UNIVERSITY OF BALTIMORE LAW FORUM

VOLUME 52 SPRING 2022 NUMBER 2

University of Baltimore School of Law, 1401 North Charles Street, Baltimore, Maryland 21201. (410) 837-4497. http://law.ubalt.edu/academics/publications/lawforum/.ublawforum@ubalt.edu.

Cite this issue as 52 U. Balt. L.F. _ (2022).

LETTER FROM THE EDITOR-IN-CHIEF

To the Maryland Legal Community:

The Editorial Board, Associate Editors, and Staff Editors of the *University of Baltimore Law Forum* is honored to present the second issue of Volume 52. *Law Forum* is dedicated to publishing developing pressing issues that are unique to the Maryland legal community. It is an immense pleasure and honor to serve as *Law Forum's* first African American Editor in-Chief. As a legal journal, we have worked tediously to produce a quality publication for the Maryland Legal Community.

Volume 52.2 opens with an article written by Professor Teresa Rivera Bean. In this article, she discusses how to lay a foundation for undergraduate students interested in a career in law by combining curriculum with experiential learning in both an academic and field setting like a law school clinic program. The second article is written by Michael DeStefano, Esq. where he discusses the current housing blight issues in Baltimore, the cities previous iterations at trying to tackle the problem and how it uses and misuses its current tactic called “Vacants to Value”, as well as ways to improve the cities its blight-elimination efforts. Also, included are two student comments. The first is written by Ms. Marianne Gluckert Smith, that explores the problems with digital contact tracing and the potential consequences to Maryland trade secrets claimants. The second is written by Lauren Stone, that analyzes the current laws governing collection of uncompensated care, gaps in the protections offered, and propose solutions to seal those gaps.

This publication reflects the hard work and commitment of our Editorial Board, Associate Editors, 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,

Parker Imani Headd ("Payne")
Editor-in-Chief
University of Baltimore Law Forum - Vol. 52, No. 2

Member, National Conference of Law Reviews

UNIVERSITY OF BALTIMORE LAW FORUM

VOLUME 52 SPRING 2022 NUMBER 2

ARTICLES

LEARNING BEYOND THE CLASSROOM: THE CASE FOR ESTABLISHING AN UNDERGRADUATE PRE-LAW CLINIC

Teresa Rivera Bean 147

BALTIMORE'S TARGETED BLIGHT ELIMINATION PROGRAM AND HOW IT CAN BE IMPROVED

Michael DeStefano 179

COMMENTS

TRACING PROPERTY INTERESTS: HOW MANDATORY COVID-19 CONTACT TRACING CONFLICTS WITH THE MARYLAND CONSTITUTION AND TRADE SECRET LAW

Marianne "Marnie" Gluckert Smith 201

REGULATING MEDICAL DEBT COLLECTION: HOW MARYLAND SHOULD IMPROVE PROTECTIONS FOR THOSE WHO CANNOT AFFORD CARE.

Lauren Stone 226

RECENT DEVELOPMENTS

E.N. v. T.R *Oluwatosin Adedeji-Fajobi* 254

Esteppe v. Balt. City Police Dep't. *Jeneen Burrell* 258

Madrid v. State *Erin Carrington Smith* 261

Nationstar Mortg. LLC v. Kemp *Fateh Tarar* 265

State v. Miller *Chelsea Roberts* 269

Town of Riverdale Park v. Ashkar *Leah Rowell* 272

Velicky v. Copycat Bldg. LLC *Jacob Linn* 276

ARTICLE

LEARNING BEYOND THE CLASSROOM: THE CASE FOR ESTABLISHING AN UNDERGRADUATE PRE-LAW CLINIC

By: **Teresa Rivera Bean**[1]

Pre-Law: Undergraduates with an interest in the legal field.

Clinic: Institution-based program that provides a hands-on legal experience for students while providing services to clients.

"You cannot teach today the same way you did yesterday to prepare students for tomorrow."[2]

This article provides a framework for undergraduate institutions to establish a pre-law clinic (PLC). As a former clinical student, trial attorney, and now scholar-practitioner and associate professor, I sought to provide my students with an opportunity to learn beyond the classroom. Much like clinical education in law school, the PLC is a practical, hands-on learning experience, working with real cases. This article is a research-based "how to" that errs on the side of overjustification. First, this article will discuss the rationale for establishing the PLC, and the importance of experiential learning opportunities for undergraduate students.[3] Second, this thesis examines a brief history of legal education reform over the past thirty years identifying the fundamental skills needed for law students to be "practice ready" upon graduation, and how those areas of reform apply to the undergraduate experience.[4] Third, there is an outline describing the format and components of the PLC.[5] Finally, this article includes how the PLC was implemented, lessons learned, and teachable moments.[6]

I. Rationale For Establishing The PLC, And The Importance Of Experiential Learning Opportunities For Undergraduate Students

---

[1] Teresa Rivera Bean, J.D. is an Associate Professor of Law and Criminal Justice at Hood College, Frederick, MD., https://www.hood.edu/academics/departments/department-law-criminal-justice/law-criminal-justice-faculty-staff.

[2] John Dewey (1915).

[3] *See infra* Section I.

[4] *See infra* Section II.

[5] *See infra* Section III.

[6] *See infra* Section IV.

A. Introduction

The objective is to lay a foundation for undergraduate students interested in a career in law by combining curriculum with experiential learning in both an academic and field setting.[7] My goal is for my students to learn by doing and acquire skills and values that will serve them as they pursue ethical business practices in law or any other field.

When the newly established law and criminal justice department at my institution drafted learning concepts and student learning objectives (SLOs), we included "Effectively prepare students for law school and employment in the law and criminal justice fields" as one of our program goals, with experiential learning as the learning concept.[8] The rationale for the PLC was to create more experiential learning experiences for students. Often, the major has more students than internship placements. The criminal justice system and agencies are rather particular about interns. Some agencies prefer not to use interns. The agencies I can convince to take interns have stringent requirements that many students cannot meet. Still, other agencies will only take one intern at a time. As the pre-law advisor, I had to figure out a way to secure an internship placement for all my students, as is required by the major.

B. Experiential Learning and the Law

Experiential learning as applied to the legal field can be defined as:

> *[A] fully-integrated teaching pedagogy that incorporates experience and relationship-based learning into doctrinal, practical skills and clinical courses, that provides students with formative and summative assessments and that trains students in the core competencies and the soft skills necessary to think, write, and practice like a lawyer, through a curriculum that engages students in the tasks most commonly associated with the practice of law*.[9]

---

[7] *Pre-Law Studies at Hood*, HOOD COLLEGE, https://www.hood.edu/sites/default/files/Admission/Dept.%20Brochures%20F21/21_Dept Bro_Pre-Law%20Brochure_ONLINE.pdf (last visited Jan. 28, 2022).

[8] *Student Learning Outcomes*, HOOD COLLEGE, https://www.hood.edu/academics/departments/department-law-criminal-justice/student-learning-outcomes (last visited Jan. 17, 2021).

[9] Adam Lamparello & Charles E. MacLean, *Experiential Legal Writing: The New Approach to Practicing Like a Lawyer*, J. LEGAL PROF. 1, 15 (2015), https://ssrn.com/abstract=2494896 or http://dx.doi.org/10.2139/ssrn.2494896.

And as it is applied to the clinical experience, experiential learning can also be defined as:

> *[M]ethods of instruction that regularly or primarily place students in the role of attorneys, whether through simulations, clinics, or externships. Such forms of instruction integrate theory and practice by providing numerous opportunities for students to learn and apply lawyering skills as they are used in legal practice (or similar professional settings). These learning opportunities are also designed to encourage students to begin to form their professional identities as lawyers, through experience or role-playing with guided self-reflection, so that they can become skilled, ethical, and professional life-long learners of the law*.[10]

Both definitions include students as problem solvers who learn by doing.

In the legal context, "[e]xperiential learning encompasses five elements: (1) experiencing, (2) reflecting, (3) processing, (4) generalizing (identifying learned principles), and (5) applying [information learned] to different contexts." [11] The core competencies for experiential learning include: legal research and analysis, problem-solving, factual investigation, communication, negotiating, organizational and management of casework, and identifying and solving ethical dilemmas.[12] Soft skills include "interpersonal communication skills, working collaboratively with others, exercising sound judgment, and thinking 'outside the box.'"[13] It's learning by doing wherein students become participants in the learning process; the focus is "on the student experience[,] not the faculty function."[14]

Most undergraduate internship sites for law and criminal justice majors are at law offices, criminal justice agencies, and various law enforcement departments.[15] Students have a certain number of hours to

---

[10] David I.C. Thomson, *Defining Experiential Legal Education*, 1 J. OF EXPERIENTIAL LEARNING 1 Apr. 2015, at 1, 20.
[11] Lamparello & MacLean, *supra* note 9, at 11.
[12] *See generally id.* at 11-12.
[13] *Id*. at 15; *see also* Heather R. Huhman, *The Ten Unique Soft Skills Employers Desire in New Hires*, ENTREPRENEUR (Mar. 18, 2019), http://www.entrepreneur.com/slideshow/299944.
[14] *See* Thomson, *supra* note 10, at 20 (noting that the self-reflection piece is crucial to the student experience).
[15] Dave Murphy & Steve Gibbons, *Criminal Justice Internships: An Assessment of the Benefits and Risks*, 4 W. OR. UNIV. DIGITAL COMMONS 1, 3 (2017)*; see also Law &*

complete if they are receiving credit and are generally supervised by an on-site supervisor who performs midterm and final evaluations.[16] Those evaluations are sent to the Center for Career Development and Experiential Education and then forwarded to the sponsoring professor.[17] Students are asked to perform legal tasks while observing actual lawyers and professionals. However, given their limited experience, students do not actually assume the role of mediator, investigator, paralegal, or law clerk. Each firm/agency usually has these roles fulfilled by experienced paraprofessionals. While simulations and internships provide the opportunity to gain skills and learn about the law, these experiences can be artificial.[18] In my experience, students will not engage as they would if they were handling a real case.

College prepared me for law school, as I learned how to read and brief cases and engage in legal analysis. As a product of clinical legal education at American University's Washington College of Law, and as an assistant professor at a liberal arts college, I became interested in combining experiential learning with a criminal justice curriculum. I envisioned establishing a legal clinic where undergraduate students work on real legal cases. As the clinical supervisor and part-time practicing attorney, the students would receive their internship credit for being under my supervision at Hood's law clinic, located at the institution. Why clinical education? Because "[it's] an opportunity for a liberating education, an opportunity for teacher and student to join in a common quest for developing self-conscious reflection from experience. As a result, students transform into self-learners [and] teachers become reflective self-evaluating transformative agents of education."[19] I decided to combine my background and experience to create

---

Criminal Justice (B.A.), HOOD COLLEGE, https://www.hood.edu/academics/programs/law-criminal-justice (last visited Jan. 17, 2021).

[16] *How to Get Academic Credit for an Internship*, HOOD COLLEGE, https://www.hood.edu/campus-community/catherine-filene-shouse-center-career-development-experiential-education/internship-program/get-academic-credit (last visited Jan. 17, 2021).

[17] *Internship Information*, HOOD COLLEGE, https://www.hood.edu/campus-community/catherine-filene-shouse-center-career-development-experiential-education/internship-program (last visited Jan. 17, 2021).

[18] *See* DAVID CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS 5 (2002). Professor Chavkin's experiences are similar to the experiences I have had with simulations and internships.

[19] William P. Quigley*, Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 AKRON L. REV. 463, 474 (1995).

an unforgettable experiential learning experience for college students.[20] Hence, the Pre-Law Clinic ("PLC") was born.

