not welcome.[134] The NCAA also has the ability to challenge legislation passed by these states, presumably on dormant commerce clause grounds.[135] However, the NCAA needs to carefully consider this action as challenging legislation would cause backlash from states in the form of antitrust lawsuits.[136] The NCAA has not traditionally fared well in these lawsuits and would presumably like to avoid the hefty fine that accompanies a violation of the Sherman Antitrust Act of 1890.[137] Even so, the NCAA would likely retaliate if any such legislation conflicts with its own rules and regulations as fifty different laws for fifty different states is an infeasible solution to this problem.[138] If the federal government does get involved, states would then have to worry about preemption regarding their legislation versus any legislation passed by the federal government.[139]

IV. Solution: Maryland's Legislation Should be Viewed as a Backup Plan as The Real Power Rests with the NCAA and the Federal Government

The first step of this solution will examine the implications of Maryland approving legislation to give student-athletes the ability to profit from their name, image, and likeness, as well as the extended rights afforded by H.B. 548. The second step of this analysis will show that federal legislation is not only the most logical solution, but the only way to make a real impact in the world of collegiate athletics on this issue.

A. *Maryland has Little Chance to Enact Real Change*

Maryland finds itself in an interesting position. Its lawmakers want to better protect the state's student-athletes but its institutions risk disqualification if the NCAA finds that this protection exceeds what it is willing to offer.[140] Maryland legislators have crafted one of the most progressive student-athlete bills that would change the way student-

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[134] *Id.*
[135] Aimonetti, *supra* note 18.
[136] Aimonetti, *supra* note 18.
[137] B. David Ridpath, *The NCAA Violates Antitrust Law*, FORBES (Sept. 30, 2015), https://www.forbes.com/sites/bdavidridpath/2015/09/30/this-just-in-the-ncaa-violates-anti-trust-law/#12704b1a1099.
[138] Aimonetti, *supra* note 18.
[139] McCann, *supra* note 87.
[140] Paul Steinbach, *Lawmaker: Let College Athletes in Maryland Unionize*, ATHLETIC BUS. (Feb. 2019), https://www.athleticbusiness.com/contract-law/lawmaker-let-college-athletes-in-maryland-unionize.html.

athletes are viewed forever.[141] The NCAA's ultimate decision on a rule for the compensation of athletes endangers any progress made by individual states, such as Maryland.[142] Maryland H.B. 548, and lead sponsor Del. Lierman, has the potential to protect and compensate student-athletes on numerous fronts.[143] In a courageous attempt following the tragic death of one of the University of Maryland's football players, student-athletes would receive the ability to profit off of their name and likeness, the right to unionize to negotiate scholarship terms, added insurance benefits, and a student advocate to campaign on their behalf.[144]

Perhaps, like California, Maryland lawmakers could consider an extended start date for H.B. 548, should it pass.[145] If this is the case, the extended period would allow for the NCAA to publish its rule on name, image, and likeness compensation, and for the individual states to repeal or continue their legislation in light of having the complete NCAA decision.[146] Maryland would carry lesser risk that their rule on the issue would be in conflict with the NCAA, thus jeopardizing student-athlete eligibility.[147] At the very least, extending the commencement date would give time for other jurisdictions to play "catch up", hopefully passing similar legislation.[148] The more states that are able to pass similar legislation, the less likely the NCAA will disqualify student-athletes from participation in sanctioned events.[149]

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[141] *Id.*

[142] Steven Appelbaum, et al., *What the NCAA's Decision on Student-Athlete Compensation Might Mean for Fla.,* DAILY BUS. REV. (Dec. 5, 2019), https://www.law.com/dailybusinessreview/2019/12/05/what-the-ncaas-decision-on-student-athlete-compensation-might-mean-for-fla/?slreturn=20200117140606.

[143] Justin Wise, *2020 Politics Adds Momentum to Paying College Athletes, Unionization*, THE HILL (Dec. 1, 2019), https://thehill.com/homenews/campaign/471553-2020-politics-adds-momentum-to-paying-college-athletes-exploring.

[144] H.B. 548.

[145] Appelbaum, *supra* note 142, (The date of effect for California's legislation on this matter is January 1, 2023).

[146] J. Brady McCollough, *News Analysis: NCAA makes move on Name, Image and Likeness Use, but There's a Long Way to Go*, LOS ANGELES TIMES (Oct. 29, 2019), https://www.latimes.com/sports/story/2019-10-29/ncaa-athletes-nil-college-athletes-profit-name-image-likeness.

[147] McCann, *supra* note 87.

[148] Chris Landon, *Digesting the Fair Pay to Play Act*, SB NATION (Sept. 30, 2019, 8:58 PM PT), https://www.uwdawgpound.com/2019/9/30/20892694/analysis-paying-college-athletes-fair-pay-to-play-act-sb-206-lebron-james-gavin-newsom.

[149] John Feinstein, *The NCAA is Still Whining About Pay to Play. It's too Late for That*, WASH. POST (Oct. 16, 2019, 12:57 PM ET), https://www.washingtonpost.com/sports/colleges/the-ncaa-is-still-whining-

While an effective passage of H.B. 548 will likely require an extended start period, it is also imperative that Maryland lawmakers such as Del. Lierman consider the eight guidelines the NCAA published on October 29, 2019.[150] The NCAA's rule has yet to be determined and will not be known for another year, yet legislators must consider these guidelines to ensure compliance, or significant compliance, with this rule. Del. Lierman, and other sponsors of H.B. 548 will have to deal with significant ambiguity from the NCAA.[151] In undergoing an analysis of H.B. 548, the eight factors laid out by the NCAA can be used to critique the four main parts of the bill.[152] These four parts are: scholarship negotiation, disability insurance, use of image and likeness, and an independent student athlete advocate.[153] If the Maryland legislature is serious about protecting the rights of its student-athletes and wishes to avoid retribution from the NCAA, it must ensure that its rule reasonably and substantially complies with these guidelines.[154] It appears that while Del. Lierman has the right idea for improving the treatment of Maryland's student-athletes, H.B. 548 in its current form likely violates the guidelines set forth by the NCAA and Maryland's athletes could potentially face disqualification, if enacted.[155] The Maryland rule for student-athlete rights would almost certainly need to remove any parts involving treating these individuals as employees of the institutions for which they compete, such as long-term disability insurance and the right to negotiate scholarship terms.[156] If H.B. 548 was revised, the

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about-pay-to-play-its-too-late-for-that/2019/10/16/d128a2c8-f01e-11e9-8693-f487e46784aa_story.html.

[150] *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, NCAA (Oct. 29, 2019, 1:08 PM ET), http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities.

[151] Michael McCann, *Key Questions, Takeaways from the NCAA's NIL Announcement*, SPORTS ILLUSTRATED (Oct. 29, 2019), https://www.si.com/college/2019/10/30/ncaa-name-image-likeness-announcement-takeaways-questions.

[152] H.B. 548.

[153] Staff, *New Maryland Bill Would Give Student Athletes Collective Bargaining Rights*, FOX 5 WASH. DC (Feb. 6, 2019), https://www.fox5dc.com/news/new-maryland-bill-would-give-student-athletes-collective-bargaining-rights.

[154] Bromberg, *supra* note 92.

[155] Jeremy Bauer-Wolf, *New Bill May Allow Athlete Compensation*, INSIDE HIGHER ED (June 26, 2019), https://www.insidehighered.com/news/2019/06/26/ncaa-may-not-allow-participation-championship-games-if-california-bill-passes.

[156] Billy Witz, *N.C.A.A. is Sued for Not Paying Athletes as Employees*, N.Y. TIMES (Nov. 6, 2019), https://www.nytimes.com/2019/11/06/sports/ncaa-lawsuit.html.(Referencing repeated actions to have student-athletes recognized as employees of their schools or of the NCAA have repeatedly failed).

right to collectively bargain would almost certainly need to be removed as the NCAA is steadfastly opposed to treating student-athletes as employees.

In light of Title IX concerns and recruiting advantages, legislators should choose to err on the side of specificity. While the current bill lacks any specific limits regarding name, image, and likeness compensation, a provision which caps the amount of money an individual student-athlete is able to earn in a given year would assuage many concerns over unfair treatment.[157] Likewise, the more ambiguous provision in H.B. 548, the independent student-athlete, could be defined more thoroughly as to avoid any conflict or perception of conflict with the NCAA's guidelines.[158] Of course, Maryland's bill should only act as a backup plan should the NCAA or the federal government fail to pass any meaningful changes.[159] That being said, lawmakers should be sure to err on the side of caution when amending H.B. 548 as to not find its institutions in violation of the NCAA's rules.

B. National Problem, Federal Solution?

The problem presented with the compensation of student-athletes certainly affects Maryland, but it also has major ramifications for the rest of the country. However, it is unlikely that fifty solutions for fifty states is adequate. Rather, a more complete solution could be reached by the federal government. This point was discussed by NCAA president, Mark Emmert.[160] While federal government intervention has previously been ridiculed by NCAA decision makers, Emmert has sought assistance from several members of Congress.[161] Emmert understands that, while running college sports from Washington, D.C. is impractical and undesirable, assistance from federal lawmakers is much preferred when compared to the reality of fifty different state laws.[162] The federal government also has a handy tool at its disposal: preemption.[163] This means that if the federal government passes legislation on this issue, the state legislations in conflict with this decision would no longer be valid.[164] This would also pertain to any

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[157] Dosh, *supra* note 100.
[158] McCann, *supra* note 151, at 2.
[159] Dan Wolken, *NCAA President Mark Emmert: We Need Help from Congress on Athlete Name, Image, Likeness*, USA TODAY (Dec. 11, 2019), https://www.usatoday.com/story/sports/college/2019/12/11/ncaa-president-mark-emmert-wants-congress-aid-name-image-likeness/4401102002/.
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] Aimonetti, *supra* note 18, at 35.
[164] Aimonetti, *supra* note 18, at 35.

NCAA rule or regulation set forth that does not agree or coincide with the federal action.[165]

While federal government intervention in college athletics is rare, it is not without precedent. Dating back to the earliest days of college sports, the federal government has played a fairly significant role in the success and regulation of the college landscape.[166] One of the first such instances was President Theodore Roosevelt's rally of college football minds to stop the abolition of the game from the ranks of college sports.[167] Yet another instance, and perhaps a much larger example, was the passage of federal civil rights law, Title IX, in 1972.[168] Calling gender equity a similar issue to student-athlete compensation would be asinine. However, Title IX does provide an example of the federal government acting and passing legislation which impacts the NCAA on an issue of great importance. The NCAA did file a lawsuit challenging the legality of Title IX, but the lawsuit was promptly dismissed.[169] The Title IX legislation and adoption by the NCAA is proof of the federal government's willingness and ability to inflict change on the private institution when the issues are of great importance.[170] Having federal legislation on the books would assist in smoothing discrepancies from various jurisdictions while also serving as a strong antagonist to rebut the NCAA.[171]

C. Constructing Model Federal Student-Athlete Bill

The federal government is clearly the best avenue for enacting any meaningful change in this field. As such, it is likely that federal legislators will look to provide a compromise of sorts between the progressive states and the NCAA which seeks to keep as much of the status quo and "tradition" as possible.[172] The bill would need to provide student-athletes the ability to receive compensation for their name,

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[165] Aimonetti, *supra* note 18, at 36.
[166] Sarah Eberspacher, *5 Times the U.S. Government Interfered in the World of Sports*, WEEK (Oct. 23, 2013), https://theweek.com/articles/458315/5-times-government-interfered-world-sports.
[167] *Id.*
[168] *Id.*
[169] Sarah Kwak, *Title IX Timeline*, VAULT (May 7, 2012), https://www.si.com/vault/2012/05/07/106189983/title-ix-timeline.
[170] Justin Wise, *2020 Politics Adds Momentum to Paying College Athletes, Unionization*, THE HILL (Dec. 1, 2019), https://thehill.com/homenews/campaign/471553-2020-politics-adds-momentum-to-paying-college-athletes-exploring.
[171] Wolken, *supra* note 159.
[172] Ray Glier, *After LSU vs. Clemson, It May Be The Feds vs. NCAA*, FORBES (Jan. 13, 2020), https://www.forbes.com/sites/rayglier/2020/01/13/after-lsu-vs-clemson-it-will-be-the-feds-vs-ncaa/#7ca9d90176cc.

image, and likeness while simultaneously providing the NCAA with an enforceable remedy for any infraction.[173] An appropriate compromise at the federal level would lay out distinct examples of what is compensable and alternatively, what is not.[174] Furthermore, sports law scholar Richard Karcher suggests that a mandatory arbitration provision be added to such legislation as well as the right to enjoin through civil action by the state or by the student-athlete.[175] Federal legislation would serve as a compromise between individual states and the NCAA, while avoiding eligibility and lawsuit concerns that would likely result at the state level.[176]

D. The NCAA's Role

Much like the federal government, the NCAA can enact change that has a much larger reach than any individual state.[177] The NCAA has considered individual state legislation such as the bill that was passed in California and considers such legislation unconstitutional.[178] However, with the risk of ongoing legal battles with any number of the fifty states, it does not appear that the NCAA wants to pursue such a strategy.[179] Rather, the NCAA has shown deference to federal legislators on this issue.[180]

V. Conclusion

The NCAA was faced with immense pressures when deciding to release the now infamous press statement outlining a potential solution to the image and likeness problem. It has maintained that California's "Fair Pay to Play Act" is unconstitutional and has threatened disqualification for California institutions as well as possible lawsuits. The conflict between the NCAA and local legislatures is not a problem to be solved on a state by state basis: a uniform rule is necessary. As

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[173] *Id.*
[174] Richard T. Karcher, *A Model Federal College Athletes Right of Publicity Statute,* EASTERN MICHIGAN UNIV. (Dec. 10, 2019), https://collegeathletesrightofpublicity.blogspot.com/2019/12/drafted-by-richard-t.html. (A complete example of what federal legislation could look like after being called upon by both the NCAA and legislators in several states.)
[175] *Id*.
[176] Glier, *supra* note 172.
[177] Aimonetti, *supra* note 18, at 31.
[178] Tom Schad, *What it Means: How California Bill Will Impact College Sports, and What Comes Next*, USA TODAY (Sept. 30, 2019), https://www.usatoday.com/story/sports/college/2019/09/30/ncaa-whats-next-california-law-and-its-impact-college-sports/3821349002/.
[179] Berkowitz, *supra* note 77.
[180] *Id.*

such, the best possible solution to the image and likeness problem in college sports is federal legislation that equalizes the environment of collegiate athletics and provides one clear and concise rule that prevents any state from gaining an advantage or risking disqualification.

The federal government has shown a willingness to intervene in college athletics when necessary and, more importantly, courts have supported such an imposition on the NCAA. The best possible solution is a federal bill that gives student-athletes the right to profit off of their image and likeness, just like the California bill without going as far as giving student-athletes the right to collectively bargain, as proposed in Maryland's H.B. 548. Federal legislation like this would give student-athletes the right to be compensated for their name, image, and likeness as would any other college student, while also preserving the spirit of amateurism that lies at the heart of college athletics.

In the event that Maryland legislators wish to pass a bill on this issue, it seems that the best possible solution would only include compensation for name, image, and likeness, and the independent student-athlete advocate. Such a bill should be passed with an enactment date well into the future, no earlier than January 1, 2023, so as to avoid any possible conflict with the NCAA and the legal ramifications that would undoubtedly follow.

COMMENT

From LOL to OMG: Why Maryland's Child Pornography Laws Must Exclude Consensual Teenage Sexting

By: Paulina Taniewski

> A forty-seven-year-old man, Stephen Fields, uses four false social media accounts to pose as a twenty-year-old woman. Fields uses these accounts to send and receive media of children engaged in sexually explicit conduct. Fields was prosecuted for distribution of child pornography and attempted production of child pornography.[1]
>
> A sixteen-year-old girl, S.K., records herself engaging in consensual sexual activity with another. She sends the videos to her two close friends, and one friend shares the video with the school's resource officer after they had a falling out. S.K., a minor herself, was prosecuted for distribution of child pornography in Maryland.[2]

I. Introduction

A third of American teenagers send more than one hundred text messages a day.[3] Ninety-five percent of U.S. teenagers aged thirteen to eighteen have access to a smartphone, and fifty-seven percent of parents of U.S. teenagers worry about their child sending or receiving explicit messages.[4] Growing up as a teenager is a challenging experience. Teenagers must balance parental supervision and protection, while exploring their identity, relationships with others, and desire for greater independence. For some teenagers, sexting is another way to explore their

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[1] *Towson Man Sentenced to 12 Years in Federal Prison for Distribution of Child Pornography*, U.S. DEP'T OF JUST. (Oct. 9, 2019), https://www.justice.gov/usao-md/pr/towson-man-sentenced-12-years-federal-prison-distribution-child-pornography.

[2] *In re* S.K., 466 Md. 31, 57, 215 A.3d 300, 315 (2019).

[3] Amanda Lenhart et al., *Teens and Mobile Phones*, PEW RSCH. CTR. (Apr. 20, 2010), https://www.pewinternet.org/2010/04/20/teens-and-mobile-phones/.

[4] Monica Anderson & JingJing Jiang, *Teens' Social Media Habits and Experiences*, PEW RSCH. CTR. (May 31, 2018), https://www.pewresearch.org/internet/2018/05/31/teens-social-media-technology-2018/#vast-majority-of-teens-have-access-to-a-home-computer-or-smartphone; Monica Anderson, *How Parents Feel About – and Manage – Their Teens' Online Behavior and Screen Time*, PEW RSCH. CTR. (Mar. 22, 2019), https://www.pewresearch.org/fact-tank/2019/03/22/how-parents-feel-about-and-manage-their-teens-online-behavior-and-screen-time/.

sexuality and relationships.[5] At least 18.5% of middle and high schoolers have received sexually explicit images or videos on their phones or computers.[6]

This comment is prompted by the 2019 Court of Appeals of Maryland decision *In re S.K.*[7] The court found teenager S.K. was properly adjudicated delinquent under Maryland's child pornography statute, even though the sexually explicit video was of S.K. herself, and was consensually sent by S.K.[8] In this case, S.K. was both the violator and the perceived "violated" of the child pornography statute.[9] This decision resulted from the Maryland legislature's failure to adequately modernize its child pornography statutes to incorporate the impact technology has had on teenage lives.[10]

This comment will explore the problems with Maryland's current child pornography statute and its applicability to teenage consensual sexting. The comment will argue that teenagers engaged in consensual sexting should be exempted under Maryland's statute, and that alternatively, the statute could be amended in a variety of manners.[11] Further, the comment will argue that sexting and the broader concept of "digital health" should be added to public school health curriculums, along with a community-based approach to addressing the potential consequences of sexting.[12]

Section II will discuss the legislative history behind both the federal and Maryland child pornography statutes.[13] Section II will also discuss recent changes to Maryland's statute, including new laws, the

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[5] Sexting: (2005) The creation, possession, or distribution of sexually explicit images via cellphones. The term is a portmanteau of sex and texting. *Sexting*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[6] *In re S.K.*, 466 Md. at 43, 215 A.3d at 307 (citing Linda Searing, *The Big Number: 18.5 Percent of Youths Get Sexually Explicit Images, Videos on Devices*, WASH. POST (July 27, 2019), https://www.washingtonpost.com/health/the-big-number-185-percent-of-youths-get- sexually-explicit-images-videos-on-devices/2019/07/26/2720ae4e-aee5-11e9-a0c9- 6d2d7818f3da_story.html?utm_term=.eec26e054fb5).

[7] Ann E. Marimow, *Maryland's Top Court Upholds Child Pornography Charge Against Teen Who Texted Friends a Video of Herself*, THE BALT. SUN (Aug. 26, 2019, 12:16PM), https://www.baltimoresun.com/politics/bs-md-pol-court-case-text-photo-herself-20190829-tuvw6c2ojnbcnd7kjciluehsq4-story.html.

[8] MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-01(l), (m) (West 2019) ("(l) 'Delinquent act' means an act which would be a crime if committed by an adult. […] (m) 'Delinquent child' is a child who has committed a delinquent act and requires guidance, treatment, or rehabilitation."); Garnett v. State, 332 Md. 571, 577, 632 A.2d 797,800 (1993) (Held the age of consent to sexual activity in Maryland is sixteen years of age.); *see also In re* S.K., 466 Md. 31, 54-55, 215 A.3d 300, 314 (2019).

[9] *In re S.K.,* 466 Md. at 31, 54, 215 A.3d at 300, 313.

[10] *Id.* at 62-64, 215 A.3d 300, 19-20.

[11] *See infra* Section IV.

[12] *See infra* Section IV.

[13] *See infra* Section II.

statutory interpretation within *In re S.K.*, and new legislative proposals in response to the case.[14] Section III will emphasize the statutory and social dilemma of charging sexting teenagers under Maryland's statute as rooted in gender bias.[15] Section IV will specifically provide a three-prong solution to the teenage sexting phenomena. First, the author will provide ways in which the statute can be amended to better shield teenagers who are consensually sexting.[16] Second, the author will propose sexting and "digital health" be included in public school sexual education classes in order to explain the consequences of internet activity and explore the gendered stigma behind certain sexual activities.[17] Finally, the author will argue a community-based approach is the proper intervention when a sext spreads beyond its intended audience instead of shaming and adjudicating the minor victim as delinquent.[18]

II. Historical Development

Both federal and Maryland child pornography statutes fail to distinguish whether the person charged under the statute may also be the victim protected in the text.[19] The definitions of child pornography are broad and may lead to difficulty in deciding whether to prosecute as it is unclear if the victim may also be the perpetrator. Although both federal and Maryland statutes have attempted to keep up with changes in technology and modern communication, both have failed to address teenage sexting.[20]

A. A Brief Overview of the Evolution of Federal Child Pornography Statutes

Congress first passed the Protection of Children Against Sexual Exploitation Act in 1977, which prohibited the use of children under the age of sixteen to produce child pornography.[21] The act was meant to encompass both large-scale and individual traffickers of child pornography.[22] Congress then passed the Child Protection Act of 1984 to further prohibit the production, raise the age of children protected from

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[14] *See infra* Section II.C.
[15] *See infra* Section III.
[16] *See infra* Section IV.A.
[17] *See infra* Section IV.B.
[18] *See infra* Section IV.C.
[19] *See* sources cited *infra* notes 28-34; s*ee also* sources cited *infra* note 41.
[20] *See* sources cited *infra* notes 28-34; s*ee also* sources cited *infra* note 41.
[21] Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95–225, 92 Stat. 7 § 2 (1978) (codified at 34 18 U.S.C. §§ 2251-53).
[22] S. Rep. No. 95–438, at 6 (1977).

sixteen to eighteen, and include trafficking of child pornography for non-pecuniary reasons.[23]

The first major change to federal child pornography statutes after the modernization of technology occurred in 1988, when Congress enacted amendments to include the use of computers.[24] This update criminalized transporting, distributing, or receiving child pornography through a computer.[25] Congress continued to enact a variety of amendments relating to technology and child pornography, some of which were struck down by the Supreme Court.[26] Congress must continue to draft such amendments related to child pornography carefully so to avoid overbreadth, which could lead to an infringement on First Amendment free speech rights.[27]

B. Current Federal Child Pornography Statutes Relevant to Teenage Sexting

Federal law defines child pornography as any visual depiction such as "[A] digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct . . . ."[28] Persons may be charged under a number of federal child pornography statutes depending on the alleged offense. For example, 18 U.S.C. § 2251 criminalizes the production of child pornography, stating "Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct . . . ."[29] This statute applies to any parent, legal guardian or person who has custody or control of a minor who knowingly permits them to engage in or assist another person to engage in sexually explicit conduct.[30] A first time violation or

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[23] Child Protection Act of 1984, Pub. L. No. 98–292, 98 Stat. 204 (1984).
[24] Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No., 100-690 § 7511, 102 Stat. 4485 (codified as amended at 18 U.S.C. § 2252(a) (1999)).
[25] *Id.*
[26] Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); David Stout, *Supreme Court Strikes Down Ban on Virtual Child Pornography*, N.Y. TIMES (Apr. 16, 2002), https://www.nytimes.com/2002/04/16/national/supreme-court-strikes-down-ban-on-virtual-child-pornography.html (The Child Pornography Prevention Act of 1996 prohibited [1] any visual depiction, including computer-generated images, that appeared to be of a minor engaging in sexually explicit conduct, and [2] any visual depiction that conveys the impression of depicting a minor engaging in sexually explicit conduct. The Free Speech Coalition, an adult-entertainment trade association, argued "appears to be" and "coveys the impression" were both overbroad and too vague, therefore violating the First Amendment protection of speech that is neither obscene or child pornography. The U.S. Supreme Court held these provisions were overbroad and unconstitutional. The statute covered speech that was not criminal and created no victims.).
[27] Stout, *supra* note 26.
[28] 18 U.S.C. § 2256(8)(B).
[29] 18 U.S.C. § 2251(a).
[30] 18 U.S.C. § 2251(b).

attempted violation may result in a fine and fifteen to thirty years in prison.[31] Those who have previously violated the statute or related federal or state statute face greater punishments.[32]

Persons who attempt to distribute sexually explicit materials involving minors to a minor to encourage participation in illegal activity are in violation of 18 U.S.C. §2252A(a)(6).[33] A violation of this statute can result in imprisonment for five to twenty years, depending on the specific offense and any related prior convictions.[34] The U.S. Department of Justice has made clear that "[F]ederal jurisdiction almost always applies when the Internet is used to commit a child pornography violation."[35]

Like Maryland law, federal child pornography statutes fail to distinguish whether the minor being protected by the statutes can also be the target of prosecution.[36] The U.S. Department of Justice clarifies that the age of consent in a state is irrelevant; any depiction of a minor who is under the age of eighteen is illegal.[37] In the United States, the age of consent to sexual activity varies from state to state.[38] The age may range from sixteen to eighteen years old.[39] However, the U.S. Supreme Court has held that crimes related to 18 U.S.C. §§ 2252(a)(1), (a)(2) require individuals charged with distribution of child pornography hold scienter of the depicted performer's age – the alleged offender must know the victim was under the age of eighteen.[40]

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[31] 18 U.S.C. § 2251(e).
[32] *Id.*
[33] 18 U.S.C. § 2252A(a)(6).
[34] 18 U.S.C. § 2252A(b).
[35] U.S. DEP'T OF JUST., CITIZEN'S GUIDE TO U.S. FEDERAL LAW ON CHILD PORNOGRAPHY (2017).
[36] 18 U.S.C. § 2256; Interview with Assistant U.S. Attorney, U.S. Attorney's Office for the District of Maryland (Feb. 20, 2020) (A confidential interview with an Assistant U.S. Attorney ("AUSA") revealed the U.S. Department of Justice does not typically prosecute minors under the federal child pornography statute. According to the AUSA, the federal justice system avoids placing minors in federal prison at all costs, and will either decline to prosecute such cases or pass them on to state prosecutors. The AUSA will typically only prosecute a minor if there is no other possibility of prosecuting in another jurisdiction; this is rare.).
[37] *See supra* note 35.
[38] Jennifer Ann Drobac, *Wake Up and Smell the Starbucks Coffee: How* Doe v. Starbucks *Confirms the End of 'the Age of Consent' in California and Perhaps Beyond*, 33 B.C. J. OF L. & SOC. JUST. 1, 1 (2013).
[39] *Id.*
[40] United States v. X-Citement Video*,* Inc.*,* 513 U.S. 64, 115 (1994) (The Supreme Court held an individual who owned and operated a video company was required to hold actual knowledge the pornographic video he sold and shipped to an undercover police officer depicted a performer under the age of eighteen. "Knowingly" was extended to the age of the victim as well.).