C. Research on Pre-Law Clinics for Undergraduates

While experiential learning and high-impact educational practices (HIPs) are hot topics in education, establishing a PLC encompasses both and is rather cutting edge. [21] While most U.S. law schools have clinical legal education, I could not find any current clinical legal education programs at the undergraduate level (and certainly nothing entitled "clinic" other than nursing clinicals).[22]

The PLC would integrate the liberal arts involving law, criminal justice, political science, psychology, English, history, and sociology with the legal profession. Next, if we partner with criminal justice agencies and non-profits, we would engage in service-learning and volunteer service hours. The volunteer activities performed by the PLC students would be considered civic engagement" as we address the concerns and advocate for underserved populations. Therefore, while the PLC complies with the college's mission, I simply needed to determine which underserved populations would be amenable to working with the PLC.

---

[20] My purpose in writing this article is to provide a "how to" guide for other colleges with scholar-practitioners to explore the need for and then implement a PLC for their respective institutions.

[21] GEORGE D. KUH, HIGH-IMPACT EDUCATIONAL PRACTICES *9 (Assoc. of Am. Coll. & Univ., ed. 2008),* https://provost.tufts.edu/celt/files/High-Impact-Ed-Practices1.pdf. A HIP is defined as an educational initiative that involves a high impact activity deep learning by the student with self-reported gains. *Id.* at 14. HIPs "increase rates student retention and student engagement." *Id.* at 9. There are 11 common HIPs identified by the American Association of Colleges & Universities (AAC&U), which are: first year seminars and experiences, common intellectual experiences, learning communities, writing-intensive courses, collaborative assignments and projects, undergraduate research, diversity and global learning, e-portfolios, service learning, internships, and capstone courses and projects. *Id.* at 6.

[22] Telephone Interview with David Chavkin, Professor Emeritus, American University's Washington College of Law (Aug. 17, 2018). According to Professor Chavkin, the first pre-law clinic was one he ran for the University of California at Berkeley, out of Berkeley Neighborhood Legal Services and later at San Francisco Neighborhood Legal Assistance. *Id.* At its peak, Professor Chavkin supervised 50 undergraduate paralegals, each earning credits for 15 hours per week time commitment. *Id.* Currently, Georgetown University Law Center has a Criminal Investigative Internship program (which is similar to the PLC) that accepts undergraduates from institutions around the U.S. to assist with their criminal justice clinic. *Id.; see also Investigative Internship*, GEO L., www.law.georgetown.edu/experiential-learning/clinics/investigative-internship-program/ (Aug. 2021).

Professor Gabel's article on the Bankruptcy Assistance and Practice Program (BAPP) provides an excellent framework for the PLC, using cost-effective methods.[23] She uses the business model of a "lean startup" when creating the BAPP, noting that "[l]egal clinics should follow the same three-step process that a lean startup follows: build, measure, and learn."[24] Her article includes a retrospective on what worked and what she would do differently.[25]

D. The PLC as a Model Ethical Law Office[26]

It is imperative that I emphasize professional responsibility, appropriate work ethic (such as meeting deadlines, timeliness, keeping meticulous documentation of the file and timesheets), and the delivery of stellar work product. Issues of professional responsibility, ethics, morals, and professionalism will be raised on a weekly basis with the PLC students both personally and professionally. To promptly address those issues, I incorporated specific ethical issues in the boot-camp portion of the PLC, and in the weekly classroom seminar.[27] There is also a summer assignment to read the Maryland Attorneys' Rules of Professional Conduct.[28] In addition, Professor Peter Joy's article "The Law School Clinic as a Model Ethical Law Office," was instrumental in creating the PLC.[29] As Professor Joy also notes, the first lawyers that students get to know are their law professors, and the clinic law office will probably be their first experience in a law office.[30] Therefore it is incumbent upon me, as their professor, to model ethical behavior because "[p]rofessionalism ideals can either be enhanced or undermined by the behavior of faculty in and out of the classroom."[31] I concur with Professor Joy's argument "that every in-house clinical teacher should strive to make her clinic a model ethical law office."[32] One of the goals of the PLC is for students to become ethical practitioners which is why the PLC has to be a "model ethical law office."[33]

---

[23] *See generally* Jessica D. Gabel, *The Lean Legal Clinic: Cost-Effective Methods of Implementing Experiential Education*, 7 ELON L. REV. 261 *passim* (2015).
[24] *Id.* at 262, 316.
[25] *See id.* at 310-16.
[26] Peter A. Joy, *The Law School Clinic as a Model Ethical Law Office*, 30 WM. MITCHELL L. REV. 35 *passim* (2003).
[27] Pre-Law Clinic (PLC) Terms of Participation, *in* PRE-LAW CLINIC MANUAL 1, 3 (2021).
[28] Md. Rule 19-300.1 to -308.5.
[29] *See* Joy, *supra* note 26, at 35 *passim*.
[30] *Id.* at 36, 45.
[31] *Id.* at 37.
[32] *Id.* at 38.
[33] *Id.* at 42.

The first area of ethical behavior to address is the unauthorized practice of law. Every state has a student practice rule that allows law students in an American Bar Association (ABA) accredited law school clinic to represent clients under the supervision of a licensed attorney.[34] Since the PLC is not an ABA-accredited law school clinic, nor are the other requirements met under the student practice rule, the undergraduate students will not be practicing law. However, the Maryland Rules nonetheless provide that the supervisory attorney must make reasonable efforts to ensure that the "non-attorneys" conduct is compatible with the professional obligations of the attorney.[35] Or in other words, the students must comply with the Maryland Rules of Professional Conduct as well.

As long as attorneys supervise the delegated work and are ultimately responsible for the work product, attorneys can work with law clerks and paralegals without being found to have assisted in the unauthorized practice of law.[36] While "[t]he level of supervision may vary, depending on the type of work involved and the competence of the legal assistant, [supervision] must always be present."[37]

The following is a list of specific issues of professional responsibility that the PLC will address: the attorney-client relationship, confidentiality, conflict of interests, and truthfulness in statements to others. As part of the agreement between the PLC and the Office of the Public Defender (OPD, our partnering agency) students will not have direct client contact.[38] However, students will have access to a copy of the client's file with instructions from

---

[34] *E.g.,* Md. Rule 19-220.

[35] *E.g.,* Md. Rule 19-305.3. Comment 1 describes non-attorneys as

> secretaries, investigators, law student interns, and paraprofessionals. Such assistants . . . act for the attorney in rendition of the attorney's professional service. An attorney must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product.

Id. Comment 2 requires managerial attorneys to "make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that non-attorneys will act in a way compatible with the Maryland Attorneys' Rules of Professional Conduct." *Id.*

[36] *See* Att'y Grievance Comm'n v. Hallmon, 343 Md. 390, 398, 681 A.2d 510, 514 (1996).

[37] *Id.* at 399, 681 A.2d at 515 (citing A.G. Greene & K. Williams-Fortin, *Expanding the Role of the Legal Assistant – Why Do It?* In Leveraging With Legal Assistants 6, 8 (A.B.A. Sec. of Law Prac. Mgmt., A.G. Greene ed., 1993)).

[38] *See infra* Section III.D.2. (explaining that clients will be informed that students are investigating their cases under the supervision of a scholar-practitioner and their assigned Public Defender and must give written consent to the PLC's assistance).

the OPD on how to prepare the case for trial. Students will be privy to confidential information. Not only will the students be drilled on the utmost importance of confidentiality, but they will also sign a confidentiality agreement with the clinic and with the OPD. [39]

Students will be advised to inform me if at any time during the clinic they know, have a relationship with, or have interests that are materially adverse to the client, any witnesses, or anyone related to the case. As part of the agreement with the PLC, students will not be able to maintain legal employment concurrently with their clinical experience to avoid potential conflicts.

II. Brief History Of Legal Clinical Education Reform Identifying The Fundamental Skills Needed For Law Students To Be "Practice Ready" Upon Graduation, And Applying The Reform To The Undergraduate Experience

A. Fundamental Legal Skills and The Reform Movement

A clinical education "reform" movement formally began in 1992.[40] An ABA Task Force comprised of lawyers and educators, chaired by attorney Robert MacCrate, gathered to consider educational issues regarding the "practice of law."[41] The MacCrate Report identified skills that are central to the practice of law such as problem-solving, legal analysis and reasoning, and factual investigation.[42]

The MacCrate Report called upon legal education to acknowledge that the skills needed to become a lawyer went beyond doctrinal learning.[43] Students needed to learn how to apply legal theory to legal practice. Perhaps the most substantial impact of the MacCrate Report is that "in the 15 years that followed was significant growth in clinical legal education in the legal academy."[44] In other words, clinical education bridges the gap between theory and practice.

---

[39] Intern/Volunteer Privileged Communications/Confidentiality Agreement, *in* PRE-LAW CLINIC MANUAL 1 *passim* (2021). A violation of the duty of confidentiality will result in removal from the clinic which could, in turn, effect the student's graduation. *Id.*

[40] *See* ROBERT MACCRATE, ET AL., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM (A.B.A. ed., July 1992) [hereinafter MACCRATE Report].

[41] *Id.* at v, 233-72.

[42] *Id*. at 135, 138-41 (referring to the ABA Task Force's "Statement of the Fundamental Lawyering Skills and Professional Values"); *see also* AM. BAR ASS'N OF AM. LAW SCHS., CLINICAL LEGAL EDUCATION: REPORT OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS-AMERICAN BAR ASSOCIATION COMMITTEE ON GUIDELINES FOR CLINICAL EDUCATION 7 (A.B.A. ed., 1980) [hereinafter GUIDELINES FOR CLINICAL EDUCATION].

[43] MACCRATE Report, *supra* note 40, at 138-39, 220-21.

[44] Thomson, *supra* note 10, at 7-8.

In 2007, the Carnegie Foundation for the Advancement of Teaching published its study on legal education.[45] The Carnegie Report noted that law schools were giving "only casual attention to teaching students how to use legal thinking in the complexity of actual practice of law. Unlike other professional education, most notably medical school,[46] legal education typically pays relatively little attention to direct training in professional practice.[47] "The result is to prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner…."[48] The Carnegie Report recommended three apprenticeships that are essential to the "practice of law": intellectual or cognitive (analytical reasoning, argument, and research), practice (simulated practice, clinics, and externships), and professional identity (ethical standards, social roles and responsibilities) to be integrated throughout the law school curriculum.[49] While teaching legal analysis remains central, "[i]t should extend beyond case-dialogue courses and become part of learning to "think like a lawyer" in practice settings."[50] The

---

[45] WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS, PREPARATION FOR THE PROFESSION OF LAW 1 *passim* (Jossey-Bass ed., 2007) [hereinafter CARNEGIE Supplement]; *see also* Doug Ferguson, *What is the Carnegie Report and Why Does it Matter?*, SLAW (May 21, 2014), https://www.slaw.ca/2014/05/21/what-is-the-carnegie-report-and-why-does-it-matter/?.

[46] CARNEGIE Supplement, *supra* note 45, at 6. Professor Gabel noted in her article that other professions, such as the medical field, produces graduates with practical skills through early doctor-patient interactions as well as through the residency program. *See* Gabel, *supra* note 23, at 270. Indeed, the literature about clinical education incorporates the medical school approach to experience-based clinical learning. *Id.* In Dean Elliott Milstein's article, he commented

> There is a part of the medical school model that has something important to say to clinical legal education. We need to reach beyond our students, to the practicing lawyers. We should do for the legal profession what the medical schools for the medical profession, to lead them to better ways to practice. We should send out from our law clinics the "wisdom" we have accumulated from our analysis of the lawyering process.

Symposium, *Clinical Legal Education: Reflections on the Past Fifteen Years and Aspirations for the Future*, 36 CATH. U. L. REV. 337, 350 (1987).

[47] Ferguson, *supra* note 45.

[48] *Id.*

[49] CARNEGIE Supplement, *supra* note 45, at 28.