C. Maryland Statutes

i. Current Child Pornography Statute

In Maryland, child pornography is prohibited through several statutes analogous to federal ones.[41] A person may not cause or induce a minor to be a subject in obscene matter, sadomasochistic abuse, or sexual conduct.[42] A person also may not photograph or film a minor engaging in these acts or conduct, they may not use a computer to depict or describe the acts, and they may not knowingly promote, distribute or possess with the intent to distribute any matter that depicts a minor in such acts.[43] A first time violation of CR § 11-207 results in a felony and potential fine up to $25,000 and/or imprisonment up to ten years.[44] Furthermore, someone who violates the statute more than once may be fined up to $50,000 and/or up to twenty years in prison.[45]

ii. Changes to Child Pornography Law

In the past, Maryland child pornography statutes required that a minor be engaged in sexual conduct.[46] Thus, minors who were depicted in "lascivious exhibition"[47] were not covered by the statute. In April of 2019, Governor Larry Hogan signed a bill updating the law to expand "sexual conduct" to include lascivious exhibition of the genitals or pubic area of any person, and to clarify that "visual representations" may include a computer-generated image that is indistinguishable from an actual and identifiable child.[48] This change in part reflects an attempt by the legislature to modernize the statutes to align with developments in technology.[49]

iii. *In re S.K* and the Interpretation of CR § 11-207

At least some of the 2019 bills surrounding child pornography were

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[41] MD. CODE ANN., CRIM. LAW § 11-207 (West 2019).
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] Danielle E. Gaines, *Lawmakers Pass Bill That Would Expand Prosecution of Child Erotica*, MD. MATTERS (Apr. 14, 2019), https://www.marylandmatters.org/2019/04/14/lawmakers-pass-bill-that-would-expand-prosecution-of-child-erotica/.
[47] *Id.* (Lascivious exhibition: minors posing with their genitals exposed in a manner meant to be erotic.).
[48] S.B. 736, 2019 Leg., 439th Sess. (Md. 2019).
[49] Gaines, *supra* note 46.

in reaction to the ruling of *In re S.K.*[50] The Maryland legislature has introduced five new bills in the 2020 session to attempt to modernize the child pornography statute.[51] The Court of Appeals of Maryland found that a minor may be charged under CR § 11-207 even if the minor produces and distributes pornographic materials of himself or herself.[52] In other words, a minor who is engaged in consensual sexual activity may be their own pornographer through the act of "sexting."[53] The court also held that the minor's cellphone video is a digital file that is covered under the CR § 11-203 prohibition of displaying obscene content to minors.[54]

In re S.K, a sixteen-year-old female, S.K., in Charles County, was best friends with sixteen-year-old female, A.T. and seventeen-year-old male, K.S.[55] The trio had a group text message where they would send photos and videos to "one-up" and impress each other.[56] In light of this competition, S.K. texted a video of herself consensually performing fellatio on a male.[57] S.K. was nude and her upper torso is visible for most of the video.[58] After a falling out between S.K. and K.S., K.S. reported the video to the high school resource officer, who then reported this to the State's Attorney's Office for Charles County.[59] The State charged S.K. as

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[50] *Id*.
[51] S.B. 45, 2020 Leg., 440th Sess. (Md. 2020) (This bill alters certain elements of the child pornography statute so that person and minor cannot be the same individual. It is the most basic statutory change in response to *In re* S.K.); S.B. 365, 2020 Leg., 440th Sess. (Md. 2020) (This bill amends a few different laws and requires that minors cannot be found in violation of the law unless they have previously been adjudicated or charged with certain delinquent acts. Further, if child pornography is that minor's most serious offense then they will be placed in a mandatory educational program and found guilty of a civil offense.); H.B. 931, 2020 Leg., 440th Sess. (Md. 2020) (This bill amends the distribution of child pornography to strictly apply to persons eighteen years of age or older.); H.B. 1245, 2020 Leg., 440th Sess. (Md. 2020) (This bill also amends a variety of laws. It brings a minor's sexting to juvenile court and does not include consensual sexting between minors when no emotional distress occurred and the sender had no reasonable expectation the message would stay private. It also changes the statutory language so the person and minor cannot be the same individual charged. Further, a minor cannot be charged with child pornography from possessing pictures of themselves on their phones. This bill also develops a "sexting-ed" class to be taught from sixth to twelfth grade.); H.B. 0272, 2020 Leg., 440th Sess. (Md. 2020) (This bill brings violations to the child pornography laws by minors under the jurisdiction of the juvenile court and requires consensual sexting between minors be a mitigating factor in adjudication.).
[52] *In re* S.K., 466 Md. 31, 48, 215 A.3d 300, 310 (2019).
[53] *Id.* at 36, 215 A.3d at 303.
[54] *Id.* at 65, 215 A.3d at 320.
[55] *Id.* at 35, 215 A.3d at 302.
[56] *Id.*
[57] *In* re S.K., 466 Md. 31, 35, 215 A.3d 300, 302 (2019).
[58] *Id.* at 37, 215 A.3d at 303.
[59] *Id.* at 37-38, 215 A.3d at 303-04.

a juvenile[60] and she was adjudicated delinquent for distributing child pornography in violation of C.R. § 11-207(a)(4) and displaying an obscene item[61] to a minor in violation of C.R. § 11-203(b)(1)(ii).[62] S.K. was not required to register as a sex offender; however, she was placed on electronic monitoring and probation which required drug testing, an anger management class, and a substance abuse assessment.[63] Notably, none of these conditions of probation seem directly related to the violations that S.K. was found guilty of committing.

Upon appeal the Court of Special Appeals of Maryland found a minor who legally engaged in consensual sexual activity was not exempt from C.R. § 11-207(a)(4), as the "person" and "minor" may be the same individual under the language of the statute.[64] However, they found that a "digital file" did not come under the meaning of "item" in the statute regarding displaying obscene items to a minor.[65] The Court of Appeals of Maryland upheld the intermediate appellate court's finding that under C.R. § 11-207(a)(4), an individual may be both the "person" and "minor" described.[66] The court found that the plain meaning of the statute did not distinguish as to whether a minor or adult is distributing the matter.[67] The court further asserted that any other interpretations of the statute could only be made if the statute itself was amended by the Maryland General Assembly, but it was not within the power of the court to make these changes.[68] Further, the Court of Appeals of Maryland reversed the intermediate appellate court's ruling regarding a "digital file."[69] The court found that a cellphone video is a text digital file covered under the term "film" in CR § 11-203 and thus S.K. was also in violation of CR § 11-203(b)(1).[70]

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[60] MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-01 (l) (West 2019) (S.K. was found delinquent; she committed an act that would be a crime if committed by an adult.).
[61] MD. CODE ANN., CRIM. LAW § 11-203(4) (West 2019) ("'Item' means a: (i) still picture or photograph; (ii) book, pocket book, pamphlet, or magazine; (iii) videodisc, videotape, video game, film, or computer disc; or (iv) recorded telephone message.").
[62] *In re S.K.*, 466 Md. at 38-39, 215 A.3d at 304 (Count one was filming a minor engaging in sexual conduct in violation of CR. § 11-207(a)(2). The count was dismissed by the circuit court, which sat as a juvenile court, as no evidence was presented that S.K. was filming the video.).
[63] *Id.* at 39, 215 A.3d at 304-05 (The basis for such a punishment was not discussed in the decision. It is unclear why S.K. was required to complete drug testing and classes. Certain information may have been withheld from the public because this case was tried in juvenile court.).
[64] *Id.* at 57-58, 215 A.3d at 315-16.
[65] *Id.* at 39-40, 215 A.3d at 304-05.
[66] *Id.*, 215 A.3d at 305.
[67] *In re* S.K., 466 Md. 31, 57, 215 A.3d 300, 315 (2019).
[68] *Id.* at 57-58, 215 A.3d at 315-16.
[69] *Id.* at 65, 215 A.3d at 320.
[70] *Id.*

iv. Proposed Statutory Changes

During the 2019 legislative session, Delegate C.T. Wilson introduced House Bill 1049, which would have decriminalized specific instances of distribution or manufacturing of child pornography by a person younger than the age of eighteen.[71] According to Delegate Wilson, this bill was, at least in part, in response to the Court of Appeals of Maryland ruling, *In re S.K.*[72] The bill's provisions would have affected § 11-207(a)(4), which states:

> a person may not:
> . . .
> 4) knowingly promote, advertise, solicit, distribute, or possess with the intent to distribute any matter, visual representation, or performance:
> (i) that depicts a minor engaged as a subject in sadomasochistic abuse or sexual conduct; or
> (ii) in a manner that reflects the belief, or that is intended to cause another to believe, that the matter, visual representation, or performance depicts a minor engaged as a subject of sadomasochistic abuse or sexual conduct;[73]

Delegate Wilson admitted to drafting the bill in a broad manner so it could be further clarified by the committee, and expressed he was unsure how to draft the bill to narrowly apply to situations similar to *In re S.K.*[74] The bill did not pass, and it appears as though lawmakers across the country are unsure of how to, or whether, to prevent the prosecution of teenagers for sexting.[75] Two members of the Maryland state senate wrote an op-ed on how the use of technology needs to be better accounted for in Maryland's child pornography statute:

> Next session, we will also aim to make possession of child pornography a felony for first-time offenses, as is the law in 42 other states. Not all sexually deviant offenders should

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[71] H.B. 1049, 2019 Leg., 439th Sess. (Md. 2019).
[72] Hearing on H.B. 1049, 2019 Leg., 439th Sess. (Md. 2019) (statement of Del. C.T. Wilson).
[73] MD. CODE ANN., CRIM. LAW § 11-207 (West 2019).
[74] *See supra* note 72.
[75] *See In re S.K.*, 466 Md. at 45 n.15, 215 A.3d at 308 n.15 (Other states that allow teenagers to be charged under the child pornography statute include: Alabama, Alaska, California, Delaware, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Virginia, Wisconsin, and Wyoming.).

> be felons, but all sexual exploiters of children should be eligible to enter that category, even if it is their first time getting caught.[76]

Although this op-ed does not address the possibility of teenagers being convicted of a felony under this proposition, the article highlights the tensions in modernizing such a statute.[77] Lawmakers aim to be "tough on crime" and deter the creation and distribution of child pornography, yet teenagers caught sexting can be charged under these laws.

III. Issue

In re S.K. held that a teenager who possess digital materials of themselves engaging in consensual sexual activity can be their own pornographers.[78] This ruling led to mixed responses from legislators, attorneys, and professionals in the field.[79] Because Maryland has failed to adequately update its child pornography statute, the population lawmakers meant to protect is the same population that is prosecuted.[80] Under the First Amendment, the state has a compelling interest in protecting children from abuse and safeguarding their wellbeing.[81] Such an interest receives strict scrutiny upon review of related statutes, where the statutes are presumed valid.[82] When a statute is being reviewed under the compelling state interest test, the state must demonstrate the statute is narrowly-tailored to accomplish a compelling state interest.[83] Critics of amending child pornography statutes to reflect teenage sexting argue the state's compelling interest in safeguarding children outweighs the need to amend outdated statutes.[84]

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[76] Susan Lee & Lesley Lopez, *New Md. Law Fights Child Pornography, but More Must be Done*, BALT. SUN (Sep. 23, 2019, 6:00 AM), https://www.baltimoresun.com/opinion/op-ed//bs-ed-op-0923-child-pornography-20190923-ddohiu72yjdwxp25amlcqfgb3a-story.html.

[77] *Id.*

[78] *In re S.K.*, 466 Md. at 48, 215 A.3d at 310.

[79] *The Kojo Nnamdi Show: A Maryland Teen Sent a Racy Video to Friends. The Court Says She Distributed Child Pornography*, WAMU 88.5 (Sep. 09, 2019), https://thekojonnamdishow.org/shows/2019-09-09/a-maryland-teen-sent-a-racy-video-to-friends-the-court-says-she-distributed-child-pornography.

[80] Sarah Wastler, *The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes That Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images By Teenagers,* 33 HARV. J. L & GENDER 687, 694 (2010).

[81] New York v. Ferber, 458 U.S. 756-58 (1982).

[82] *Id.*

[83] *Id.* at 757.

[84] *See Wastler, supra* note 80; *but see* Janis Wolak et al., *How Often are Teens Arrested for Sexting? Data From a National Sample of Police Cases,* 129 PEDIATRICS 4, 4-12 (2012) ("Another important policy issue is the question of how many youth-produced

Some data demonstrates that teenagers, more specifically teenage girls, are pressured into sexting through their male peers and societal influence.[85] Prosecuting teenagers for sexting will not only predominantly affect teenage girls, but it is an ineffective and harmful method of addressing teenage sexting.[86] Child pornography laws present a confusing conflict between the desire to protect teenagers and the saturation of sexualized images of women and men in advertisements, television, and the internet.[87]

Whether Maryland teenagers are prosecuted under the child pornography statue is up to prosecutorial discretion, and it is unclear how many prosecutors have declined to charge cases similar to S.K.'s.[88] Such discretion leaves too much of the decision to prosecute based on a State's Attorney's priorities, personal views, and precedent. Further, such authority by the State's Attorney's office arguably infringes on the rights of parents to raise their children and punish such behavior if they choose.[89] This could be argued to be an exercise of paternalism, where the state decides to intervene where a parent or community member might be more appropriate.[90] In light of *In re S.K.* and the balancing of concerns, Maryland needs to update their heavy-handed approach to consensual

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sexual images are circulated online where they potentially could become fodder for the child pornography trade. Importantly, in nearly two-thirds of cases, images were confined to cell phone storage and transmission and had not been posted online. This does not mean that the images could never find their way to the Internet, but cell phone images are less accessible.").

[85] John O. Hayward, *Hysteria Over Sexting: A Plea for a Common Sense Approach*, 14 ATLANTIC L.J. 60, 65 (2012) (citing Pew Internet & Am. Life Project, *Teens and Sexting: How and Why Minor Teens are Sending Sexually Suggestive Nude or Nearly Nude Images Via Text Messaging*, PEW RSCH. CTR. (2009), https://www.pewresearch.org/internet/2009/12/15/teens-and-sexting/).

[86] *Id.*

[87] *Id.* at 68 (citing SEXUAL TEENS, SEXUAL MEDIA: INVESTIGATING MEDIA'S INFLUENCE ON ADOLESCENT SEXUALITY xi (Jane D. Brown et. al eds., Lawrence Erlbaum Associates 2002)).

[88] *In re* S.K., 466 Md. 31, 57, 215 A.2d 300, 315 (2019); *Cf.* Wolak et al., *supra* note 84, at 4 (Out of 214 "experimental" type youth-produced sexual images cases, 17% of suspects were charged in juvenile court, 5% were charged with state crimes, and none were charged with federal crimes. "Experimental" type images involved no aggravating factors (such as adult recipients, intent to harm, or reckless misuse) and occurred as sexual attention seeking, in romantic relationships, or had no apparent sexual motivation.).

[89] Clay Calvert, *Sex, Cell Phones, Privacy and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 24 (2009) (citing Rick Ruggles, *Parents Advised to Monitor Children's Internet Activities*, OMAHA WORLD-HERALD, Mar. 22, 2009, at 4B); *see also* Miller v. Skumanick, 605 F. Supp. 2d 634 (M.D. Pa. 2009).

[90] Calvert, *supra* note 89, at 24 (quoting Dahlia Lithwick, *Teens, Nude Photos and the Law*, NEWSWEEK, Feb 23, 2009).

teenage sexting.

IV. Solution

A three-part solution is recommended to address the legal issue surrounding teenage consensual sexting. First, Maryland should amend its child pornography statute to be a more accurate reflection of modern technology's effect on teenage sexuality and sexual activity.[91] Second, sexting should be discussed in the context of a broader "digital health" curriculum offered in public school health education classes outlining the risks and stigma of such activity.[92] Finally, teenagers whose consensual sexts have spread beyond their intended audience should have a community-based support system available.[93]

A. Amending Maryland's Child Pornography Statute

The state has a compelling interest in protecting children and preventing child pornography.[94] Although this interest is important and justifies many laws, it is not an appropriate response to teenage sexting. Prosecuting teenagers' consensual sexting as both victims and perpetrators, however, sends a contradictory message to minors and fails to protect true victims.[95] Lawmakers must ask themselves who they are attempting to protect and who they are attempting to target.[96] Consensual sexting differs from "revenge pornography," where a person's image is shared without the consent of the subject involved.[97] Thus, the child pornography statute in question, C.R. § 11-207, must either differentiate between the perpetrator and victim, remove liability for the consensual sexting of teenagers under the age of eighteen, or provide specific guidelines to prosecutors to clarify which instances may warrant a delinquency proceeding, such as in cases of coercion.

i. Amend the Statute so "Person" and "Minor" Cannot Mean the Same Individual

An important conclusion made in the decision of *In re S.K.* was clarifying that the Maryland child pornography statute C.R. § 11-207 permits the person prosecuted under the statute to be the same individual

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[91] *See infra* Section IV.A.
[92] *See infra* Section IV.B.
[93] *See infra* Section IV.C.
[94] Wastler, *supra* note 80.
[95] *See supra* note 72.
[96] Hayward, *supra* note 85, at 72-73.
[97] Chris Lloyd, *The Crime of Sexting: A Deconstructive Approach*, 27 INFO. & COMM. TECH. LAW 55, 61-62 (2018) (discussing how revenge pornography differs from sexting).

as the minor harmed.[98] Maryland should amend the language in C.R. § 11-207 to clarify that a "person" and "minor" cannot be the same individual.[99] This distinction could be achieved more broadly by amending it into the statute. An amendment such as this would protect the minor depicted in the sext from being prosecuted as the perpetrator. This would not protect minor B who received and kept the consensual sext of minor A, who could still potentially be guilty of "[K]nowingly promot[ing], distribut[ing] or possess[ing] with the intent to distribute any matter that depicts a minor . . . ." under C.R. § 11-207.[100]

A more focused and effective approach would be to plainly target teenagers and sexting in the amendment by permitting consensual sexting between minors or adding it as an affirmative defense in juvenile adjudications.[101] Maryland Delegate C.T. Wilson, who introduced House Bill 1049, suggested exactly this in 2019.[102] An amendment such as this raised many concerns for legislators, due to the possibility of coercion between minors of a large age gap or the potential for sexts to spread and cause harm.[103] It is important to note that there is little data to suggest criminalization, such as the criminalization of peer-to-peer file sharing, is an effective method of deterring teenagers.[104] Although S.K. was adjudicated delinquent in juvenile court and not criminal court, the data suggests the prohibition of an act does not necessarily act as a deterrent.[105]

Although House Bill 1245, introduced in the 2020 legislative session, reviews sexting in the context of consent, which is crucial to addressing teenage sexting, it does not take into consideration age

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[98] *In re S.K.*, 466 Md. 300, 48, 215 A.3d 300, 310 (2019).
[99] *Id.* at 57, 215 A.2d at 315; *see also* S.B. 45, 2020 Leg., 440th Sess. (Md. 2020) (proposing amendment to the statute to clarify that "person" and "minor" cannot be the same individual).
[100] MD. CODE ANN., CRIM. LAW § 11-207 (West 2019); *see also* H.B. 1245, 2020 Leg., 440th Sess. (Md. 2020) (Other bills proposed during the 2020 legislative session have included clarifications surrounding when a minor should be charged under the statute – consensual sexting has been taken under consideration.).
[101] *See* H.B. 1245, 2020 Leg., 440th Sess. (Md. 2020).
[102] H.B. 1049, 2019 Leg., 439th Sess. (Md. 2019); *see also supra* note 72.
[103] *See supra* note 72; *see also* Mary Graw Leary, *Sexting or Self-Produced Child Pornography? The Dialog Continues—Structured Prosecutorial Discretion Within A Multidisciplinary Response*, 17 VA. J. SOC. POL'Y & L. 486 (2010).
[104] Hayward, *supra* note 85, at 81 (citing *RIAA v. The People: Five Years Later*, ELEC. FRONTIER FOUND. (Sept. 30, 2008), https://www.eff.org/wp/riaa-v-people-five-years-later).
[105] Hayward, *supra* note 85, at 72-73 (citing *RIAA v. The People: Five Years Later*, ELEC. FRONTIER FOUND. (Sept. 30, 2008), https://www.eff.org/wp/riaa-v-people-five-years-later); *Cf.* Nicola Döring, *Consensual Sexting Among Adolescents: Risk Prevention Through Abstinence Education or Safer Sexting?*, 8 CYBERPSYCHOLOGY: J. OF PSYCHOSOCIAL RSCH. ON CYBERSPACE 1, 12 (2014) ("[M]any adolescents who already know about possible negative outcomes still engage in sexting.").

differences.[106] Sexting between two seventeen-year-olds versus a seventeen-year-old and a thirteen-year-old should be treated differently.[107] The amendment could include a prohibition of an age gap beyond two or three years between the sender and receiver, with language such as "[m]inors shall not be prosecuted under this statute, unless there is greater than a two-year age difference between the minor parties." Factors such as age, coercion, and motivation are the details that matter, and why the prosecutorial guidelines suggested below are so important.[108]

ii. Outline Procedures to Guide Prosecutorial Discretion

If Maryland legislators fail to amend the child pornography statute to directly address teenage sexting, another potential amendment is to require prosecutors to review certain factors when deciding whether and how to prosecute a potential case. As discussed in section III, it is unclear how many sexting cases prosecutors decline to charge.[109] Much of these decisions come down to the individual prosecutor.[110] In the context of teenage sexting, such discretion is not just as it allows for personal biases and individual morals to influence the decision to prosecute.[111] Important factors should be highlighted for prosecutors to take into account when reviewing potential charges.[112] Factors such as the ages of the parties, how the sext was spread, whether it spread beyond its intended audience, and the motivation of the parties sharing the sext should be outlined for a prosecutor as they evaluate the case.[113] Emphasizing these factors before prosecutors could help guide their discretion and lead to fewer consensual teenage sexting cases appearing before the courts. Another potential solution is to mimic the prosecutorial certification process required of federal prosecutors in cases involving minors.[114] Such certification may

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[106] H.B. 1245, 2020 Leg., 440th Sess. (Md. 2020).
[107] Calvert, *supra* note 89, at 28 ("The law, in fact, recognizes that subtle variations of age do matter when it comes to matters affecting sex and minors.").
[108] Calvert, *supra* note 89, at 28-30 (citing how states criminalize statutory rape and sexual abuse of minors differently depending on the age difference between the perpetrator and the victim).
[109] *See supra* Section III; *Cf.* Wolak et al., *supra* note 88.
[110] *In re* S.K., 466 Md. 31, 44, 215 3.Ad 300, 308 (2019) (citing Robert H. Wood, *The Failure of Sexting Criminalization: A Plea for the Exercise of Prosecutorial Restraint*, 16 MICH. TELECOMM. & TECH. L. REV. 151 (2009)).
[111] *Id*.
[112] John A. Humbach, '*Sexting' and the First Amendment*, 37 HASTINGS CONST. L.Q. 433, 458 n.142 (2010).
[113] Calvert, *supra* note 89, at 27-32 (Factors for legislators and prosecutors to consider include the age of the minors involved, whether the sender is depicted in the sext or forwarding a received message, and if it is mutually consensual between the sender and receiver.).
[114] U.S. DEP'T OF JUST., JUSTICE MANUAL 9-8.110 (2020) ("With one limited exception . . . , a juvenile cannot be proceeded against in any court of the United States unless the

act as a general deterrent in either presenting such a case before, or receiving approval from, a county State's Attorney or District Attorney.

B. Integrating "Digital Health" into Sexual Education Courses

Sexting is a new part of the digital world that will not be slowing down, and preparing students to understand how their sexts (and other actions on the internet) affect themselves and others is a crucial factor in developing technologically responsible habits.[115] Minors should begin to learn about responsible online behavior and the consequences of their actions on the internet starting in the sixth grade.[116] Then, healthy online habits can be further developed in sexual education, starting in the seventh grade.[117] A two-fold method of educating teenagers about sexting could be effective.[118]

Maryland's H.B. 1245, introduced in the 2020 legislative session, includes the development of an educational program to be administered in grades six through twelve.[119] The program is meant to educate minors on the risks of possessing, sending, displaying, and publishing sexually explicit or nude images.[120] Such a proactive program is an opportunity to help minors develop healthy sexuality and a realistic understanding of the consequences of sexting in a supportive environment.[121]

i. Educate About the Risks of Sexting Without Shaming

Students should be taught about the consequences of sexting from an objective and realistic perspective through a feminist lens. By teaching minors about the realities of sexting, we can empower them to make more

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Attorney General, after investigation, certifies to the appropriate United States District Court that (1) the juvenile court or other appropriate state court does not have jurisdiction or refuses to assume jurisdiction over the juvenile with respect to the alleged act of juvenile delinquency; or (2) the state does not have available programs and services adequate for the needs of juveniles; or (3) the offense charged is a crime of violence or an offense described . . . .").

[115] Hayward, *supra* note 85, at 111.

[116] *See* HOWARD COUNTY PUBLIC SCHOOL SYSTEM, FAMILY LIFE & HUMAN SEXUALITY OBJECTIVES (2018/2019) (Howard County, Maryland introduces a unit regarding positive ways to manage emotions in its Health classes starting in the sixth grade.).

[117] *Id.* (Howard County, Maryland introduces a unit regarding interpersonal communication and decision making in the seventh grade, alongside information regarding sexual health.).

[118] *Id.*

[119] H.B. 1245, 2020 Leg., 440th Sess. (Md. 2020).

[120] *Id.*

[121] Nathan Jurgenson, *Sexting and the Criminalization of Teen Desire*, SOC. LENS (Mar. 30, 2011), http://thesocietypages.org/sociologylens/2011/03/30/sexting-and-the-criminalization-of-teen-desire/.

informed decisions.[122] Throughout their development, teenagers are exploring their sexuality and identity, and it is important to recognize that sexting may be a part of that.[123] Instead of shaming or criminalizing such behavior, education encourages teenagers to develop healthy sexuality, in all forms, and identify risks.[124] A criminalization or prohibition of sexting contradicts the messages our hypersexual society is sending teenagers.[125] The saturation of sex in the media suggests being sexual is not necessarily off limits for minors.[126]

ii. Acknowledge how Gender Impacts Repercussions for Sexual Activity

Teenagers, more specifically teenage girls, are pressured into sexting through their male peers and societal influence.[127] Although feminists are divided as to the benefits or harms surrounding pornography, most agree that the social stigma and consequences surrounding sexual activity are usually greater for women.[128] Girls' own bodies have been used to sexually shame them, and it is crucial to provide context as to why data demonstrates girls suffer more consequences than boys.[129] What does this stigma reflect about our greater society? Honest conversations in an educational setting could help develop healthier attitudes towards gender and sexuality, or perhaps simply expose students to a new perspective.[130]

C. Create a community-based support system

Some states have attempted to develop a community-based

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[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] Calvert, *supra* note 89, at 15 n.67 (citing M. GIGI DURHAM, THE LOLITA EFFECT: THE MEDIA SEXUALIZATION OF YOUNG GIRLS AND WHAT WE CAN DO ABOUT IT 48 (2008)).
[126] Calvert, *supra* note 89, at 15 n.72 (citing M. GIGI DURHAM, THE LOLITA EFFECT: THE MEDIA SEXUALIZATION OF YOUNG GIRLS AND WHAT WE CAN DO ABOUT IT 114-15 (2008)) (As in the case of teen pop icon, Brittany Spears, posing in a school-girl uniform in 1998.).
[127] Jessica Ringrose & Laura Harvey, *Boobs, Back-off, Six Packs and Bits: Mediated Body Parts, Gendered Reward, and Sexual Shame in Teens' Sexting Images*, 29 J. OF MEDIA & CULTURAL STUD. 205, 214 (2015).
[128] *Id.*
[129] *Id.; see also* Andrew J. Harris et al., *Building a Prevention Framework to Address Teen "Sexting" Behaviors*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION (Sep. 2013), https://ojjdp.ojp.gov/library/publications/building-prevention-framework-address-teen-sexting-behaviors. (Describing gendered repercussions of sexting: "Along similar lines, the youth focus group participants routinely cited the divergent reputational impacts on males and females.").
[130] Ringrose & Harvey, *supra* note 127.

approach to teenage sexting.[131] This includes counseling and parental support alongside mandated educational programs for perpetrators.[132] Teenagers who have not experienced adverse effects due to sexting should not be forced into counseling; however, a collaboration between parents and the school resource team can help a teenager if their sext was spread.[133] Such a support should acknowledge that teenagers are exploring sex and sexuality, and that shaming is neither an effective nor appropriate response to sexting.[134] Responses to teenage sexting, specifically girls' sexting, reflects a larger societal stigma surrounding women, pleasure, and sex.[135] Teenagers should not feel shame or guilt surrounding sex, but instead should be well-informed of potential consequences and be permitted to make their own decisions.[136]

V. Conclusion

Teenagers today are navigating their sexuality in a technologically complex society. Consensual sexting between minors should not be a criminal offense. By failing to amend its child pornography statutes, Maryland lawmakers have left vulnerable to prosecution the exact population they intended to protect. Although states have a compelling interest in preventing child pornography and its devastating effects, cases such as *In re S.K.* should not fall under this scope. Maryland's refusal to explore how modern teenage sexuality has evolved in the era of technology shames teenagers and inadequately prepares them to face sex in the modern adult world.