[50] Ferguson, *supra* note 45; *see also* WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION OF THE PROFESSION 7 (Jossey-Baas, ed. 2007) [hereinafter CARNEGIE Report]. Many American law schools heeded the advice. For instance, the entire third year at Washington & Lee University School of Law "focuses on lawyer engagement" such as simulations, clinics, and externships. Harvard Law requires first year students to take a problem-solving workshop "to bridge the gap between academic study and practical lawyering." Committee on the Professional Education Continuum, *Twenty Years After the*

Carnegie Report supported the MacCrate Report's focus on the skills needed to practice law.[51] And even as an impetus for forming her bankruptcy clinic, Professor Gabel suggested that the doctrinal approach to legal education causes students to miss out on the "rich complexity of actual situations."[52] In 2007, the Best Practices Report, compiled by Clinical Legal Education Group (CLEA), supported experiential learning, and defined it as "integrat[ing] theory and practice by combining academy inquiry with actual experience."[53] While CLEA obviously endorses clinical education, their report also suggests simulation-based courses.[54]

Yet nearly thirty years after the MacCrate Report, there remains the "public perception of a problematic gap between legal education and legal practice."[55] Employers at large law firms posed questions about why the time-honored case method of teaching law is still used when there needs to be more focus on the "basics of practice, such as how to write a contract or how to draft a complaint" and on practical experience.[56] In 2014, the ABA attempted to bridge the gap by requiring all law students to take six credits of experiential learning courses (clinics, simulation, and externships) as part of their law school curriculum.[57]

One thing is for certain, the MacCrate, Carnegie, Best Practices Reports, and the ABA (as well as the bench and the bar) want legal education to shift its primary focus on doctrinal learning to a curriculum that gives students the skills and ethical values to practice law.[58] To remedy this, "[w]hat is needed is an even greater variety of experiential opportunities that speaks to the strengths of our faculty and the needs of our students, and that

---

MacCrate Report: A Review of the Current State of the Legal Continuum and the Challenges Facing the Academy, Bar, and Judiciary, 8-9 (A.B.A, 2013) [hereinafter Committee on the Professional Education Continuum].

[51] Gabel, *supra* note 23, at 269-70.

[52] Gabel, *supra* note 23, at 269 (citing CARNEGIE Report, *supra* note 50, at 5).

[53] ROY STUCKEY ET. AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 121, 165 (Clinical Legal Educ. Ass'n ed., 2007).

[54] *Id*. at 111.

[55] Committee on the Professional Education Continuum, *supra* note 50, at 1.

[56] *Id*. at 4.

[57] AM. BAR ASS'N AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 303(a)(3) (A.B.A. ed., 2014) (noting that prior to this resolution, law students were only required to take one credit of experiential learning courses); *see also* Michele Pistone, *ABA Standards Review Committee votes for 6 credits of experiential learning*, A PLACE TO DISCUSS BEST PRACTICES FOR LEGAL EDUCATION (July 17, 2013), http://bestpracticeslegaled.albanylawblogs.org/2013/07/17/aba-standards-review-cmte-votes-for-6-credits-of-experiential-learning/.

[58] *See* MACCRATE Report, *supra* note 43, at 7; *see also* CARNEGIE Report, *supra* note 50; *see also* Committee on the Professional Education Continuum, *supra* note 50; *see also* ROY STUCKEY ET. AL., *supra* note 53 at 121, 165 (Clinical Legal Educ. Ass'n, 2007).

is nuanced in its delivery by subject matter or specialty area of law."[59] Many law schools are providing first-year students (also known as 1Ls) the opportunity to take experiential learning courses.[60] The University of Denver has one full year called the "Experiential Advantage."[61] Case Western Reserve University School of Law gives 1Ls the opportunity to work with real clients and has created a program that teams up 1Ls and 3Ls.[62] Since 1Ls are only one year ahead of college seniors--Enter the PLC!

B. Applying Clinical Reform Efforts at the Undergraduate Level

Considering the perception that law school graduates aren't thoroughly prepared to "practice law" upon graduation, I thought "there's no time like the present" to start reinforcing skills like problem-solving, deductive reasoning, interviewing, written and verbal communications, and applying facts to the law but at the undergraduate level. When structuring the PLC, requirements for the internship program (field placement) were combined with academic instruction, skill-building, mentoring, reflective practice, and supervisory oversight involved in clinical education.[63] The PLC will bridge the gap between learning theory and then applying that theory to real cases.[64] The PLC ensures that the students are engaged in the process and their cases which in turn will help them retain what they've learned.[65] Once the students are engaged and learning by doing, they will undoubtedly be invested and take ownership for their skills progression and work product. While it is an undisputed maxim that "I learn more when I teach," the PLC will deliver an exceptional return on the investment. "Experiential learning is personal and effective in nature, influencing both feelings and emotions[,] as well as enhancing knowledge and skills. It goes beyond classroom learning and ensures that there is a high level of retention, thereby delivering exceptional RoI [return on investment] over a traditional learning program." [66]

---

[59] Thomson, *supra* note 10, at 4.
[60] *See id.* at 17.
[61] *Id.* at 20, n. 54.
[62] *See generally Experiential Education*, CASE W. RSRV. UNIV. SCH. OF L., https://law.case.edu/Academics/Experiental-Education (noting this "Clinic Residence" program no longer exists) (last visited Jan. 28, 2022).
[63] *See Pre-Law Studies at Hood*, *supra* note 7.
[64] *See* Rajiv Jayaraman, *Eight Reasons Why Experiential Learning is the Future of Learning*, ELEARNING INDUS. (Oct. 24, 2014), https://elearningindustry.com/8-reasons-experiential-learning-future-learning.
[65] *See id.*
[66] *Id.*

The experiences the students will have, the skills they will build, and the learning that will take place will set the students apart from the competition when competing for law school placements or the job market.[67] If the PLC is tied to the student's major, it will provide a connection between education and employment.[68]

The PLC students will learn by doing in a collaborative process between the student and the supervising lawyer. Students will attend a seminar with "structured interactive time" which will integrate theory and practice through readings and simulations before guided practice in a criminal litigation support type of clinic.[69] As discussed before, undergraduates cannot practice law as in a typical clinical setting for law students; however, they can be trained as investigators and legal assistants and build legal skills under the supervision of a licensed attorney.[70]

Perhaps the most meaningful difference between the PLC and internships is that clinical education emphasizes critique, self-critique, and reflection. To truly grasp the subject matter and have a meaningful experience, clinic students need to engage in "reflective skills development."[71] Students will be continually mentored and supervised but will also engage in self-evaluation. In his textbook, *Clinical Legal Education*, Professor David Chavkin, clinical professor at American University's Washington College of Law, notes that "[s]ince one of the goals of clinical education is to develop in students the ability to continue to grow as a lawyer in practice, the ability to assess and criticize one's performance is a critical skill to be cultivated."[72] While self-evaluation can take place through journaling, conferences, papers, or evaluation exercises, "the goal is still the same."[73] Allowing students to make mistakes is different from

---

[67] *See Pre-Law Studies at Hood*, *supra* note 7.
[68] *See Law & Criminal Justice (B.A.)*, *supra* note 15.
[69] *See Pre-Law Studies at Hood*, *supra* note 7.
[70] MODEL RULES OF PROF'L. CONDUCT r. 5.3 (AM. BAR ASS'N 1980).
[71] DAVID CHAVKIN, *supra* note 18, at 22. Some of the questions students should ask themselves are:

> Can you effectively criticize your own performance? Are you able to identify your strengths and weaknesses in the various areas of legal work? Did you gain insights about your future role as an attorney? Did you identify the aspects of lawyering that are important to you and the parts that are distasteful to you? Did you learn the kinds of legal work that you want to do? Did you learn about the way that the legal system enforces norms? Did you learn about the value and limitations of lawyers in your legal system? Did you learn about the political and social contexts in which effective individual case analysis must take place? Did you gain insights about your future identity as an attorney? *Id.*

[72] *Id*. at 24.
[73] *Id*.

traditional learning where students are penalized when they make mistakes. Identifying mistakes, sharing them with peers and the supervisory attorney, processing them, and learning from them shows both personal and professional growth.

III. Selecting The Format And Components Of The Plc

A. Exploring Partnering Agencies

When I first considered where to get legal cases for the PLC, I thought of area law firms. However, upon careful consideration, getting work from area firms had too many issues such as workflow and the potential for conflicts of interest. As the former Chief of the Domestic Violence Unit, I knew that domestic violence victims were an underserved population. After speaking with counsel for our local domestic violence shelter, we agreed that the expedited nature of protective order hearings could pose a problem with completing the work in a timely manner.

B. OPD as Our Partnering Agency

As a former career prosecutor, I contacted the Office of the Public Defender for Frederick County, Maryland (OPD) which serves indigent criminal defendants charged with misdemeanors and felonies.[74] The OPD has a huge caseload and a relatively small staff of attorneys and support personnel.[75] The entire Frederick office has one investigator. I contacted the District Public Defender, and she enthusiastically supported the PLC. We mutually agreed upon handling misdemeanor cases, and issues involving confidentiality and attorney/client privilege. [76] Another area of concern with internship-type placements at the OPD is also alleviated by the PLC: cramped office space. PLC students will work under my supervision at the PLC located on campus.

The students' duties will be to assist the OPD in the preparation of criminal cases for trial.[77] Students will be investigating the case, taking crime scene photos and measurements, locating and interviewing witnesses,

---

[74] *See Mission and Values*, MD. OFF. OF THE PUB. DEF., https://www.opd.state.md.us/mission-and-values (last visited Jan. 24, 2022).

[75] *See generally* Douglas Colbert, *The Maryland Access to Justice Story: Indigent Defendants' Right to Counsel at First Appearance*, 15 U. MD. L.J. RACE RELIG. GENDER & CLASS 1, 11 (2015) (discussing the limited staff of OPD and the impact on indigent defendants).

[76] Pre-Law Clinic (PLC) Terms of Participation, *in* PRE-LAW CLINIC MANUAL, *supra* note 27, at 3 (stating that we agreed that the students would not have direct client contact).

[77] *Id.* at 1, 3.

identifying a factually correct narrative of the incident based upon their investigation and case review, identifying legal issues, conducting legal research, drafting trial memoranda, compiling trial notebooks, writing investigative reports, transcribing jail calls and police videos, preparing demonstrative evidence and courtroom exhibits, and aiding the Assistant Public Defender at all hearings on the case.[78]

Students will be expected to attend all court dates on their cases to aid the Assistant Public Defender.[79] I provided the confidentiality agreement between the student, the PLC, and the Office of the Public Defender (OPD), and they provided their required documentation.[80]

C. Format of the PLC

The OPD will assign cases to the PLC with a referral sheet listing the tasks to perform and deadlines. I will then assign those cases to the students. As the PLC Director, I will be responsible for the day-to-day supervision of the students.[81] Students will also receive guidance and supervision from the OPD and will be expected to establish a professional relationship with the Assistant Public Defender assigned to their case. Best practices dictate that the ideal ratio for students to clinical professor is between 8:1 and 12:1.[82] 54% of clinics have student/professor ratio at 8:1.[83] The ratio is dependent upon "several factors that include the number of cases assigned to the student, the nature and complexity of the cases, the respective roles and responsibilities of the faculty and students with respect to each case, the number of credit (contact) hours, other responsibilities of the supervisor, such as teaching responsibilities for other courses, research, scholarship,

---

[78] *See Pre-Law Studies at Hood*, *supra* note 7.
[79] *See* Pre-Law Clinic (PLC) Terms of Participation, *in* PRE-LAW CLINIC MANUAL, *supra* note 27, at 1, 3.
[80] Intern/Volunteer Privileged Communications/Confidentiality Agreement, *in* PRE-LAW CLINIC MANUAL, *supra* note 39 *passim*.
[81] *See Pre-Law Studies at Hood*, *supra* note 7.
[82] Robert Dinerstein, et. al., *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 538 (1991) (citing the ratio as 8:1); GUIDELINES FOR CLINICAL EDUCATION, *supra* note 42, at 82; J.P. "Sandy" Ogilvy, *Guidelines for the Self Evaluation of Legal Education Clinics and Clinical Programs*, 15 T.M. COOLEY J. PRAC. & CLINICAL L. (SPECIAL ISSUE) 1 (2014).
[83] MACCRATE Report, *supra* note 40, at 250; *see also* GUIDELINES FOR CLINICAL EDUCATION, *supra* note 42, at 82 ("The probable average ratio for all reporting schools was 1:8."); Dinerstein, *supra* note 81, at 538; Telephone Interview with Chavkin, *supra* note 22 (stating the ideal number of students is **"**8-10 who can devote 20-25 hours a week to field work.").

governance and committee work, and other duties."[84] Therefore, I will accept 8 students in the clinic.