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[131] Hayward, *supra* note 85, at 104-05.
[132] *Id.*
[133] H.B. 1245, 2020 Leg., 440th Sess. (Md. 2020) (H.B. 1245 does not require minors engage in counseling when found consensually sexting. It suggests that a comprehensive approach that is both proactive and appropriately reactive is most effective.).
[134] John S. Santelli et al., *Abstinence-Only-Until-Marriage Policies and Programs: An Updated Position Paper of the Society for Adolescent Health and Medicine*, 61 J. OF ADOLESCENT HEALTH 400, 400-03 (2017) ("Sexuality education should be comprehensive, medically accurate, and culturally competent; promote healthy sexuality; and prepare young people to make healthy sexual decisions. Instruction in sexuality education should include essential concepts and issues such as sexual orientation, sexual health, gender identity and power dynamics, intimate partner violence and sexual exploitation, healthy relationships, social and structural determinants, personal responsibility . . . .").
[135] Ringrose & Harvey, *supra* note 127.
[136] Santelli et al., *supra* note 134.

RECENT DEVELOPMENT

BALTIMORE CITY POLICE DEPARTMENT V. POTTS: UNDER THE LOCAL GOVERNMENT TORT CLAIMS ACT, BALTIMORE CITY IS LIABLE FOR THE JUDGMENT AGAINST ITS OFFICERS THAT RESULTED FROM THEIR TORTIOUS ACTS COMMITTED WITHIN THE SCOPE OF EMPLOYMENT.

By: Renee Boyd

The Court of Appeals of Maryland held that the actions of the police officers involved in this case were in furtherance of the Baltimore City ("City") Police Department's ("Department") business under the Local Government Tort Claims Act (LGTCA). *Baltimore City Police Dep't v. Potts*, 468 Md. 265, 320, 227 A.3d 186, 219 (2020). The court also held that the actions of the officers were incidental to conduct authorized by the Department, and thus were in scope of employment under LGTCA. *Id.* Therefore, the City and the Department are liable for the judgment against the officers. *Id.* at 320, 227 A.3d at 219.

There are two cases which question whether the actions of the police officers were within the scope of their employment. In the first case, Ivan Potts was stopped without probable cause on September 2, 2015 by three police officers who were members of the Department's Gun Trace Task Force (GTTF). When he did not consent to a search of his person, the officers slammed Potts to the ground, kicked him, beat him, and handcuffed him. The officers produced a handgun never seen by Potts and tried to put it in Potts' hands so his fingerprints would be on the gun. Potts was so badly injured that the booking unit refused to process him until he was taken to a hospital to be treated. Potts was convicted for possession of a firearm and sentenced to eight years in prison. By the time his conviction was vacated, he was in custody for a total of nineteen months. Potts subsequently filed suit against the officers, the Department, the Mayor, and the City Council of Baltimore.

On August 18, 2016, in the second Baltimore City case, three police officers, also members of the GTTF, stopped William James' car without probable cause. Although the officers lacked any reasonable suspicion that James had committed, or was committing a crime, they informed James they would let him go only if he produced the name of a person who possessed guns or drugs. When James informed the officers, he didn't know of any such person, they advised James that he would be imprisoned for possession of a gun. The officers then produced a weapon saying it belonged to James and arrested him. James spent more than seven months in custody awaiting trial. He sued the officers, the Department, and the City.

In both cases, the arresting officers and the plaintiffs agreed to a settlement of $32,000. Potts and James' estate filed supplemental complaints

in their cases, seeking payment of the settlement from the City.

While motions for summary judgment were pending in Potts in federal court, the parties filed a joint motion to the Court of Appeals of Maryland to certify a question of law. In *James*, the circuit court held that the officers had acted within the scope of employment and that the City was required to compensate the estate. While the case was pending in the Court of Special Appeals, the City petitioned for a *writ of certiorari.* The question in the writ of certiorari and the certified question of the law were identical: whether the judgments sought to be enforced by the plaintiffs were based on "tortious acts or omissions [that were] committed by the [officers] within the scope of [their] employment with the [City]."

The court first examined the conduct under the LGTCA. The LGTCA states that a government is liable for judgments against its employees for damages that result from tortious acts or omissions committed by the employees within the scope of their employment with the local government. *Potts*, 468 Md. at 282-83, 227 A.3d at 196-97 (citing *Md. Code Ann., Cts. & Jud. Proc. §§* 5-301 to 5-304 (West 2013)). The LGTCA, however, does not define scope of employment. *Potts*, 468 Md. at 271, 227 A.3d at 190. Instead, the court looks to Maryland case law to define the term. *Id.* In *Sawyer v. Humphries,* the court used a two-prong test to determine if the employee acted within the scope of employment. *Id*. at 271, 227 A.3d at 190 (citing *Sawyer v. Humphries,* 322 Md. 247, 255, 587 A.2d 467, 470 (1991)). The first prong is whether the employee's actions "were in furtherance of the employer's business" and the second prong is whether the employer "authorized" the employee's actions. *Id.* The Court of Appeals of Maryland examined these two issues. *Id.*

Based on the first prong of the test, the Court of Appeals of Maryland held that, in both cases, the actions of the officers were in furtherance of the Department's business because there was no evidence or indication that the officers acted to protect their own interests. *Potts,* 468 Md. at 306, 227 A.3d at 211. The Court also held that the actions of the officers were at least partially motivated by a purpose to serve the Department. *Id.*

Police activities include stopping, searching and arresting individuals. Therefore, officers who engage in these activities are acting within the scope of employment. *Potts,* 468 Md. at 306, 227 A.3d at 211. Here, the court acknowledged the misconduct of the officers was egregious but held that even though the conduct was wrongful, the officers' actions were still in the scope of employment. *Id*. at 305, 227 A.3d at 210. Making arrests, even when officers engage in egregious conduct, is still acting within the scope of employment. *Potts*, 468 Md. at 306, 227 A.3d at 211 (citing *Cox v. Prince George's Cty*., 296 Md. 162, 171, 164, 460 A.2d 1038,1043 (1983)).

The court also held that an arrest is still in the scope of employment even if the arrest is not supported by probable cause. *Potts*, 468 Md. at 307, 227 A.3d 211 (citing *Houghton v. Forrest,* 412 Md. 578, 583-84 , 989 A.2d 223, 226-27(2010)). Using excessive force during the arrest does not render the

arrest outside the scope of employment. *Id*. at 308, 227 A.3d at 212 (citing *Prince George's Cty. v. Morales,* 230 Md. App. 699, 702-03, 149 A.3d 741,742-43 (2016)). Lastly, the court held that fabricating and planting evidence on a suspect does not render the officer's actions outside the scope of employment. Potts, 468 Md. at 308, 227 A.3d at 212 (citing *Titan Indem. Co. v. Newton,* 39 F. Supp.2d 1336, 1342 (N.D. Ala. 1999)).

After assessing the second prong of the test, the court concluded that the officers' misconduct was authorized by the Department because it was "incident[al] to the performance of duties" that the Department entrusted to its employees. *Potts,* 468 Md. at 312, 227 A.3d at 214 (quoting *Sawyer*, 322 Md. at 253, 587 A.2d at 469-70). The court based the conclusion on its analysis of the ten factors set forth in *Sawyer* for determining whether an employee's actions are incidental to those that the employer authorized. *Potts*, 468 Md. at 312, 227 A.3d at 214. Here, the actions were of the type that the officers were hired to routinely perform, the conduct occurred while they were on-duty in the jurisdiction they were authorized to serve, and the misconduct appeared to further the Department's routine business of making arrests. *Id.* at 313, 227 A.3d at 215.

The Court of Appeals of Maryland held that while the officers did engage in unlawful actions, their conduct resulted in arrests that were deemed to be lawful. *Potts*, 468 Md. at 315, 227 A.3d at 216. Some of the officers' actions consisted of misconduct, but others were actions that the officers were entrusted to perform. *Id.* The end result was that the officers' actions constituted lawful police activity. *Id.* The court held that the officers' actions were within the scope of employment under LGTCA because their actions were in furtherance of Department business and were incidental to authorized conduct. *Id.*

The Court of Appeals of Maryland ultimately held that the actions of the police officers involved in this case were in furtherance of the Baltimore City Police Department's business under the Local Government Tort Claims Act. The City argued that the conduct of the officers was so corrupt and egregious that it should not be held liable to pay the victims. But if these rogue officers are convicted and are serving time, the victims may never receive the money from the settlements they are due. With no income during incarceration, it is unlikely that the officers will ever pay.

The misconduct in the GTTF was undoubtedly egregious and unprecedented. The cases brought forth by Potts and James set precedent, refusing to provide the City with blanket immunity that would have been binding on future cases. There was a unanimous ruling that the City should have known of the misconduct and must now cover Potts' and James' judgments. So, while the court made it clear it was not making a blanket ruling for all future GTTF lawsuits, the ruling clearly demonstrated that the ultimate responsibility for the officers' misconduct rests with the governmental entities that employed and supervised them. The ruling will pave the way for future lawsuits, and while each future case will need to

stand on its own merits, victims of the GTTF's misconduct now have precedent to hold the City liable for the officers' actions.

RECENT DEVELOPMENT

GABLES CONSTR., INC. V. RED COATS, INC.: A THIRD-PARTY WHICH HAS SIGNED A WAIVER OF SUBROGATION WITH THE INJURED PARTY CANNOT BE CONSIDERED A JOINT TORTFEASOR UNDER THE UCATA AND IS THEREFORE NOT LIABLE FOR CONTRIBUTION.

By: Alexa Mellis

The Court of Appeals of Maryland held that a third-party who is not liable in tort to an injured party as a result of a contractual waiver cannot be held liable for contribution pursuant to the Maryland Uniform Contribution Among Joint Tort-Feasors Act ("UCATA"). *Gables Constr., Inc. v. Red Coats, Inc.,* 468 Md. 632, 671, 228 A.3d 736,759 (2020). A waiver of subrogation in a contract prevents the third-party from being liable in tort to the injured party and as a result the injured party may not bring a claim against it. *Id.* at 657, 228 A.3d at 750-51. Accordingly, a third-party who is not liable in tort to the injured party cannot be held liable for contribution because the UCATA requires that the joint tortfeasor be liable to the injured party. *Id.* at 645, 228 A.3d at 743.

On August 2, 2012, Upper Rock II, LLC ("Upper Rock") entered into a contract ("the Prime Contract") with Gables Construction, Inc. ("GCI") under which GCI would serve as the general contractor for the construction of an apartment building. Both Upper Rock and GCI waived the right to subrogation on the condition that Upper Rock purchased property insurance for the construction project. Consequentially, GCI could not be held liable by Upper Rock for any fire damage. In January 2014, GCI's parent company hired Red Coats, Inc. ("Red Coats") to provide security and fire watch services for the apartment project. Red Coats was to provide security at night after GCI personnel walked through the jobsite ensuring no hazards were present upon completion of each workday. On March 31, 2014, both GCI personnel and the Red Coats security officer failed to perform a sweep of the building. That night, a fire ignited and destroyed the building, causing $17.6 million in damages.

In November 2014, Upper Rock filed an action in the Circuit Court for Montgomery County against Red Coats. Upper Rock alleged that the failure to perform an adequate fire watch arguing it was the proximate cause of the March 31st fire. Upper Rock was granted a partial summary judgment motion on the issues of duty and breach. Thereafter, Red Coats and Upper Rock entered into a settlement agreement where Red Coats would pay $14 million to Upper Rock. In August 2015, Red Coats filed a third-party complaint for contribution against GCI. The jury ultimately determined that the contractual waiver did not shield GCI from liability for contribution to Red Coats. GCI

subsequently appealed the circuit court's judgment. The Court of Special Appeals of Maryland affirmed the lower court's ruling, finding GCI to be a joint tortfeasor pursuant to the UCATA because the waiver of subrogation had no bearing on the relationship between the parties. The Court of Appeals of Maryland granted GCI's petition for certiorari.

The question before the court, an issue of first impression, was whether a defendant could be liable for contribution under the UCATA despite the defendant not being liable to the injured party by virtue of a contractual waiver. *Gables Constr., Inc.*, 468 Md. at 644, 228 A.3d at 743.

The Court of Appeals of Maryland first addressed the issue of whether GCI was considered a joint tortfeasor under the UCATA. *Gables Constr., Inc.* 468 Md. at 665, 228 A.3d 755. The court noted that Red Coats claim against GCI could only succeed if GCI satisfies the definition of a joint tort-feasor. *Id.* at 651, 228 A.3d 747. The court relied on the statutory interpretation of "joint tort-feasor" under the UCATA. *Id.* at 657, 228 A.3d at 751. The UCATA defines a joint tort-feasor as "two or more persons jointly or severally liable in tort for the same injury to person or property." *Id.* at 651, 228 A.3d at 747 (quoting Md. Code Ann., Cts.& Jud. Proc. §3-1401 (West 2020)). The Court of Appeals of Maryland evaluated the meaning of "liable in tort" in several previous cases, ultimately concluding that direct liability of the third party to the injured party is required for the right of contribution to be available. *Gables Constr., Inc.* 468 Md. at 657-62, 228 A.3d at 751-53. In reviewing those holdings, the court found that the defenses which precluded the injured party from directly suing the third-party acted as a complete bar to recovery. *Id.* at 662, 228 A.3d at 754. Accordingly, to bring a claim for contribution against a third-party, there must be legal responsibility to the injured party, not mere culpability. *Id.* at 657, 228 A.3d at 751.

The Court of Appeals of Maryland also addressed whether the waiver of subrogation in the Prime Contract prevented Upper Rock from bringing a claim against GCI. *Gables Constr., Inc.*, 468 Md. at 655, 228 A.3d at 749. In reviewing the Prime Contract, the court reaffirmed that a contractual waiver of subrogation is sufficient to waive a right to a claim of subrogation. *Id.* at 654, 228 A.3d at 749 (citing *John L. Mattingly Constr. Co. v. Harford Underwriters Ins. Co.,* 415 Md. 313, 999 A.2d 1066 (2010)). The waiver in the Prime Contract indicated that Upper Rock and GCI mutually agreed to not hold the other party liable should any damages result from a fire, so long as Upper Rock purchased property insurance for the value of the project. *Gables Constr., Inc.* at 657, 228 A.3d at 750. This agreement shifted the risk of loss to the insurance company, a common practice within the construction industry. *Id.* at 653, 228 A.3d at 749. The court ultimately found that Upper Rock and its insurer were precluded from bringing a claim against GCI for the damage sustained in the fire. *Id.* at 653, 228 A.3d at 749.

After establishing that GCI was not liable in tort to Upper Rock, the Court

of Appeals of Maryland then evaluated whether the contractual waiver acted as a complete bar to recovery by Red Coats for contribution. *Gables Constr., Inc.*, 468 Md. at 663, 228 A.3d at 754. Red Coats took the position that the contractual waiver did not preclude its claim for contribution, relying on *Parler & Wobber v. Miles & Stockbridge, P.C.* *Id.* at 665, 228 A.3d at 755. In *Parler*, the court balanced the right to contribution and public policy considerations originating from the attorney-client privilege. *Id.* (citing *Parler & Wobber v. Miles & Stockbridge, P.C.*, 359 Md. 671, 681, 756 A.2d 526, 531 (2000)). However, the *Parler* court declined to find a compelling reason to recognize the defense of attorney-client privilege as an exception to the right to contribution pursuant to the UCATA. *Id.* at 666, 228 A.3d at 756. The Court of Appeals of Maryland in the instant case found *Parler* to be inapposite, holding that the defense of attorney-client privilege was not a defense to a direct suit by an injured party. *Id.* at 665, 228 A.3d at 756 (citing *Parler*, 359 Md. 671, 756 A.2d 526).

In the present case, the Prime Contract waiver of subrogation was sufficient for Upper Rock to waive liability against GCI creating a defense to the direct suit. *Gables Constr., Inc.* 468 Md. at 655, 228 A.3d at 749 (citing *Mattingly Constr. Co.,* 415 Md. 313, 999 A.2d 1066 (2010)). Liability for contribution is predicated on the liability to the injured party, not a common relationship between the injured party and the joint tortfeasors. *Gables Constr., Inc.*, 468 Md. at 669, 228 A.3d at 758.

The decision in *Gables Constr., Inc.* reinforces the role of subrogation waivers in construction contracts in the financial risks that accompany construction work. To find that the waiver is an insufficient defense to a claim for contribution would be to needlessly increase costs and litigation expenses for the parties and insurance companies alike. Despite this compelling justification, the court limited the analysis to American Institute of Architects ("AIA") standard form contracts, which are the most commonly used forms throughout the construction industry. The court's analysis did not venture into the implications of this ruling on other types of construction contracts that may be less commonly used. Accordingly, Maryland practitioners should be cautious in applying this decision to other standard construction contracts where a joint tortfeasor may have contractually waived a right to subrogation, as this holding was limited to AIA contracts only.

RECENT DEVELOPMENT

LEWIS V. STATE: THE ODOR OF MARIJUANA IS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE FOR A SEARCH INCIDENT TO ARREST, AND THEREFORE EVIDENCE OBTAINED AS A PRODUCT OF THAT SEARCH IS NOT ADMISSIBLE.

By: Rebecca Guay

The Court of Appeals of Maryland held that the odor of marijuana alone is not sufficient to meet the burden of probable cause to perform a search incident to arrest, and therefore any evidence retrieved is inadmissible as the product of an illegal search. *Lewis v. State*, 470 Md. 1, 27, 233 A.3d 86, 101-102 (2020). The court further held that the odor of marijuana cannot determine the amount, if any, of the contraband. *Lewis*, 470 Md. at 23, 233 A.3d at 99. A search or seizure made by law enforcement officers based on the odor of marijuana is unlawful as it violates a person's Fourth Amendment protections from unreasonable searches. *Id.* at 26, 233 A.3d at 101. Consequently, a search by police without probable cause cannot produce evidence admissible in court. *Id.* at 17, 233 A.3d at 95.

On February 1, 2017, Officer David Burch ("Burch") of the Baltimore City Police Department received a tip about a potentially armed person. Burch notified the monitors at CitiWatch, which identified a person matching the description entering Bag Mart. Burch was familiar with the area known as an "open air drug market" and knew Bag Mart as a regular distribution market for marijuana.

Six officers responded and entered the crowded store which smelled like marijuana. When Rasherd Lewis ("Lewis"), who matched the description, passed immediately in front of Burch, the officer smelled marijuana coming from Lewis's person. Burch testified that he stopped Lewis because of the tip and the odor of marijuana. After stopping him, Burch's colleague, Officer Curtis, grabbed Lewis's hands and handcuffed him. Once handcuffed, Burch made a complete search of Lewis, first searching Lewis's bag where he located a handgun. Then, he searched Lewis's person and found marijuana in a sealed, one-inch plastic baggie inside his pocket.

At a suppression hearing, the Circuit Court of Baltimore City denied Lewis's motion to suppress the handgun, marijuana, and other items seized during the arrest and subsequent search. Lewis contended the police lacked probable cause to believe he either committed a felony or was committing a felony. The state argued that the odor of the drug was enough to establish the necessary probable cause because, although decriminalized, marijuana in any amount is evidence of a crime. The court determined that the odor of marijuana was enough to establish the belief that Lewis carried evidence of a crime and therefore denied his motion to suppress.

At trial, the Circuit Court for Baltimore City found Lewis guilty of possession of a handgun. The Court of Special Appeals of Maryland affirmed the ruling. The majority agreed with the circuit court that the odor of marijuana emanating from a person, similar to the odor coming from a vehicle was sufficient to establish probable cause to perform a search incident to arrest. The dissent drew a distinction between the types of searches noting that there are several benign reasons one might smell like marijuana without having the contraband on their person. Lewis, on appeal, argued that his arrest, based solely on the smell of marijuana on his body, lacked probable cause and made the handgun found upon search of his person inadmissible. The Court of Appeals of Maryland granted certiorari to examine whether probable cause existed to allow a search incident to arrest based solely on the odor of marijuana.

The Court of Appeals of Maryland framed the analysis within the recent decriminalization for possession of less than 10 grams of marijuana. *Lewis*, 470 Md. at 9, 233 A.3d at 91 (citing MD. Code Ann., Crim. Law § 5-601(c)(2) (West 2014)). The court then highlighted the established rights of citizens "to be secure in their person" against unreasonable searches and seizures afforded by the U.S. Constitution's Fourth Amendment. *Lewis*, 470 Md. at 17-18, 233 A.3d at 96 (citing U.S. Const. amend. IV). A warrantless search is deemed unconstitutional if determined to be unreasonable. *Lewis*, 470 Md. at 18, 233 A.3d at 96. To withstand the scrutiny of the Fourth Amendment guarantees, the character of a reasonable search is based on the totality of circumstances surrounding that particular search and seizure. *Lewis*, 470 Md. at 18, 233 A.3d at 96 (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)). This protection from unreasonable searches is subject to a small number of exceptions. *Lewis*, 470 Md. at 18-19, 233 A.3d at 96 (quoting *Grant v. State*, 449 Md. 1, 16-17, 141 A.3d 138, 146 (2106)).

These exceptions include vehicle searches and search incident to arrest. *Lewis*, 470 Md. at 18-19, 233 A.3d at 96. A vehicle is subject to a search if police have "probable cause to believe the automobile contains either contraband or evidence of a crime." *Lewis*, 470 Md. at 19-20, 233 A.3d at 97 (quoting *State v. Johnson*, 458 Md. 519, 533, 183 A.3d 119, 127 (2018)). The justification for this exception lies in the mobility of the car coupled with a diminished expectation of privacy in one's vehicle. *Lewis,* 470 Md. at 20, 233 A.3d at 97 (citing *California v. Carney*, 471 U.S. 386, 391 (1985)). Probable cause to justify a search incident to arrest must be based on the belief the person has either committed, or is committing, a felony. *Lewis*, 470 Md. at 20, 233 A.3d at 97 (citing *Maryland v. Pringle*, 540 U.S. 366, 369-70 (2003)). This exception is grounded in the need to confiscate weapons and prevent the destruction of evidence. *Lewis*, 470 Md. at 20-21, 233 A.3d at 97-98 (citing *Riley v. California*, 573 U.S. 373, 383 (2014)). The odor of marijuana that permits the search of one's car does not apply to

search incident to arrest. *Lewis*, 470 Md. at 25, 233 A.3d at 100. Although similar in respect, the prerequisites for the two search exceptions diverge. *Id.* at 21, 233 A.3d at 98. The distinct difference is founded on a person's constitutional protection to be secure in their body, in contrast to limited privacy rights afforded to one's automobile. *Id.* at 22, 233 A.3d at 98.

The relevant exception in this case is the search incident to arrest. *Lewis*, 470 Md. at 18, 233 A.3d at 96. Lewis argued on appeal that the search was unlawful because the police, at the time of the arrest, did not have probable cause to believe Lewis had committed a felony or was in the act of committing a felony. *Id.* at 12, 233 A.3d at 93. When determining if probable cause exists for a search incident to arrest, the court must look to the likelihood law enforcement believed the arrestee committed a felony. *Lewis*, 470 Md. at 22, 233 A.3d at 98 (citing *Pacheco v. State*, 465 Md. 311, 325, 214 A.3d 505, 513 (2019)).

With regard to marijuana, law enforcement agents must have probable cause the arrestee is in possession of a criminal amount of the drug prior to the search. *Lewis*, 470 Md. at 22-23, 233 A.3d at 99 (citing *Pacheco*, 465 Md. at 332-33, 214 A.3d at 517-18). The court determined that the odor of marijuana does not make it possible to conclude the amount of marijuana present and therefore law enforcement officers cannot be sure a criminal amount is present. *Id* at 23, 233 A.3d at 99. Without the certainty of the actual amount of marijuana present, law enforcement cannot be sure an attempted felony, felony, or misdemeanor has occurred and therefore the court held that they lack probable cause for a search incident to arrest. *Id.*

The Court of Appeals of Maryland held that the inability of an officer to determine if a criminal amount of marijuana exists – based solely on odor – does not constitute probable cause to perform a search incident to arrest. Following this decision, courts must deny admissibility of evidence produced by a search based solely on the odor of marijuana emanating from a person. It is unclear what the immediate impact of this decision will be. Historically, courts have developed measures to balance the rights of citizens against the reach of law enforcement officers to apprehend suspects. This decision tilts in favor of the protection afforded to individuals from unreasonable searches and seizures by the Fourth Amendment. While the shift to narrow the state's ability to collect evidence may increase Fourth Amendment protections for citizens, it simultaneously eliminates the arguably legitimate suspicion of criminal behavior – based on the odor of a marijuana – from the toolbox of trained police officers. This limitation on law enforcement may have unintended consequences in their attempt to decrease drug related crimes.

RECENT DEVELOPMENT

NATIONWIDE MUT. INS. CO. V. SHILLING: A BREACH OF CONTRACT OCCURS IN AN UNDERINSURED OR UNINSURED MOTORIST CLAIM WHEN AN INSURER DENIES AN INSURED'S REQUEST OF BENEFITS UNDER THE COVERAGE, TRIGGERING THE STATUTE OF LIMITATIONS PERIOD.

By: Markisha Dobson

The Court of Appeals of Maryland held that an injured party's underinsured motorist claim against their insurance company will not be time-barred if the insurer fails to deny the insured's claim for recovery benefits. *Nationwide Mut. Ins. Co. v. Shilling*, 468 Md. 239, 260-61, 227 A.3d 171, 183 (2020). The court elaborated that underinsured and uninsured motorist claims must be viewed as contract law actions. *Id*. at 259-60, 227 A.3d at 183. Thus, when the insurer denies an insured's claim for benefits in an underinsured and uninsured motorist claim, the contract is breached and the statute of limitations begins to run. *Id*. at 248, 227 A.3d at 176. Therefore, courts must turn to contract law to determine when the statute of limitations begins to run for underinsured and uninsured motorist claims. *Id*. at 259-60, 227 A.2d at 183.

On April 19, 2011, Margaret Shilling ("Shilling") was involved in a car accident in Odenton, Maryland with Barbara Gates ("Gates"), who was underinsured and at fault. Shilling was injured following the accident and required extensive medical treatment over three years. Gates' liability coverage with Agency Insurance Company ("Agency") was for $20,000 which did not cover the total amount of Shilling's damages. Shilling was insured by Nationwide Mutual Insurance Company ("Nationwide"), which provided up to $300,000 per person in bodily injury compensation. Shilling's insurance coverage included protection from paying for damages when a tortfeasor was uninsured or underinsured. Shilling and Agency reached a settlement agreement in which Shilling received $20,000. After Nationwide and Shilling agreed to release all claims against Gates, Shilling continued to seek relief for unpaid medical bills from Nationwide. On January 26, 2015, Shilling sent a demand letter to Nationwide for the underinsured motorist benefits from her insurance policy. Nationwide confirmed receipt of the demand letter and reached out to Shilling's attorney four different times, but never denied Shilling's claim for underinsured benefits.