The seminar will involve the academic portion of the clinic and skill building with simulated exercises.[85] We will also have guest speakers and presenters on relevant criminal justice topics. Student teams will have scheduled weekly sessions with me to review their specific cases.[86] I will be constantly advising, evaluating, and supervising the students' skills and academic progress with both formative and summative assessments.[87] For the fieldwork portions of the PLC, I will be monitoring time entries, the clinic calendar, and the students' journals, self-assessments, and reflections.[88] Finally, as promised to the OPD, ultimately, I am responsible for the work product and will review all investigations and trial notebooks before providing the work to the OPD. [89]

Another piece of advice I culled from Professor Gabel's experiences creating her bankruptcy clinic was that she woefully underestimated the number of hours that were required for student supervision.[90] I will spend 2.5 hours per week in the seminar, approximately 4 hours per week in individual team meetings, and an additional 4 hours in the clinic office doing various tasks such as communicating with the OPD and making sure files are completed.

D. Components of the PLC (Seminar and Field Work)

The clinic will begin in the fall semester for a minimum of 15 weeks.[91] There will be a graded 3 credit seminar that meets once a week along with one-on-

---

[84] Ogilvy, *supra* note 82, at 92.
[85] *See* Pre-Law Clinic (PLC) Terms of Participation, *in* PRE-LAW CLINIC MANUAL, *supra* note 27, at 1 *passim*.
[86] *See infra* Section III.D.5.
[87] *See infra* Section III.D.7.
[88] *See infra* Section III.D.
[89] *See* Stephen R. Miller, *Field Notes from Starting a Law School Clinic*, 20 CLINICAL L. REV. 137, 166 (2013). As Professor Miller noted, I will of course correct errors of law, but the more mundane aspect of correcting students' work will involve editing grammar errors and legal writing errors.
[90] Gabel, *supra* note 23, at 308 (noting that the hours she spent working on her clinic were far more than she estimated). Knowing that I will spend approximately 10 to 12 hours a week just on the PLC, and exclusive of the clinic seminar, I wondered whether those hours would be factored into my academic workload. Unfortunately, they were not.
[91] *See* Pre-Law Clinic (PLC) Terms of Participation, *in* PRE-LAW CLINIC MANUAL, *supra* note 27, ¶ 13 (noting that students work 120 hours over the course of a semester, which is generally 15-16 weeks).

one meetings with the supervising attorney once a week, and 3 credits of satisfactory/unsatisfactory clinical fieldwork.[92]

1. Weekly Seminar

The weekly seminar will consist of reviewing law and theory with guided practice; discussion of ethical and personal dilemmas; skill-building; use of simulations; and case rounds.[93] During the rounds, students will bring up an issue or topic for discussion that is case-based and will learn from the experiences of others using a collaborative team approach.[94] In addition to the weekly seminar, teams will meet individually with me to discuss individual cases. Students will be working together in teams for investigations and case preparation.[95]

2. Field Work

The clinical fieldwork would take place at various locations.[96] Students can work in the clinic office to make phone calls, conduct research, and do investigative work. Understanding the ethical duty of confidentiality, students can work in locations such as the library or their rooms. However, to meet with witnesses, review crime scenes, take photographs, and put together their investigations, they will have to go out into the field.[97] For safety, students will always work in teams of two.[98] It is also expected that students will keep an accurate calendar of all court dates and attend hearings to assist the attorney.[99] While space is at a premium at the OPD, students

---

[92] *See Pre-Law Studies at Hood*, *supra* note 7. Other undergraduate majors, such as education, social work, and nursing, have had supervised clinicals for decades. One of the major questions I have had to address time and again about the PLC is whether our students would be practicing law. Not only is the unauthorized practice of law unethical under Maryland Rules of Professional Conduct, but it is also a misdemeanor. This query is analogous to questioning whether nursing students conduct surgery in their clinicals.

[93] *See* Pre-Law Clinic (PLC) Terms of Participation, *in* PRE-LAW CLINIC MANUAL, *supra* note 27, ¶ 8.

[94] Students will present their case, much like case rounds in medical school. I expect that by the end of the semester, the students will share ideas and stories from their individual experiences and learn from one another.

[95] *See* Pre-Law Clinic (PLC) Terms of Participation, *in* PRE-LAW CLINIC MANUAL, *supra* note 27, ¶ 17.

[96] *Id.* ¶ 16.

[97] *Id.* ¶ 17.

[98] *Id.* ¶ 8.

[99] *Id.* ¶ 12.

may meet with the attorney at their office to discuss the investigation, litigation support, and pre-trial preparation.[100]

3. Eligibility and Time Commitment

The PLC was designed for mature, conscientious students entering their senior year with a sincere interest in the law.[101] Exceptional juniors will also be considered. Ideally, I prefer a student with at least a 3.2 GPA or with the permission of the professor. The ideal student needs to have strong written and verbal communication skills. The student needs to be able to work efficiently to honor deadlines and organize and prioritize work and follow up assignments. The PLC is not limited to law and criminal justice majors because the subject matter applies across the disciplines. However, the pre-requisite courses needed to adequately prepare the student for the PLC are Introduction to Law, Introduction to Criminal Justice, Criminal Law, and Legal Research and Writing (or with permission of the instructor). The application process will include a writing sample, an interview, and faculty recommendations.[102]

The PLC is not pedagogically suited for all students. It requires a significant time commitment and students must be diligent, yet flexible. The PLC must be a priority. Students will more than likely have to work irregular hours in order to complete their investigations.[103] Students also must meet all deadlines as required by the OPD and court dates.[104]

4. Time Keeping System

I researched various methods of timekeeping to track the hours worked on cases and for the 120 hours field placement requirement.[105] I considered using timesheets but ended up using an online, time-keeping system for lawyers that is free for clinical educational use.[106] I selected a method that was user-friendly, accessible remotely, and able to upload case

---

[100] *See id.* ¶ 10.
[101] *See* Pre-Law Clinic (PLC) Terms of Participation, *in* PRE-LAW CLINIC MANUAL, *supra* note 27, ¶ 2.
[102] *See id.* ¶ 18. The ideal information in the letter of recommendation would include whether the is student reliable, dependable, able to meet deadlines, and on time for class and in attendance regularly.
[103] *See id.* ¶ 12. Understanding that the students must complete a minimum of 120 hours for the field work component, those hours can be completed at any time. Many witnesses may not be available during the weekdays, so students may have to conduct interviews on weekends or at night.
[104] *See id.*
[105] *Id.* ¶ 13.
[106] *Id.* ¶ 14 (the students will use Clio Legal Software).

files and documents onto a cloud-type service.[107] The system also has the ability to assign tasks to individual users, and it has a calendar function.[108]

5. Teamwork

Students will work collaboratively in teams of two.[109] Similarly, the practice of law is based on the team approach with more experienced associates mentoring young attorneys and law clerks, who, in theory, should be helping one another. Students will develop better interactive skills with their teammates, professor, and partnering agency, not to mention that they will be networking and making professional contacts.[110] While I assign team projects in most of my classes, the reason for teamwork in the clinic was stated best by Professor Miller, in his article about starting a law school clinic, "[i]t seems to me that a skill students need to learn in my class is how to be an effective lawyer, and part of that is confronting underperforming colleagues."[111] Students will learn how to break big projects into parts, assign tasks evenly, and then hold one another accountable for the final product. As stated above, because the PLC will be handling criminal cases, working in teams provides a layer of safety when interviewing witnesses and conducting crime scene investigations.[112]

6. Syllabus

For the PLC, I combined my department's Student Learning Objectives (SLOs) with ABA Standard 302 to include teaching theory and ethics, skill-building exercises, critique, self-critique and reflective evaluations.[113] As noted in Professor Miller's article, "[c]linics require a surprising amount of substantive, even doctrinal, teaching."[114] He suggests adding non-client serving parts as well.[115] Professor Gabel suggests covering the "big picture concepts" in the criminal code and topics and situations students will most likely encounter in their fieldwork.[116] Both recommend

---

[107] *See* Pre-Law Clinic (PLC) Terms of Participation, *in* PRE-LAW CLINIC MANUAL, *supra* note 27, ¶ 14.
[108] *See id.*
[109] *See id.* ¶ 17.
[110] *See Pre-Law Studies at Hood*, *supra* note 7.
[111] Miller, *supra* note 89, at 168.
[112] *See* Pre-Law Clinic (PLC) Terms of Participation, *in* PRE-LAW CLINIC MANUAL, *supra* note 27, ¶ 17.
[113] *Student Learning Outcomes*, *supra* note 8; ABA STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCH. § 302 (A.B.A., 2020-21).
[114] Miller, *supra* note 89, at 152.
[115] *Id.*
[116] Gabel, *supra* note 23, at 285.

using guest speakers or "experts in the field" for the classroom component including issues on ethics, professionalism, and substantive legal issues.[117] Both also suggest using simulations.[118] I ordered and surveyed many criminal investigation textbooks and settled on one that included checklists and real-world hypotheticals. I assigned a *Nutshell on Trial Advocacy* that was relatively easy to follow and had helpful suggestions on formulating case theory, interviewing witnesses, and conducting investigations.[119] I also selected the Maryland Rules, U.S. Supreme Court cases, Maryland cases, legal articles, law reviews, news clippings, and other scholarly materials. Prior to the start of the semester, I gave the students an assignment that included reading Maryland case law, the Maryland Rules of Criminal Procedure, and the Maryland Lawyer's Rules of Professional Conduct.[120] The students had to answer hypothetical questions involving the definitions of "practicing law" and the "unauthorized practice of law."

I also incorporated writing into the syllabus. Not only will students have to do case reports, but they will also be expected to keep a journal of their activities and reflections.[121] In addition, there will be a research and writing component wherein students will write blog posts (500 words) involving substantive areas of criminal law and procedure, the criminal justice system, lawyers, the judiciary, or the correctional system, excluding any case-specific references.[122] The students will also have a mid-term reflective evaluation and a final reflective evaluation.

7. Assessment

Students will model and practice skills before they are graded.[123] Formative assessment will include one-on-one with me as the clinic professor, and discussions that are both student and professor-led. Daily activities and summative assessments will focus on evidence of skills progression, critique, self-critique, and self-reflection. The summative assessments will be relative (by comparing work to that of other students) and individualized (focused on both my assessment and the student's assessment of their strengths and weaknesses at the beginning of the clinic and at the end). Students will schedule a one-on-one midterm evaluation and

---

[117] *See* Miller, *supra* note 89, at 159; *see generally* Gabel, *supra* note 23, at 293-96.
[118] *See id.*; *see generally* Gabel, *supra* note 23, at 283-84.
[119] PAUL B. BERGMAN, TRIAL ADVOCACY IN A NUTSHELL (West Academic ed., 6th ed. 2017).
[120] *See* Pre-Law Clinic (PLC) Terms of Participation, *in* PRE-LAW CLINIC MANUAL, *supra* note 27, ¶ 19.
[121] *See id.* at ¶ 9.
[122] *See id.*
[123] *See id.* ¶ 8.

a one-on-one final evaluation that will include both our written assessments and my oral assessment. Some of the evaluative criteria[124] include:

a. Professional Relationships;
b. Case Management;
c. Oral and Written Advocacy;
d. Professional Responsibilities;
e. Participation;
f. Reflective Practice (self-evaluation, or as Professor Chavkin aptly noted "So, the most significant mistake that you can make in clinic is not to learn from your mistakes.");[125] and
g. Personal Development (consider the student's growth as an adult and whether they learned about themselves and others).[126]

Self-reflections should be contained in the journal, in the mid-term and final reflection, and for the individual supervisory meetings which include case plans.[127] The final assessment may also include a skills progression demonstration with a mock case file.

8. Insurance and Liability Issues

The Chief Financial Officer of the college explained that the college has adequate insurance coverage for its educational programs which includes general liability, excess liability, educators' legal liability, cyber liability, workers' compensation, business automobile, property, business income, crime, and inland marine.[128] I inquired about potential legal malpractice insurance and per Hood College, any riders needed to cover the professional liability of clinic personnel could be added.[129]

Since students are expected to use their own motor vehicles for clinic work, they are required to have automobile insurance and provide

---

[124] *See* Chavkin, *supra* note 18, at 20-24.
[125] *Id*. at 24. I believe that reflection is when the real learning happens.
[126] *Id*. at 23.
[127] *See* Pre-Law Clinic (PLC) Terms of Participation, *in* PRE-LAW CLINIC MANUAL, *supra* note 27, ¶ 9.
[128] *See generally* HOOD COLLEGE, HOOD COLLEGE BENEFITS GUIDE 2021-2022 (2021), https://cld.bz/DsD7CPu/14/.
[129] Other than supervising the students during their investigations, legal research, and case preparation, I will not be representing clients on behalf of the OPD at this juncture.

documentation upon acceptance into the PLC.[130] Similarly, students are responsible for obtaining their own health insurance and providing documentation.[131]

Since the PLC students cannot and will not be practicing law, there is no need for student malpractice insurance as is required for law school clinical students in Maryland.[132] To offer a level of protection when I presented the PLC to the college's Curriculum Committee, I referenced the Federal Volunteer Protection Act which limits tort liability for harm caused by the acts or omissions by volunteers on behalf of a nonprofit organization or governmental agency, as long as they were acting within the scope of their responsibilities. [133] In essence, as long as there was no lack of training or oversight, the Act offers qualified immunity from acts of ordinary negligence.[134]

Other disciplines such as education and student teaching, nursing, and social work include fieldwork components that raise similar liability issues.[135] Some internship placements such as at correctional institutions, police agencies, probation offices, and the courthouse have the potential to be inherently more dangerous than the field-work proposed for the PLC.[136] Accordingly, students will be required to sign a liability waiver acknowledging the potential risks to their person or property when conducting criminal investigations and witness interviewing in various locations in Frederick County.[137]

---

[130] *See* Pre-Law Clinic (PLC) Terms of Participation, *in* PRE-LAW CLINIC MANUAL, *supra* note 27, ¶ 21.
[131] *Id.* ¶ 20.
[132] *See generally* UNIV. OF BALTIMORE, INSURANCE COVERAGE FOR STUDENTS (2022), http://www.ubalt.edu/about-ub/offices-and-services/procurement/insurance.cfm ("[c]overage may be provided for student interns participating in Internships in the Law Clinic or in the allied health fields. The State performs an annual survey of students may participate in internship programs. The University pays a fee to the State for coverage provided under these programs.").
[133] Federal Volunteer Protection Act of 1997, 42 U.S.C.A. §§ 14503-05 (Westlaw Pub. L. No. 117-80).
[134] *See id.*
[135] I highly recommend meeting with faculty across the disciplines to review how they handle field work, proper documentation, liability issues, and supporting materials such as handbooks and manuals to not "reinvent the wheel" at your institution. The education department was extremely helpful and provided me with their manuals and guidelines for their field work aptly entitled "student teaching."
[136] *See* Pre-Law Clinic (PLC) Terms of Participation, *in* PRE-LAW CLINIC MANUAL, *supra* note 27, ¶¶ 15-16 ("[I]t is important that all interns be aware of the potential risks.").
[137] Intern/Volunteer Privileged Communications/Confidentiality Agreement, *in* PRE-LAW CLINIC MANUAL, *supra* note 39 *passim*.

9. Funding

There is a cost to implement quality experiential education such as a clinic.[138] For the clinic to be successful, there must be a low faculty-to-student ratio.[139] As such, institutions need to allocate faculty resources and financial assets in order to support experiential learning.[140] The funds required for the campus office, locking file cabinet, computer, phone, and office supplies will come from the college's internal budget, as well as the department's budget. The college already has limited access to a legal research database (Nexis Uni) for access to U.S. Supreme Court cases, Maryland cases, and Maryland statutes and rules.[141] Students will not receive compensation for their participation in the clinic.

E. Getting the Buy-In

1. From the institution

The PLC benefits the college by creating an innovative, real-world opportunity for students thereby giving them skills needed in the workforce, establishing community partnerships, and improving student retention. Professor Gabel cautioned that the new course could be met with skepticism at the institution. [142] She was not kidding. I was invited to present my research on the PLC at a faculty professional development session. I was met with thinly veiled hostility. After what I believed to be a substantial presentation with thoughtful and supportive audience questions, a colleague said, "So basically what you're doing is just creating worker bees? Where's the substance?"[143] Again and calmly, I explained how the PLC would be applying doctrinal learning to real-world cases under the supervision of experienced attorneys.

---

[138] Gabel, *supra* note 23, at 310-13.
[139] *See id.* at 272; *see also* Committee on the Professional Education Continuum, *supra* note 50, at 9.
[140] Gabel, *supra* note 23, at 310-13.
[141] *See* Beneficial-Hodson Library, *Library Research Guides – Databases A to Z* (2022), https://hood.libguides.com/az.php (Hood University students have access to Library Research databases, such as Nexis Uni, amongst others); *see generally LexisNexis*, Nexis Uni, https://www.lexisnexis.com/en-us/professional/academic/nexis-uni.page (last visited Jan. 17, 2022).
[142] Gabel, *supra* note 23, at 298.
[143] Of course, the assumption was that the PLC students would not be doing anything pedagogically sound or productive.

Professor Gabel suggests getting a legal coordinator to assist with the clinic.[144] Given the real casework and non-negotiable deadlines, as well as confidentiality issues, the PLC will need administrative support over and above what is currently provided to the faculty.[145]

The development and creation of the PLC followed the typical path of other newly created courses. The Curriculum Committee ("CC"), comprised of faculty members, the Registrar, and the Provost, reviewed my proposal, my syllabus, and supporting materials. The CC raised several areas of concern that are relevant to this article:

a. Confidentiality: The CC insisted that I draft a Code of Conduct and a Confidentiality Agreement which I had already done and included in my clinic manual.[146] The students will be expected to sign and will be provided a copy of each.[147]
b. Scope: The CC insisted that I have a Memorandum of Understanding ("MOU") with the OPD, despite the fact that I provided the email exchange between the OPD and myself indicating their enthusiastic support of participating in the clinic. Even Professor Miller indicated that he typically drafts "at a minimum, a confirmatory e-mail regarding the scope of the representation and obtain client approval of that scope."[148] The email exchange was not sufficient for the CC. I shared that I had not presented the MOU to the OPD, nor had I reviewed and adopted the OPD's file paperwork because the clinic had not been accepted as a viable course. I did not want to have a signed MOU with the OPD only to have the course fail to pass through the CC.
c. Client Disclosure and Consent: The CC wanted to be sure that the client knew and fully consented to the PLC students assisting with their cases. While the District Public Defender and I were in agreement, I nevertheless drafted a Client Disclosure and Consent form that will be signed by both the client and the Assistant Public Defender assigning the case to the clinic.

---

[144] Gabel, *supra* note 23, at 312.
[145] *See* Pre-Law Clinic (PLC) Terms of Participation, *in* PRE-LAW CLINIC MANUAL, *supra* note 27, ¶ 12. I share an administrative assistant who works for six academic departments.
[146] Intern/Volunteer Privileged Communications/Confidentiality Agreement, *in* PRE-LAW CLINIC MANUAL, *supra* note 39 *passim*.
[147] *Id.* at 4.
[148] Miller, *supra* note 89, at 164.

d. Necessity for External Permission: The CC inquired whether there was a governing or licensing body such as the ABA that needed to grant permission for the PLC to exist. The Council of the American Bar Association's Section of Legal Education and Admissions to the Bar is the recognized accrediting agency for J.D. programs in the United States.[149] In its role as accrediting authority, the Council has adopted Standards and Rules of Procedure for Approval of Law Schools that establish the minimum requirements for all ABA-approved schools.[150]

> I explained that while the Maryland Rules of Professional Conduct apply to the students under my supervision, since we are an undergraduate institution and not a law school, there are no legal licensing bodies or accrediting agencies for our PLC.[151]

2. From the Partnering Agency

The PLC benefits the community and the partnering agency because it provides community service to the OPD and provides litigation support in preparation for trial.[152] As stated above, I drafted a client acknowledgment letter so the OPD's client would have to agree to use the PLC's services.[153] An issue I contemplated was how would I maintain continuity with the OPD considering the PLC began and ended in the fall semester. Hence, the PLC II was born. Based upon exemplary performance and successful completion of PLC I, and with my permission, the PLC II course permits students to continue their PLC client work through the spring semester. As it is currently written, PLC II has both a seminar (for 3 credits) and a fieldwork component (for 3 credits). However, upon further reflection, the PLC II should be supervisory fieldwork only. The only time when I may not be able to provide the PLC's services to the OPD would be over the summer months.

3. From the students

---

[149] *The American Bar Association*, AM. BAR. ASS'N, https://www.americanbar.org/about_the_aba/ (last visited Jan. 28, 2022) (emphasis added).
[150] CLINICAL LEGAL EDUC. ASS'N, HANDBOOK FOR NEW CLINICAL TEACHERS, 10 (7th ed. 2015) (emphasis added).
[151] Pre-Law Clinic (PLC) Terms of Participation, *in* PRE-LAW CLINIC MANUAL, *supra* note 27, ¶ 3.
[152] *See Pre-Law Studies at Hood*, *supra* note 7.
[153] Intern/Volunteer Privileged Communications/Confidentiality Agreement, *in* PRE-LAW CLINIC MANUAL, *supra* note 39 *passim*.

The PLC benefits the students by providing an opportunity to: build skills, prepare for their career, problem solve, learn how to apply the law, reinforce their values, and reflect on their performance.[154] Students will be given networking opportunities and a memorable and engaging undergraduate experience. However, their buy-in requires flexibility and a major time commitment. While the student participants are seniors, it is anticipated that they can and will successfully balance their coursework with fieldwork.

Part of the students' agreement with the PLC is that they must agree to return to school early to attend all of the mandatory "PLC Boot Camp" for one-and-a-half days prior to the start of the semester.[155] The boot camp is the orientation to the clinic.[156] The "boot camp" will review the Maryland Rules, case management, documenting the file and calendaring, timekeeping, cultural competency, and ethics.[157] Students will be given the PLC Manual and documents to sign.[158] The PLC manual will contain policies and procedures, office management information, and forms.[159] Students will be given scenarios to ensure all understand the role of the PLC student. An attorney from the OPD will present on how to prepare a case for trial. A detective will present on how to conduct a basic investigation. The boot camp will be action-packed and cannot be missed.[160]

IV. Implementing The Plc, Lessons Learned, And Teachable Moments

A. Implementing the PLC

The Hood College Pre-Law Clinic completed its inaugural year during the August 2018 through April 2019 academic year. Seven students fully participated in the first PLC and handled eleven criminal cases, providing 898 hours of service to the OPD. Students participated in pre-trial preparation of cases, legal research, criminal investigations, job shadowing, and courtroom observations. The second PLC was implemented in August 2019 and ended

---

[154] *See Pre-Law Studies at Hood*, *supra* note 7.