On September 23, 2016, Shilling filed an action against Nationwide in the Circuit Court for Anne Arundel County for unpaid damages not covered under Gates' insurance policy. Nationwide filed a motion to dismiss Shilling's claim alleging that the three-year statute of limitations period had

expired. Ultimately, the Circuit Court for Anne Arundel County granted Nationwide's motion to dismiss because it determined that the statute of limitations began to run on April 23, 2013 which was the settlement date with Agency. Next, Shilling filed an appeal to the Court of Special Appeals of Maryland. Before trial, the Court of Special Appeals granted the parties' motion to stay an appeal, thereby remanding the case back to the circuit court. The Circuit Court for Anne Arundel County, upon remand, held again that Shilling's claim was time-barred as the statute of limitations began to run on April 23, 2013, when the Agency policy was exhausted. Shilling then filed several motions which the Court of Special Appeals of Maryland granted to determine the accuracy of the circuit court's decision in this matter.

The Court of Special Appeals of Maryland reversed the circuit court's decision. The court held that her claim was not time-barred because the earliest possible date that the statute of limitations period could have started was February 3, 2014, which was the date that Shilling executed the release. Nationwide petitioned the Court of Appeals of Maryland for a writ of certiorari, which was granted.

Nationwide asked the court to determine when the statute of limitations started in cases that concern underinsured motorist benefits. *Nationwide*, 468 Md. at 247-48, 227 A.3d at 176. The Court of Appeals of Maryland examined the statute of limitations provision the Maryland Code and reviewed two Maryland cases that analyzed the statute of limitations in uninsured and underinsured motorist claims. *Id*. at 255, 227 A.3d at 180.

First, the Court of Appeals of Maryland applied the statute of limitations provision in civil cases to uninsured and underinsured motorist cases. *Nationwide,* 468 Md. at 259, 227 A.3d at 182. The provision states, "[a] civil action at law shall be filed within three years from the date it accrues." *Nationwide*, 468 Md. at 259, 227 A.3d 182 (quoting Md. Code Ann., Cts. & Jud. Proc. § 5-101 (West 2014)). Then the court reviewed two cases: *Lane* and *Pfeifer*. In *Lane v. Nationwide Mut. Ins. Co.*, the court held that an insured's actions against an insurer will be ruled by contract law principles. *Nationwide*, 468 Md. at 260, 227 A.3d at 183 (citing *Lane v. Nationwide Mut. Ins. Co.*, 321 Md. 165, 170, 582 A.2d 501, 503 (1990)). In contract law, the statute of limitations starts whenever the terms of the contract are breached. *Nationwide*, 468 Md. at 260, 227 A.3d at 183. Therefore, if the insurer does not deny insured's benefits claim, then the statute of limitations does not begin to run. *Nationwide*, 468 Md. at 257, 227 A.3d at 181 (citing *Lane,* 321 Md. at 176-77, 582 A.2d at 506-07).

On the other hand, in *Pfeifer*, the court held that the statute of limitations period did not begin until the exhaustion date of the tortfeasor's coverage occurred. *Nationwide*, 468 Md. at 259, 227 A.3d at 182 (citing *Pfiefer v. Phoenix Ins. Co.*, 189 Md. App. 675 at 694-95, 985 A.2d 581 at 593 (2010)). The Court of Appeals of Maryland overruled *Pfeifer* because it inaccurately

held that the statute of limitations period began to run prior to an insurer's denial of paying out the requested benefits to an insured. *Nationwide*, 468 Md. at 264, 227 A.3d at 185.

Therefore, the statute of limitations in underinsured motorist claims starts when an insurer denies an insured's request because this action breaches the insurance agreement. *Nationwide*, 468 Md. at 248, 227 A.3d at 176. As a result, when Shilling demanded recovery of the underinsured motorist benefits from Nationwide, the statute of limitations period never started since Nationwide failed to formally deny Shilling's claim of benefits. *Id*. at 261, 227 A.3d at 184.

The Court of Appeals of Maryland affirmed the decision of the Court of Special Appeals of Maryland ruling that Shilling's claim was not time-barred. *Nationwide*, 468 Md. at 247, 227 A.3d at 175. Although the Court of Special Appeals of Maryland stated that "the earliest date for commencing contract limitations [was] February 3, 2014," the Court of Appeals of Maryland disagreed. *Nationwide*, 468 Md. at 247, 227 A.3d at 175 (quoting *Shilling v. Nationwide Ins. Co.*, 241 Md. App. 261, 274-75, 209 A.3d 802, 811 (2019)). The Court of Appeals of Maryland held that there could not have been a definitive date set for the statute of limitations period to begin since Nationwide never actually denied Shilling's demand to recover underinsured motorist benefits. *Nationwide*, 468 Md. at 247, 227 A.3d at 176. Therefore, Shilling was able to pursue a claim against Nationwide in unpaid damages outside of Agency's coverage in the car accident. *Id*. at 261, 227 A.3d at 184.

In *Nationwide v. Shilling*, the Court of Appeals of Maryland concluded that if an insured files a claim against their insurance company pursuing recovery of underinsured or uninsured motorist claims, then that action is not time-barred if the insurance company fails to deny the claim. This holding ensures that the insured will not be taken advantage of by insurance companies, if the companies breach their contractual obligations within the insurance agreements. Although the insured has the opportunity to seek unpaid benefits from their insurers in such motorist claims, the insured is on notice that the statute of limitations period can potentially impact their chance to receive coverage if those benefits are not timely sought after their insurers deny their benefits. Alternatively, this also puts the insurance companies on alert when dealing with uninsured and underinsured claims. Insurance companies are also on notice that the statute of limitations begins when they deny a claim for benefits.

RECENT DEVELOPMENT

PETERSON V. STATE: DEFENDANTS FOUND GUILTY BUT NOT CRIMINALLY RESPONSIBLE ARE NOT ELIGIBLE FOR RELIEF UNDER THE UNIFORM POST-CONVICTION PROCEDURE ACT NOR BY WRIT OF CORUM NOBIS, BUT CIRCUIT COURTS MAY DETERMINE WHETHER NCR DEFENDANTS ARE ELIGBILE FOR HABEAS CORPUS RELIEF.

By: Meaghan Farnham

The Court of Appeals of Maryland held that a person convicted of a crime and found not criminally responsible ("NCR") is not eligible for post-conviction relief under the Uniform Post-Conviction Procedure Act ("UPPA") or through a Writ of Error *Corum Nobis*. *Peterson v. State*, 467 Md. 713, 739, 226 A.3d 246, 261 (2020). Since NCR defendants are not afforded similar post-conviction relief as criminally responsible defendants, the court found that NCR defendants may be entitled to *habeas corpus* relief following civil confinement or conditional release. *Id*. at 736, 226 A.3d at 259.

On March 6, 2007, two members of the Washington Area Vehicle Enforcement Team observed Mr. Peterson enter the roadway on Marlboro Pike in Prince George's County. Corporals Stakes and Aponte testified that they believed Mr. Peterson was pointing a silver rifle at an oncoming vehicle. As Mr. Peterson approached the oncoming vehicle, it appeared to the officers that Mr. Peterson was about to commit a carjacking. Corporal Aponte placed Mr. Peterson under arrest and discovered the rifle was in fact a silver calk gun. The circuit court found Mr. Peterson guilty of two counts of second-degree assault and determined that he was not criminally responsible. Mr. Peterson was committed to the Maryland Department of Health for inpatient treatment.

Relying on the Uniform Post-Conviction Procedure Act ("UPPA"), Mr. Peterson filed a *pro se* petition for post-conviction relief. After securing counsel, he then filed a Supplemental Petition for Post-Conviction Relief, which asserted: (1) Mr. Peterson's NCR plea was the "functional equivalent" of a guilty plea and was invalid because the record did not establish that he comprehended the nature of his charges, and that (2) Mr. Peterson's initial counsel was inadequate because he did not inform Mr. Peterson of the consequences of taking the plea. When the circuit court denied this petition, Mr. Peterson filed for a Petition for Writ of Error *Coram Nobis.* The court denied both the post-conviction relief request and the subsequent motion for reconsideration.

Mr. Peterson then appealed to the Court of Special Appeals of Maryland. The Court of Special Appeals of Maryland affirmed the circuit court, holding

that Mr. Peterson was not eligible for post-conviction relief under the UPPA nor under *coram nobis*. Mr. Peterson appealed and the Court of Appeals of Maryland granted *certiorari*.

The issues before the court were: (1) whether a defendant found NCR could receive post-conviction relief under the UPPA statute, (2) whether *coram nobis* relief was available to NCR defendants, and (3) whether NCR defendants could pursue *habeas corpus* relief. *Peterson*, 467 Md. at 719, 226 A.3d at 249.

The Court of Appeals of Maryland began its analysis by comparing the adverse consequences of guilty defendants found NCR from those who are found criminally liable. *Peterson*, 467 Md. at 726-33, 226 A.3d at 253-57. Unlike a criminally liable defendant, the NCR defendant could either be discharged from civil commitment or conditionally released once the court has determined that the defendant is not dangerous. *Peterson*, 467 Md. at 726, 226 A.3d at 253 (citing Md. Code Ann., Crim. Proc. § 3-114(b) (West 2020)). The fundamental differences between civil and criminal confinement is that punishment is the foundation for criminal confinement, whereas protection of the defendant and members of the community is the purpose of civil confinement. *Peterson*, 467 Md. at 730, 226 A.3d at 256 (citing *Harrison-Solomon v. State*, 442 Md. 254, 286, 112 A.3d 408, 428 (2015)).

By determining that Mr. Peterson's civil confinement is inherently different from that of criminal confinement, the Court of Appeals of Maryland held that the scope of the UPPA does not extend to defendants held NCR. *Peterson*, 467 Md. at 727, 226 A.3d at 254. The court looks to the language of the UPPA statute, which provides relief to a convicted person who is: "(1) confined under sentence of imprisonment, or (2) is on parole or probation." *Peterson,* 467 Md. at 727, 226 A.3d at 254 (citing Md. Code Ann., Crim. Proc. § 7-101 (West 2013)). The court held that the plain, non-ambiguous, meaning of "convicted," "parole," and "probation" within the statute does not apply to NCR defendants under civil confinement because the General Assembly "presumed to have meant what it said and said what it meant." *Peterson*, 467 Md. at 727, 226 A.3d at 254. With the exclusion of any language regarding civil confinement or conditional release within the statute, the court holds that NCR defendants are not eligible for relief under UPPA. *Id*.

Next, The Court of Appeals of Maryland addressed Mr. Peterson's petition for *coram nobis* relief. Peterson, 467 Md. at 733, 226 A.3d at 257. A writ of error c*oram nobis* requires a petitioner to satisfy five elements; the element in contention is whether Mr. Peterson has endured significant collateral consequences from his conviction. *Peterson*, 467 Md. at 733, 226 A.3d at 257 (citing *Jones v. State*, 445 Md. 324, 338, 126 A.3d 1162, 1170 (2015)). The court held that Mr. Peterson did not suffer significant collateral consequences from his conviction, but instead faced direct consequences

from his NCR plea. *Peterson*, 467 Md. at 733-35, 226 A.3d at 258-59. A direct consequence of a conviction is where the outcome has a "definite," "immediate," and "largely automatic effect" on the defendant's punishment. *Peterson*, 467 Md. at 734, 226 A.3d at 258 (citing *Yoswick v. State*, 347 Md. 228, 240, 700 A.2d 251, 256 (1997) (citing *Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973)). Conversely, a collateral consequence is excluded from the court's judgment and is not a "definite," and "practical" result of the conviction. *Peterson,* 467 Md. at 734, 226 A.3d at 258 (quoting *Cuthrell*, 475 F.2d at 1366). The court ruled that Mr. Peterson's commitment to the Maryland Department of Health, his conditional release, and his re-commitments thereafter were direct consequences of his NCR conviction. *Peterson*, 467 Md. at 735, 226 A.3d at 259. Thus, without collateral consequences, Mr. Peterson is not entitled to *coram nobis* relief. *Id.*

Finally, as a matter of first impression, the Court of Appeals of Maryland addressed whether a defendant ruled NCR is eligible for *habeas corprus* relief. *Peterson,* 467 Md. at 735, 226 A.3d at 259. The Court of Appeals of Maryland ruled that a circuit court may determine whether *habeas corpus* relief is available to defendants that have been "committed, detained, confined, or restrained" in ways other than physical restraint or imprisonment. *Peterson*, 467 Md. 713 at 736, 226 A.3d at 259 (citing *Sabisch v. Moyer*, 466 Md. 327, 331, 220 A.3d 272, 274 (2019)).

The court held that civil confinement falls within the plain language of the Maryland *habeas corpus* statute. *Peterson*, 467 Md. at 736, 226 A.3d at 259 (citing Md. Code Ann., Cts. &Jud. Proc. § 3-702(a) (West 2020)). "Commitment" is defined as confining a person in a prison, a mental hospital, or other institutions. *Peterson*, 467 Md. at 737, 226 A.3d at 260 (citing *Commitment*, Black's Law Dictionary (11th ed. 2019)). Therefore, when a NCR defendant is civilly committed to a Department of Health facility for impatient treatment, such involuntary commitment results in a significant deprivation of liberty over which the state has no authority without due process of law. *Peterson*, 467 Md. at 737, 226 A.3d at 260 (citing *Addington v. Texas*, 441 U.S. 418, 245 (1979)).

In addition to civil commitment, a NCR defendant's conditional release is eligible for *habeas corups* relief because the restrictions placed on a defendant are viewed by the court as a potential deprivation of liberty. *Peterson*, 467 Md. at 737, 226 A.3d at 260. Where the Court of Appeals of Maryland previously found probation as a form of confinement, it now extends confinement to the conditional release of NCR defendants. *Id*. at 736-37, 226 A.3d 259-60.

Prior to the court's holding in *Peterson*, NCR defendants in civil confinement or on conditional release were not eligible to petition for post-conviction relief. The Court of Appeals of Maryland established a mechanism for NCR defendants to seek post-conviction relief by expanding *habeas corpus* to include civil commitment and conditional release. Moving

forward, NCR defendants may now petition for post-conviction relief under *habeas corpus* to the circuit courts, which may decide whether the defendant is entitled to relief.

RECENT DEVELOPMENT

PETTIFORD V. NEXT GENERATION TRUST SERV.: A TENANT IS NOT REQUIRED TO OBJECT TO PRESERVE THE RGHT TO APPEAL WHEN THERE WAS NO CONSENT JUDGMENT, IS ENTITLED TO RAISE THE DEFENSE OF WARRANTY OF HABITABILITY WITHOUT THE THREAT OF AN IMMEDIATE EVICTION, AND IS NOT LIMITED TO RAISING A RENT ESCROW DEFENSE BASED ON CERTAIN CONDITIONS OR THE TIME OF THE YEAR.