[155] Pre-Law Clinic (PLC) Terms of Participation, *in* PRE-LAW CLINIC MANUAL, *supra* note 27, ¶ 19.
[156] *Id.*
[157] *See id.*
[158] *See Pre-Law Clinic Manual*, HOOD COLLEGE (2021).
[159] *See id.*
[160] *See* Pre-Law Clinic (PLC) Terms of Participation, *in* PRE-LAW CLINIC MANUAL, *supra* note 27, ¶ 19.

in February 2020. Six students fully participated in the PLC and handled seven criminal cases, providing 822 hours of service-learning. Students in the second PLC spent a lot of time transcribing police body cameras, observing court, and preparing cases for trial. The measurement of success is not limited to the service-learning hours we gave to the community. I would be remiss if I did not include my assessment and the students' assessment of their performance.

B. Lessons Learned and Teachable Moments

> "*We do not learn from experience…we learn from reflecting on experience."*[161]

The entire class met formally twice a week. The first day was the seminar instruction and the second day was case-specific. I also met with each team for up to an hour a week. This system worked well however, during the students' reflective assessments, most preferred to present their assigned cases to the class to garner a more comprehensive perspective and to help them "issue spot." The following italicized comments are from various PLC students.

> *I also enjoyed the class where we would go over the cases that we were working on. It was beneficial to hear what the other students had to say and it helped to look at the situations differently or in a way I hadn't thought of before. Upon first look at the cases it looked like there wouldn't be anything that could help the client and that he was definitely guilty. However, as the course went on, I realized that there were small things to look for that could undermine the state's case and help our client to be proven innocent or receive a better sentence.*[162]

I amended the procedure so that after I assigned a case to a team, I let them present their initial impressions of the case to the class and solicit feedback. Many students commented about "brainstorming," the process I taught them on how "to reality-check the strategies and tactics you are

---

[161] Robert C. Lagueux, *A Spurious John Dewey Quotation on Reflection*, BERKLEE COLLEGE OF MUSIC, 2014, at 1. This quote has been attributed to John Dewey who indeed did support the reflective practice, however it "appears nowhere in Dewey's published works."

[162] P.J., *Final Reflections*, (Dec. 9, 2019) (confidential assignment submitted within the PLC) (on file with author).

considering for your case, and to make an intelligent decision about what will work and what will not work."[163] Using Ira Mickenberg's framework established in his article "Brainstorming: Developing the Facts to Build a Case Theory of Defense," we set aside time in class to let each team present their case with all relevant documents such as the police report, photographs, and discovery materials.[164] Then the team facilitates a question and answer session, followed by a "group-think" brainstorming session.[165] While the team takes notes, the class is able to think aloud without censoring ideas to gain new perspectives whilst formulating a case theory. Mickenberg considered brainstorming a success if it helps you better understand the "need [to] gather and investigate more facts, interview more witnesses, obtain more documents. You have obtained a better idea of what needs to be done to win the trial," and if "brainstorming has put you in a position to construct a theory of defense."[166] Virtually every PLC student remarked that they learned the most from the brainstorming sessions involving the entire class.

> *[W]e're all working on the same [case]. This isn't a problem though because this way allows us to brainstorm and pick each other's minds on a case we all know the facts too. It is certainly a nice change of pace when compared to everyone grinding on their own thing. The flow of the course has also progressed into a very nice mix between these brainstorm sessions, and instruction and lectures from Prof. Bean.*[167]

We worked on skill-building virtually every class; the students loved preparing for the interviews, roll playing, and then interviewing witnesses. They also enjoyed taking crime scene photos and videos. Students even transcribed entire body camera footage provided in discovery on more than one occasion.

> *I was still able to take away a lot of skills such as interviewing, listening, what to look for in a case, and a deeper understanding for elements of the crime. A suggestion for improvement in the future would be [more] exercises like one-*

---

[163] Ira Mickenberg, *Brainstorming: Developing the Facts to Build a Theory of Defense*, OFF. OF THE OH. PUB. DEF. (May 19, 2017), https://www.opd.ohio.gov/static/Law+Library/Training/OPD+Training+Materials/2017+Trial+Advocacy+Program/Brainstorming_--_Mickenberg.pdf.
[164] *Id.*
[165] *See id.*
[166] *Id*. at 4.
[167] J.H., *Weekly Journal* (Oct. 28-Nov 4, 2018) (confidential assignment submitted within the PLC) (on file with the author).

> *on-one interviews during class and quick fact analysis exercises.*[168]

One client had two cases pending that involved search warrants for narcotics. Although the cases resulted in a plea agreement, the Assistant Public Defender offered to meet with the students to discuss case specifics. The back and forth exchange with the attorney was delightful to watch because the intricacies of the cases were discussed, and the students were fully engaged. Indeed, many students commented that while they understood that the Assistant Public Defenders were incredibly busy, they would like to have them as a regular presence in class.

> *This experience has had a meaningful impact on my life as well as my education and the career path that I may choose to follow post law school. I had never really thought about impacting my local community through working as a public defender, but this is definitely a selfless career. Working with the OPD has reaffirmed my interest in wanting to help other people that may not be able to help themselves. Once I complete my law degree I believe that I may start my legal career with a public defender's office to gain experience and help our community.*[169]

The PLC provided the OPD in-depth case analysis, complete with charts with discrepancies found in the discovery provided by the State, legal research, and direct and cross-examination questions that we drafted as a class.[170] When we returned the file to the OPD, the case contained a complete case report, list of witnesses, statement of facts, a timeline of events, the client's criminal and traffic record summary, procedural history of the case, a list of evidence, legal issues/issue spotting, discovery analysis, case theory, elemental analysis of the crimes charged, notes on witness interviews, list of State's witnesses, and any photographs taken by the PLC.[171]

> *For my case, I was asked by the public defender to interview the witnesses. Outside of police officers, there were three*

---

[168] D.S., *Final Reflections* (Dec. 13, 2019) (confidential assignment submitted within the PLC) (on file with the author).
[169] N.G., *Blog Post #1* (Oct. 8, 2018) (confidential assignment submitted within the PLC) (on file with the author).
[170] *See Pre-Law Studies at Hood*, *supra* note 7.
[171] *Id.*

> *witnesses. This was a very intimidating task because it was my first time interviewing witnesses. I had to give a short introduction – who I am, who I am associated with, and why I was calling them. 2 out of the 3 witnesses I called were cooperative, and the other caller did not want to talk to me at all. The two witnesses I did talk to had completely different demeanors. The first one I talked to was very open about what happened that day, and that person provided me with very good information. However, the other witness ... could not understand why I was defending the [person] who committed the crime. I knew she was annoyed with me because every time I attempted to speak she interrupted or sighed during my sentence. I quickly experienced that every witness will not be the most cordial.*[172]

On more than one occasion, a student found a substantial error that assisted our client. J.H. found a discrepancy between the arresting officer's report and a supplemental report written by another officer on the scene that gave conflicting information about whether a body camera was used in the encounter with our client. We notified the OPD and were able to obtain a copy of the footage. A highlight of the second PLC involved an astute student discovering a substantial legal issue that neither the Assistant Public Defender nor I had uncovered. The student poured through the discovery and noted that some evidence was put into the property room based upon the notations in the property logs. Other evidence necessary to prove one of the charges went unmentioned in any documentation by the police for nine days. When the student brought this to my attention, we notified the OPD, and our client was able to secure a favorable plea.

In terms of teachable moments, both the students and I learned from our mistakes. When we received cases from the OPD, I assigned them to a team of students and then prepared the file, did a workup myself, and then met with the team to discuss their plans. What I learned was that with each new clinic, I should engage the entire class to prepare the workup for the first two or three cases so everyone can benefit from group input and learn the step-by-step procedure to follow, then use the team analysis approach.

Adaptability and flexibility were crucial as we had deadlines to meet. The PLC began with a lengthy and formal syllabus with a list of readings and assignments.[173] However, when we became inundated with more cases than

---

[172] S.B., *Blog Entry #2* (confidential assignment submitted within the PLC) (on file with the author).

[173] *Pre-Law Clinic Manual*, *supra* note 158.

we originally expected, I had to suspend some of the more formalized syllabus assignments and focus on the casework assigned.

We worked on developing case theories. The students became frustrated when the theory they presented to the class did not seem to fit the narrative they provided. Reworking our case theories became an ongoing exercise.

> *There was a minor obstacle during the initial development of a case theory that required problem solving. The first case theory, that the search conducted by the officer was a violation of the defendant's 4th Amendment rights, proved to be difficult, if not impossible to prove under the current precedent. Thus, this required the development of a different theory that ultimately was the one that we submitted to the Office of the Public Defender.*[174]

At times we had lulls in the cases we were assigned so we added job shadowing and courtroom observations to enable the students to complete their required clinical hours.[175]

Even though the student participants were seniors, at times they just did not seem to understand the impact or the serious nature of the clinic's work. For instance, in one clinic, a student "forgot" to show up for bootcamp and was removed. In another clinic, a student missed too many classes and was removed. It was a struggle having to constantly remind the students to update our time-keeping system.

Perhaps the biggest source of frustration was students not completing the work in a timely manner. I noticed that even after I met with the teams to discuss their case plan and tasks were assigned, at the next week's meeting, nothing would be done; it was as if the first meeting never existed. This phenomenon happened often enough that I had to document the meeting and then send emails and create task reminders.

> *[T]his clinic is not for a student who thinks they are going to coast through a semester with minimal work. This clinic is very demanding, it requires many hours outside of the classroom without the supervision of a professor. I highly*

---

[174] J.D., *Midterm Evaluation* (Oct. 13, 2019) (confidential assignment submitted within the PLC) (on file with the author).

[175] *See Pre-Law Studies at Hood*, *supra* note 7; *see also* Pre-Law Clinic (PLC) Terms of Participation, *in* PRE-LAW CLINIC MANUAL, *supra* note 27, ¶ 13.

> *recommend the clinic to any and all students who are self-motivators and have a higher level of maturity.*[176]

I knew that implementing a PLC was going to be a huge undertaking but like Professor Gabel's first implementation of her bankruptcy clinic, I, too, woefully underestimated the time commitment.[177] Much of my time was spent setting up the file, uploading the documents, drafting a case plan, and then meeting with the students to see what they thought should be done. When they handed in their final case report, I spent a significant amount of time "fixing" their work and then forwarding it to the OPD. At one point, the OPD assigned cases after the students were finished with the course and were taking final examinations. Therefore, I had to handle some cases entirely by myself.[178] The following student comment corroborates my point about time management.

> *To succeed in clinic, I believe the biggest tool to have would be a successful time management skill. Members have to put time and focus into these cases while focusing on other school work. Also, this is a 3-credit internship which means members have to complete 120 hours of work. To earn the credits, members have to reach the hour requirement. Although this seems outrageous, if you are able to time manage and/or time block, then things will go over smoothly for you. Time management is important because it allows you to use your time effectively so you do not fall behind on cases or school work.*[179]

While my department put in a request for funding, the PLC operated with virtually no funding or private location. We operated in my classroom, my small office, and when available, a conference room. The students had to use my office phone to make and receive clinic phone calls. We needed hardware such as a video camera and a regular camera to photograph crime scenes. I cautioned the students about using their smartphones to take photographs as they could potentially have to produce their phones at trial if

---

[176] N.G., *Blog Post #* (Oct. 20, 2018) (confidential assignment submitted within the PLC) (on file with the author).
[177] *See generally* Gabel, *supra* note 23 *passim*; *see also* Gabel, *supra* note 90 and text accompanying.
[178] I counted this time as *pro bono* hours.
[179] S.B., *Blog Entry #3*, (Nov. 14, 2018) (confidential assignment submitted within the PLC) (on file with the author).

their authenticity was challenged. As we continue to grow the PLC, I'm mindful that the ABA provides oversight regarding "field placement programs, noting that as the number of students involved or the number of credits awarded increase, the level of instructional resources devoted to the program should also increase."[180]

> *Learning investigation skills and techniques was also a big part of the clinic. Getting real life field work, and interviewing real witnesses was cool. We learned about different interview techniques, and how to ask the [right] questions. Because of this class, 'Is there any thing else you want or think you should tell me [that I didn't ask you]?' will be the question I end every interview with if I'm fortunate enough to become a practicing attorney one day.*[181]

As I complete the third PLC, I have learned that each clinic is different and can be a proven method of adapting real-world experience at a liberal arts institution. It is clear that based upon the success of the PLCs, undergraduate students can successfully master becoming pre-law clinicians. It seems appropriate to end this article the way it began, with the words of the immortal educator, John Dewey.[182] Perhaps the essence of the Pre-Law Clinic can best be summarized as follows: "*Give the pupils something to do, not something to learn; and the doing is of such a nature as to demand thinking; learning naturally results*."