By: Craig Snyder

The Court of Appeals of Maryland held that where there is no consent judgment, a tenant is not required to object to its entry to preserve her appeal, but rather can just appeal. *Pettiford v. Next Generation Trust Serv.*, 467 Md. 624, 649, 226 A.3d 15, 29 (2020). The court held that a tenant is entitled to raise a defense based on the warranty of habitability during a summary ejectment proceeding without the threat of immediate eviction. *Id*. at 663, 226 A.3d at 37. The court held that a tenant is not limited to raising a rent escrow defense during certain times of the year. *Id*. at 667, 226 A.3d at 40.

First, on November 13, 2018, Next Generation Trust Services ("Next Generation") filed a complaint in the District Court of Maryland against Latisha Pettiford ("Pettiford"), alleging that Pettiford had failed to pay rent for five months and requesting repossession of the property. During trial, Pettiford asserted a defense based on the warranty of habitability. The court responded to Pettiford's defense by saying that if the property is uninhabitable, then Pettiford will be "out by midnight[.]" Pettiford's counsel responded that they could not move forward with the defense of warranty of habitability if Pettiford would be forced to vacate the property.

Next, Pettiford raised a rent escrow defense based on the heating issue with the property. Pettiford claimed that the last time that her heat worked was in February. Pettiford stated that she contacted maintenance personnel and the furnace was never fixed. The court informed Pettiford that she did not need heat through the months in question but that she could open an escrow for November.

After oral arguments, the parties discussed a possible resolution, but advised the court that they had not reached an agreement. The court asked if Pettiford owed the four months she did not pay, and she responded by saying "Mmm-hmm." The court then entered a consent judgment for Next Generation. Pettiford appealed to the Circuit Court of Baltimore.

On April 18, 2019, the circuit court affirmed the district court's judgment. Pettiford petitioned for a writ of certiorari on May 23, 2019, which the Court of Appeals of Maryland granted on August 26, 2019.

Fist, the court held that the district court's judgment was not a consent judgment, and Pettiford did not need to preserve her appeal by objecting. *Pettiford*, 467 Md. at 649, 226 A.3d at 29. Both parties advised the court that they had not come to an agreement to resolve the issue. *Id*. at 650, 226 A.3d at 30. The consent judgment was not a judgment entered at the consent of the parties, rather, it was initiated by the district court. *Id*. 467 Md. at 651–52, 226 A.3d at 30–31. No consideration was exchanged in the agreement because the parties never had an agreement. *Id*. at 652, 226 A.3d at 31. Additionally, Pettiford never gave a valid consent to the proposed judgment by the district court. *Id*. Pettiford's response of "mmm-hmm" falls short of a valid consent to a consent judgment. *Id*. at 652–53, 226 A.3d at 31.

Second, the court held that Pettiford is entitled to raise the defense of warranty of habitability during a summary ejectment proceeding without being threatened with immediate eviction. *Pettiford*, 467 Md. at 663, 226 A.3d at 37. The implied warranty of habitability states that a landlord's "premises shall not have any conditions which endanger the life, health[,] and safety of the tenants involving . . . lack of heat." *Id*. at 663, 226 A.3d at 37 (quoting PLL § 9-14.2(a)(4)). An action for breach of the implied warranty of habitability may be "maintained as a defense in an action of summary ejectment[.]" *Pettiford*, 467 Md. at 663, 226 A.3d at 37 (quoting PLL § 9-14.2(b)). The landlord must be given notice of the alleged breach and given reasonable time to repair the issue. *Pettiford*, 467 Md. at 664, 226 A.3d at 37–38 (citing PLL § 9-14.2(c)).

Pettiford was entitled to raise the defense of habitability. *Pettiford*, 467 Md. at 663, 226 A.3d at 37. Pettiford notified Next Generation that there was no heat on the premises since February. *Id*. at 634, 226 A.3d at 20. By trial, the heat had not been fixed for nine months. *Id*. Because Pettiford gave notice and a reasonable amount of time had passed, Pettiford was entitled to raise the defense of warranty of habitability. *Id*. at 665, 226 A.3d at 38. Therefore, the district court improperly threatened Pettiford with an immediate eviction and was required to consider the defense. *Id*. at 665, 226 A.3d at 38–39.

Third, the court held that Pettiford was allowed to raise a rent escrow defense because there were no temporal limitations requiring it to be filed at certain times of the year. *Pettiford*, 467 Md. at 667, 226 A.3d at 40. When a landlord, after a reasonable amount of time, has not repaired a defect or condition, the tenant may refuse to pay rent and raise the existing defect as an affirmative defense to a summary ejectment action. *Pettiford*, 467 Md. at 667, 226 A.3d at 40 (citing MD. CODE ANN., Real Prop. §8-211 (West 2020)).

The Court of Appeals of Maryland disagreed with the district court's dismissal of Pettiford's rent escrow defense. *Pettiford*, 467 Md. at 666–67, 226 A.3d at 39-40. Instead, this court found that the district court improperly stated that the rent escrow issue needed to be raised in a separate action. *Id*. at 666–67, 226 A.3d at 39. Specifically, the Court of Appeals of Maryland found that the district court's instruction asking Pettiford to go to the clerk's

office and open the escrow for November was evidence of the court's misunderstanding. *Id*. The district court was incorrect because a rent escrow affirmative defense can be raised against Next Generation's summary ejectment action. *Id*. at 668, 226 A.3d at 40.

The district court's decision is improper because Pettiford was permitted to raise a rent escrow defense for any month as long as there is evidence of the defect. *Pettiford*, 467 Md. at 667, 226 A.3d at 40. The district court reasoned that since heat would not be needed from June to September, Pettiford could not open a rent escrow until November. *Id*. at 667, 226 A.3d at 39. However, there is nothing in the rent escrow statute that sets forth a temporal limitation or states that the hazardous defect must impact the tenant during the months that rent was withheld. *Id*. at 667, 226 A.3d at 40.

The court's holdings in this case protects future tenants from landlord mistreatment and incentivizes landlords to repair hazardous defects or conditions. A tenant can now raise multiple defenses to fight summary ejectment actions brought by landlords. A tenant can raise a rent escrow defense for a defective condition not repaired by the landlord even when the condition is not immediately impacting the tenant. Most importantly, a tenant can raise the defense of implied warranty of habitability without being threatened of immediate eviction. The holdings in this case provide more protections to tenants and promote safety in rental properties.

RECENT DEVELOPMENT

WYNNE V. COMPTROLLER OF MARYLAND: THE MARYLAND GENERAL ASSEMBLY'S 2014 BUDGET RECONCILIATION FINANCING ACT WHICH LOWERED INTEREST RATES FOR OUT-OF-STATE TAX REFUNDS DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

By: Curtis Paul

The Court of Appeals of Maryland held that a provision in the Maryland General Assembly's 2014 Budget Reconciliation and Financing Act ("BRFA") which lowered the interest rates accrued on tax refunds for out-of-state income did not violate the dormant Commerce Clause of the United States Constitution. *Wynne v. Comptroller of Maryland*, 469 Md. 62, 94, 225 A.3d 1129, 1148 (2020). The court further held that interest rates on tax refunds are too attenuated from interstate commerce to trigger dormant Commerce Clause protections, and that the 2014 BRFA interest rate provision did not discriminate against any interstate markets or industries. *Id*.

During the 2006 tax year, Maryland residents Brian and Karen Wynne ("the Wynnes") made a significant amount of combined income from their Maryland corporation's out-of-state business ventures that was taxed both in Maryland, and other states where income was generated. Under Maryland's tax law, the Wynne's out-of-state income allowed them to claim a refund from Maryland for the taxes paid on that same income that was taxed in other jurisdictions. As of 2006 however, Maryland taxed income both at the state and county level, but only applied a refund to out-of-state taxes for the state portion of the Maryland income tax. The result was that the Wynnes paid double income tax in Maryland: first at the state level and again at the county level for their out-of-state income, without a reciprocal refund for the county tax.

In 2014 the Wynnes sought a remedy for the disproportionate tax treatment with the Maryland Tax Court and subsequent judicial review with the Circuit Court for Howard County. The Court of Appeals of Maryland, [and ultimately, the United States Supreme Court] held that the absence of a tax credit for the county portion of the Maryland income tax discriminated against interstate commerce and violated the dormant Commerce Clause. The Supreme Court further held that extending a tax credit to the county portion of the Maryland income tax for out-of-state derived income would be a sufficient remedy for the constitutional violation.

In 2014, as the Wynne's case was pending in the Supreme Court, the Maryland General Assembly drafted a Budget Reconciliation Financing Act ("BRFA") that would require the Comptroller to lower the interest rate on tax refunds for income derived from out-of-state, if the Supreme Court found in

favor of the Wynnes. Because the Supreme Court did indeed find in favor of the Wynnes, the General Assembly's 2014 BRFA was enacted, and the Comptroller lowered the interest rate to be paid on the out-of-state refunds. The effect of the Comptroller's order reduced the Wynnes' accrued interest on their tax refund for their out-of-state income by approximately $14,000.00.

The Wynnes objected to the Comptroller's order and sought review with the Maryland Tax Court, arguing that the reduced interest rate on tax refunds for their out-of-state income violated the dormant Commerce Clause. The Tax Court found in favor of the Wynnes under the same logic of the dormant Commerce Clause violation which was found in the prior Supreme Court litigation. The Comptroller then sought judicial review with the Circuit Court for Anne Arundel County. The Circuit Court reversed the Tax Court's decision and the Wynnes filed a petition for a writ of certiorari to the Court of Appeals of Maryland, which was granted.

The Court of Appeals of Maryland examined whether the 2014 BRFA provision that lowered the interest rate on tax refunds for out-of-state income violated the dormant Commerce Clause. *Wynne*, 469 Md. at 80, 225 A.3d at 1140. The court began by stating that the 2014 BRFA was part of the remedy created by the General Assembly in the wake of the prior Supreme Court litigation, and the State was permitted to consider its own interests in fiscal planning when issuing the Supreme Court's mandated remedy. *Id*. at 82, 225 A.3d at 1140-41.

The court then applied the doctrine of the dormant Commerce Clause by first examining whether the relevant portion of 2014 BRFA regulates interstate commerce. *Wynne*, 469 Md. at 83, 225 A.3d at 1141. The court recited Supreme Court precedent that there are three categories of activities that can be regulated under the Commerce Clause: the channels, instrumentalities, and activities of interstate commerce. *Wynne*, 469 Md. at 85, 225 A.3d at 1142 (citing *United States v. Lopez,* 514 U.S. 549, 558-59 (1995)). The court stated that interstate activities such as product pricing regulation and favorable in-state tax treatment were industry regulations that were unlike the 2014 BRFA provision which concerned only the rate of interest on tax refunds. *Wynne*, 469 Md. at 86, 225 A.3d at 1143.

The court compared tariff taxation, which is the primary example of interstate commerce discrimination, to the 2014 BRFA provision which was aimed only at interest rates on tax refunds and is not itself a tax. *Wynne*, 469 Md. at 86, 225 A.3d at 1141. The court stated that "there is a fundamental difference between a tax and the rate of interest that may be paid on a tax refund." *Id*. at 86, 225 A.3d at 1143. The court further reasoned that this fundamental difference made it unlikely that individuals engaged in interstate commerce would even consider tax refunds in their decision making. *Id*. at 87, 225 A.3d at 1144. The court thus concluded that the 2014 BRFA was neither favorable in-state tax treatment, nor a regulation on interstate activity, and was too attenuated from an individual's interstate decision making to have an effect

on interstate commerce. *Id*. at 87, 225 A.3d at 1144. The court therefore held that the 2014 BRFA did not regulate interstate commerce or violate the dormant Commerce Clause. *Id*. at 87, 225 A.3d at 1144.

While the court found that the 2014 BRFA did not regulate interstate commerce, the court still examined whether the 2014 BRFA provision discriminated against interstate commerce. *Wynne*, 469 Md. at 88, 225 A.3d at 1144. The court stated that discrimination of interstate commerce requires that there be a "comparison of substantially similar entities" and therefore examined whether the 2014 BRFA provision was aimed at comparable markets for interstate investment or industry. *Wynne*, 469 Md. at 89, 225 A.3d at 1145 (quoting *Dep't of Revenue v. Davis*, 553 U.S. 328, 342 (2008)). The court first stated that the interest rate on tax refunds in the current case was dissimilar from the previous litigation, in that the current 2014 BRFA was a cure for the prior constitutional defect. *Wynne*, 469 Md. at 90, 225 A.3d at 1146. The court further found that the Wynnes had failed to provide any evidence of an interstate market, or competition between markets, that would be affected by the 2014 BRFA provision. *Id*. at 91, 225 A.3d at 1146. The court rejected the Wynnes' arguments that the 2014 BRFA discriminated in effect against out-of-state business investments and disincentivized income generating activities in other states because individuals who were not engaged in interstate commerce could also have the interest rates on their tax refunds reduced by the 2014 BRFA. *Id*. at 93, 225 A.3d at 1147-48. The court concluded, that absent evidence to the contrary, the 2014 BRFA provision did not discriminate against any comparable interstate markets or industries, and therefore did not discriminate against interstate commerce or violate the dormant Commerce Clause. *Id*.

The Court of Appeals of Maryland held that the interest rate to be paid on out-of-state tax refunds, as set forth in the 2014 BRFA, did not violate the dormant Commerce Clause of the United States Constitution. *Wynne v. Comptroller of Maryland* is an important case as it is the most recent and comprehensive Maryland Court of Appeals decision concerning the dormant Commerce Clause. The case will be of great use to scholars seeking the latest Maryland ruling on the dormant Commerce Clause, as well as to law practitioners seeking guidance on the legal standards for dormant Commerce Clause regulation and interstate tax law matters. Finally, *Wynne v. Comptroller of Maryland* will be an invaluable case to the Maryland General Assembly when drafting new legislation that concerns interstate commerce, taxation, and market regulation.