---

[180] PROGRAM OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, Standard 305, Interpretation 305-4(b) (A.B.A. 2013-14), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_standards_chapter3.authcheckdam.pdf.

[181] J.H., *PLC Semester Review* (confidential assignment submitted within the PLC) (J.H. is in his third year of law school) (on file with the author).

[182] *See* John Dewey, *supra* note 2.

ARTICLE

BALTIMORE'S TARGETED BLIGHT ELIMINATION PROGRAM AND HOW IT CAN BE IMPROVED

By: Michael DeStefano

I. Introduction

I moved to Baltimore in the summer of 2014. Baltimore could not have been more different than what I grew up around in rural Wisconsin. I was immediately enthralled with its architecture, its density, its history, and its hundreds of distinct neighborhoods, among many other facets of Baltimore living. Baltimore, in its current footprint, is a city designed for nearly one million people but currently only has roughly 621,000, according to its last census in 2010.[1] The city's diminishing population remains a stubborn fact that causes thousands of abandoned structures that pock-mark the city's landscape. Baltimore's condition remains a fascinating concept for me, almost like something out of a movie about a long-lost civilization that has since disappeared leaving behind only its remnants of a once thriving society.

What immediately captured my fascination was the architecture. So much so that my spouse and I bought a vacant home in the Greenmount West Neighborhood (part of the Station North Arts & Entertainment District near Penn Station) and contracted with a developer to do a full gut rehab of the property in 2015. Thirteen months later, we managed to save a century-plus old rowhome from decades of neglect. Now, I wonder why more Baltimoreans and Marylanders are not doing the same thing? That is to say, why are not more individuals taking advantage of the glut of historical housing stock sitting idle in Baltimore City's borders?

Baltimore, much like other North Atlantic cities, is populated with brick rowhomes.[2] This was a deliberate design choice, influenced and inherited from our British colonizers.[3] Certain North Atlantic European cities, such as Amsterdam, Liverpool, London, and Belfast choose to build blocks upon blocks of rowhomes/townhomes.[4] They built this style of residences because at the turn of the sixteenth and seventeenth centuries, urban populations began to exponentially increase from a few thousand inhabitants to tens of thousands of inhabitants and this style of architecture

---

[1] James J. Kelly Jr., *A Continuum in Remedies: Reconnecting Vacant Houses to the Market*, 33 ST. LOUIS U. PUB. L. REV. 109, 118 (2013).
[2] Charles Duff, *The North Atlantic Cities*, 124 (2019).
[3] *Id.* at 34.
[4] *Id.* at 9.

allowed the most density while simultaneously giving homeowners the most square footage.[5]

To this day, Baltimore's streets are almost exclusively rowhomes. Unfortunately, nearly 17,000 of these are conservatively estimated to be vacant rowhomes spread throughout the northern, southern, and central districts of the city, with the bulk clustered in the eastern and western parts of the city.[6] To newcomers and outsiders, these vacant buildings are indicative of a city in decline. In truth, vacant buildings are just a city rightsizing itself as it battles the effects of suburban white flight and heavy losses of manufacturing.

Though Baltimore has a glut of housing stock, much of it is unlivable, and what is left is often unaffordable to the average Baltimore family.[7] Subsequently, political commentators and state officials sometimes use Baltimore as a cautionary tale to other jurisdictions across the state and nation.[8] These officials will rail against the city's mishandling of public resources and use Baltimore's perceived steady downward spiral as evidence of their assertions.[9] Cable news anchors and talk show hosts debate Baltimore City officials on affordable housing and put forth tired, lazy, and thoughtless solutions to our city's housing crisis, like simply move lower income families into these "vacant" homes – as though Baltimore's vacant buildings are move-in ready with power, water, and climate control.[10]

---

[5] *Id.* at 17.

[6] Pamela Wood & Brittany Brown, *Maryland Gov. Hogan, Baltimore Mayor Young Mark Progress in Razing City's Vacant Homes. How Much Is Unclear*, BALT. SUN (June 13, 2019, 6:30 PM), https://www.baltimoresun.com/maryland/baltimore-city/bs-md-hogan-project-core-20190613-story.html.

[7] *Forget the Luxury Apartments, Baltimore Needs More Affordable Housing*, BALT. SUN (Nov. 15, 2019), https://www.baltimoresun.com/opinion/editorial/bs-ed-1117-affordable-housing-20191115-5ksbeujgwranjbehs552hdqzt4-story.html.

[8] Brakkton Booker, *Trump Tweets On 'Disgusting' Baltimore Bring Activist Trash Collectors to City*, NPR (Aug. 15, 2019, 3:55 PM), https://www.npr.org/2019/08/15/751501433/trump-tweets-on-disgusting-baltimore-bring-activist-trash-collectors-to-city (On July 27, 2019, a segment on Fox News's morning program, "Fox and Friends," aired video of a Republican activist's social media which highlighted the trash problem certain neighborhoods in Baltimore City have. President Donald Trump then tweeted that Baltimore was a "rat and rodent infested mess" where no self-respecting person would want to live. He then went onto claim, without any evidence, that Baltimore has been misusing billions in federal dollars and alleged that Baltimore City officials have been stealing it).

[9] *Id.*

[10] *Tucker Carlson Tonight* (Fox News July 30, 2019) (Tucker Carlson interviewed Baltimore City's 12th Council District Councilperson, Robert Stokes, Sr., after President Trump's earlier tweet bashing Baltimore City as a trash pit, infested with rats, and that no human would want to live there and that if the city was unhappy with the President's tweet, that the city can return all the federal monies sent to the city. Councilperson Stokes then

What escapes the tired and the thoughtless when it comes to vacant and abandoned buildings is how much a toll the sheer magnitude of decades' worth of neglect takes. Many times, these structures cannot be saved. And even then, many of these structures cost too much to tear down, much less rehabilitate.

This paper will explore the history of how Baltimore ended up in its current condition[11]: a city with a declining population and an intractable inventory of vacant homes[12]; it will explore other jurisdictions' similar problems with vacants and abandonment and how they address this problem[13]; it will look into Baltimore's previous iterations at trying to tackle this problem and how it uses and misuses its current tactic called "Vacants to Values[14];" which is a blend of private development and public receivership. Finally, it will look at possible ways in which it can improve its blight-elimination efforts.[15]

II. Problem

A. Twenty-First Century Baltimore: From Peak to Descent.

Many academics have addressed what caused Baltimore's abandonment and subsequent neglect, because it was not always like this. Baltimore has come a long way from its beginnings as one of North America's first and wealthiest port cities in the late eighteenth century[16] to the mid twentieth century when it was one of the nation's largest cities and one of its most important and productive manufacturing centers.[17]

During the Great Migration, Baltimore experienced a massive influx of internal migration, a large portion of whom were African Americans from

---

argued that Baltimore needed more money because housing was too expensive, to which Tucker Carlson asked why should the government send more money for affordable housing if the city is knocking down abandoned properties? That, in fact, the city has *too much* housing).

[11] *See infra* Section II.A.

[12] *See infra* Section II.B.

[13] *See infra* Section III.A.

[14] *See infra* Section III.B.

[15] *See infra* Section III.C.

[16] MATTHEW A. CRENSON, BALTIMORE: A POLITICAL HISTORY 52, 54, 57 (Johns Hopkins University Press 2017).

[17] Marc V. Levine, *A Third World City in the First World: Social Exclusion, Racial Inequality, and Sustainable Development in Baltimor*e, in THE SOCIAL SUSTAINABILITY OF CITIES: DIVERSITY AND THE MANAGEMENT OF CHANGE 123, 125 (Mario Polèse & Richard E. Stren eds., 2000).

the South – particularly sharecroppers from rural areas in the South.[18] From its founding in the eighteenth century to the 1970s, Baltimore was always a white majority city that had a sizeable African American population, but during the 1930s and 1940s, tens of thousands moved north to the Chesapeake's abundant and well-paying jobs in manufacturing – specifically in Baltimore.[19] By 1950, Baltimore had a population of 950,000 people, making it the sixth largest city in the United States.[20] By the 1970s, Baltimore's demography flipped from a white majority city to a African American majority city.[21]

Maryland's largest city, at that point was also one of its wealthiest and most productive.[22] In 1950, over 34% of the city's population was employed within the manufacturing sector. Between 1950 and 1970, the number of manufacturing jobs decreased by nearly one third.[23] And then by 1995, it was further diminished by 75% so that by the turn of the century, only 8% of Baltimoreans were employed in the manufacturing sector.[24] This drastic decrease in manufacturing labor also had negative consequences in unionized labor. Those unionized positions disappeared leaving nothing in its wake: many jobs with decent pay, benefits and collective bargaining vanished.[25] What was left behind was increased unemployment, stagnant wages, insecure low wage jobs and poverty.[26]

The city's standing in the region continuously lost ground to the surrounding suburbs. In 1954, Baltimore City was producing 75% of the region's manufacturing output, by 1995 that number shrank to 30%.[27] To coincide with this deindustrialization, Baltimore's population fared no better. In 1950, Baltimore City had 71% of the region's population, by 1970 it dropped to 43.7% and then by 1997 it dipped even further to 26%.[28] To put that into perspective, in the beginning when Baltimore had nearly a million people living in its borders, the surrounding suburbs had only about 388,000 people.[29] By 1997, the numbers essentially flipped.[30] The surrounding

---

[18] *Id.* at 126.
[19] CRENSON, *supra* note 16, at 390.
[20] Levine, *supra* note 17, at 125.
[21] *Id*. at 126.
[22] *See id*.
[23] *Id*. at 125.
[24] *Id*.
[25] *See id*.
[26] *See* Levine, *supra* note 17, at 125.
[27] *Id*. at 126.
[28] *Id*.
[29] *Id*. at 123, 125-26.
[30] *Id*. at 126.

regions have nearly two million inhabitants and the city is down to a population of 657,000.[31]

This white flight period in Baltimore's history – much like other industrialized cities across the United States – culminated in Baltimore becoming a majority African American city. Through 1970, African Americans were migrating into Baltimore City from all over the region – particularly the South (Virginia and the Carolinas).[32] By 1970, the African American population doubled from its 1950 numbers, growing nearly by 200,000.[33] By the 1970s, Baltimore was an African American majority city.[34] This fact, coupled with the steady decline in available manufacturing jobs in the city and the growing dominance of suburbs exacerbated the continued exodus of middle-class Baltimoreans – especially White Baltimoreans – to the surrounding counties.[35] Anyone with means and opportunity took up the offer of large standalone homes, driveways, two car garages in safe and stable neighborhoods that were on sale in suburban communities popping up all around the city.[36] And usually, the only people with means and opportunity tended to be White.[37] This mass exodus of middle-class Whites resulted in Baltimore City's loss of its retail dominance.[38] Once upon a time, Baltimore was the retail powerhouse of the region, roughly 80% of all retail revenue was generated in the city.[39] But once all that middle-class spending power left the city, retail investment went from downtown shopping to suburban malls.[40] The, then novel, malls proved too much of a draw for retail and by

---

[31] *Id*.
[32] Levine, *supra* note 17, at 126; *see also* Ron Cassie, *How Black Families Came "Up South", Faced Down Jim Crow, and Built a Groundbreaking Civil Rights Movement, History & Politics*, BALT. MAG., https://www.baltimoremagazine.com/section/historypolitics/the-great-migration/ (last visited Jan. 15, 2022).
[33] Levine, *supra* note 17, at 126.
[34] *Id*. at 123, 126.
[35] *Id*. at 126.
[36] *Cf*. *Id*. at 126 (it naturally follows that since wealth moved to the areas surrounding Baltimore, characteristics typically found in wealthy suburban areas were present).
[37] *See generally* Audrey G. McFarlane, *The Properties of Integration: Mixed-Income Housing as Discrimination Management*, 66 UCLA L. REV. 1140, 1174 (2018).
[38] Levine, *supra* note 17, at 126 (most of the people who left Baltimore were White which in turn explains why retail sales suffered).
[39] *Id*.
[40] *Id*.

1967, the city's retail revenue in the region went from 80% down to 50%, then down to 18% by the 1990s.[41]

All of these factors: (1) the precipitous decline in manufacturing; (2) the mass exodus of middle class jobs; (3) together with White flight; and (4) Baltimore City's general decline in all economic and population indicators in relation to its surrounding communities took their toll on the city.[42] At the turn of the twenty-first century, it was estimated that over 15% of the buildings in the city were abandoned, which comes to over 40,000 structures scattered across the city's landscape.[43] This toll extends well beyond just being an eyesore.

B. The Impact that Abandoned Buildings Have On a Community.

Baltimore City, much like most other U.S. cities across the nation, has a budget that relies heavily on property taxes, in fact property taxes make up the largest source of revenue for the city's budget.[44] Property taxes are directly related to property values, ergo if property values are low, then tax revenue is low, conversely, if property values are high, then the city generates more tax revenue from those properties.[45] Subsequently, there are obvious costs with vacant structures scattered throughout the city.[46] These vacant structures are not generating tax revenue.[47] In fact, they are extracting money from municipalities in the sense that these zero revenue-generating properties cost cities money to maintain.[48] Local governments are forced to spend money on trash collection, police and firefighting protection, as vacants are prone to being intentionally set on fire.[49]

---

[41] *Id*.
[42] *See id*. at 125-27.
[43] *Id*. at 138.
[44] *Fiscal 2020 Summary of the Adopted Budget*, BUREAU OF THE BUDGET & MGMT. RSCH., ix (2019) [hereinafter *Fiscal 2020*], https://bbmr.baltimorecity.gov/sites/default/files/Final%20SOTA%20FY20-compressed%20web.pdf (demonstrating one third of the city's revenue is generated from property taxes).
[45] *See* Christopher Serkin*, Response: The Fiscal Illusion Zombie: The Undead Theory of Government Regulatory Incentives*, 66 AM. U.L. REV. 1433, 1446 (Aug. 2017).
[46] *See generally Vacant Properties The True Costs to Communities*, NAT'L VACANT PROPERTIES CAMPAIGN, (Aug. 2005), https://files.hudexchange.info/resources/documents/VacantPropertiesTrueCosttoCommunities.pdf.
[47] *Id*. at 1.
[48] *Fiscal 2020*, *supra* note 44, at 187.
[49] *See* Elizabeth Butler, *Second Chances for the Second City's Vacant Properties: An Analysis of Chicago's Policy Approaches to Vacancy, Abandonment, & Blight*, 91 CHICAGO-KENT L. REV. 233, 243 (2016).

These costs are only affiliated to the individual properties themselves, that cost does not take into consideration the surrounding properties. If there are vacant structures in a neighborhood, there is a direct correlation that in high-poverty areas, the neighboring property values are decreased by 2% within 500 feet of the vacant structure.[50] If it's a medium-poverty area, the property values are 3% lower than they should be.[51] If it is a high concentration of vacant structures, that community is most likely then looking at an irreversible decline.[52] High concentrations of vacants tend to adversely affect other properties near it.[53]

Urban residential property is much different from rural or suburban real estate. In rural areas, and to a lesser extent in suburban areas, vacant structures do not pose as a volatile problem for those local communities as a vacant does in an urban community.[54] Because urban residential lots are so close together and tend to be smaller than their rural or suburban cousins, urban communities with vacants are adversely affected that much more.[55] Urban communities are much more sensitive to blight because smaller lots force neighbors to not only worry about their own property, but they must worry about their neighbor's property as well since their neighbors' abandonment or neglect has so much potential to hurt their own property values.[56]

Overall, each vacant not only brings zero dollars in tax revenue into a city's coffers, but it also costs the city extra money just to keep these buildings from causing more problems, e.g. illegal dumping of trash, policing, and firefighting protection.[57]

On top of the fiscal cost vacants pose to a city, there are public health and safety costs, too. As alluded to before, vacants are vulnerable to arson.[58] Because these structures are abandoned, it is too common to have unauthorized entry into these premises.[59] These intruders squat, they cause arson, vandalism, and many times these structures provide a haven for

---

[50] *Id.* at 241.
[51] *Id.*
[52] Kelly, *supra* note 1, at 117.
[53] Butler, *supra* note 49, at 241.
[54] *See* Kelly, *supra* note 1, at 119.
[55] *See id*.
[56] *Id*.
[57] Butler, *supra* note 49, at 242 (stating in Chicago, the city estimates that each vacant building costs the city anywhere between $20,000 to $34,000 per year to maintain such as police, firefighting, and trash collection services).
[58] *Id*. at 243.
[59] *Id*.

criminals and addicts to conduct their drug trade.[60] Vacant buildings suggest to criminals that there is "less eyes on the street", which promote their use as a safe refuge from law enforcement.[61] Again, these activities incur a cost to the city from local law enforcement constantly policing these properties.[62] There is a direct link between vacant buildings and a higher than normal crime rate.[63] Abandonment attracts crime, and the noted rise in crime tends to be the variety of arson, burglary, sexual assault, trespassing, gambling, narcotics, and weapons violations.[64]

Not only do police and firefighters have to contend with the added danger that vacants bring to their work, but emergency first responders must cope with the hazards abandoned buildings pose to them. Structural degradation is a common theme among vacants, thus many times these buildings are extreme risks for those entering.[65] Missing sections of floors, loose roofs, weak walls, broken glass, and the like are all hazards that first responders must maneuver.[66] Many of these buildings are structurally unsound because abandoned buildings not only conceal criminal activity, but they also tend to become targets of it as well.[67] Scavengers, sometimes referred to as "house strippers" or "urban miners," go through abandoned houses and take anything of value from them, including copper pipes, aluminum siding, hardwood floors, and anything they can sell secondhand.[68] This stripping leaves the vacant exposed to the elements, further degrading its structural integrity.[69] This degraded integrity then poses a direct threat to the first responders who enter these premises to extract victims of overdoses, assaults, murders, and whatever other kinds of victims of criminal activity that vacants attract.[70]

For all the reasons stated previously, vacants pose a significant health hazard to children, as well.[71] Studies have suggested that a child's performance in grade school can be directly traced back to *which* block he

---

[60] *Id*. at 243-44.
[61] *Id*. at 244.
[62] *Id*. at 242.
[63] Butler, *supra* note 49, at 244.
[64] *Id*. at 244-45.
[65] *Id*. at 244.
[66] *Id*.
[67] *Id*. at 245.
[68] *Id*.
[69] Butler, *supra* note 49, at 245.
[70] *Id*. at 244.
[71] *Id.* at 243.

grew up on.[72] If that block and/or community is littered with vacants, then there is a direct correlation between those property values and the educational outcomes of the local children.[73] These kids also show a higher likelihood of being victims of child abuse, residential instability, hunger, and lead poisoning.[74] It does not bear mentioning that if a child begins school with these conditions and afflictions, their prospects of excelling at – or, at the very minimum – just managing to get through a grade school education, are greatly diminished.[75]

III. Discussion

A. How Other Jurisdictions Cope with Blight

Eminent domain[76] remains the most infamous and (as explained later in this paper) least effective weapon in cities' fights against urban blight. Eminent domain – a constitutionally permissible government taking, in exchange for just compensation, of private property for public use – remains volatile, overly broad, and too problematic with a "one size fits all" mentality that rarely addresses the problems it was meant to solve while causing more problems.[77] Over the years, courts have been generous in letting legislatures define "public use."[78] As long as another entity could make better use of the property, thereby increasing the tax base, it could be justified as public use.[79] Initially, eminent domain was advocated by elites as an answer to urban decline: to help minorities and rejuvenate urban cores.[80] In the end, the results of eminent domain only exacerbated racial tensions through further segregation and forced displacement of minority neighborhoods away from

---

[72] Alexia F. Campbell, *How a House Can Shape a Child's Future*, ATLANTIC (June 29, 2016), https://www.theatlantic.com/business/archive/2016/06/how-a-house-can-shape-a-childs-future/489242/.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation.").
[77] Kelly, *supra* note 1, at 111.
[78] G. Davis Mathues, *Shadow of a Bulldozer?: RLUIPA and Eminent Domain after Kelo,* 81 NOTRE DAME L. REV. 1653, 1682 (2006).
[79] Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 42-43 (2003).
[80] *Id.* at 4.

wealthier white neighborhoods.[81] At its end, mid-twentieth century eminent domain projects resulted in over one million people being displaced, the vast majority of whom were African American.[82]

Vacant buildings are one of the many repercussions of White flight and the suburbanization of America.[83] Although the notion is debatable, many believe that American suburbanization was essentially legislated into existence after World War II.[84] The Interstate Highway Act of 1956 made it much easier to commute to work, allowing people with means, i.e., people with cars, to live further away from urban cores.[85] Federally backed mortgage insurance programs made it more affordable to buy a new home.[86] Federal subsidies for new sewer, water, and power infrastructure made it more affordable for developers to build up entirely new communities away from urban centers.[87] Finally, the general lack of federal intervention on combatting redlining and racially restrictive covenants resulted in the near wholesale exclusion of minorities and low-income citizens from participating in any of the aforementioned programs, effectively exiling them to urban cores that were simultaneously losing resources to suburban areas.[88]

Conversely, local governments must help urban communities navigate their way out of urban blight through legislation. Most local and state governments do, but there are a handful that do not, believing that the private market will remedy the problem.[89] In Dayton, Ohio, for example, aside from its eminent domain powers, the local city government does not have many options other than relying on the private market forces of banks foreclosing on delinquent mortgages and reselling them.[90] Relying solely on the foreclosure process remains a risky and time-consuming endeavor. For instance, many vacant homes are owned by banks and LLCs, making it very difficult to identify who the owner is.[91] So, even if the city can get the home

---

[81] *Id.* at 47 ("in cities across the country, urban renewal came to be known as 'Negro removal.'").
[82] *Id.*
[83] *See infra* Part II.
[84] *See also* Robert A. Beauregard, *Federal Policy and Postwar Urban Decline: A Case of Government Complicity?*, 12 HOUS. POL'Y DEBATE (2001).
[85] *Id.* at 132-33.
[86] *Id.*
[87] *Id.*
[88] *Id.* at 132-33.
[89] Joseph Schilling & Jimena Pinzon, *The Basics of Blight: Recent Research on Its Drivers, Impacts, and Interventions*, VPRN RSCH. & POL'Y BRIEF NO. TWO 1, 18 (2016).
[90] Lynn Hulsey & Joanne Huist Smith, *Many Owners of Abandoned Homes Escape Responsibility*, DAYTON DAILY NEWS (May 16, 2019), https://www.daytondailynews.com/news/local/many-owners-abandoned-homes-escape-responsibility/mIxidOTe2Ov771iySkH1dM/.
[91] *Id.*

on the court's docket for failure to pay taxes or violations of the local housing code, it remains a difficult task to haul the owner into court if an LLC masks the owner's identity.[92]

Eventually, the process of identifying the culprit becomes a finger-pointing game of whom to blame. Banks, which are often listed as co-defendants in these judicial proceedings, are only trustees for the true owners: multiple investors who bought mortgages that were later bundled into securities.[93] Then these multiple investor-owners do not know who the other owners are and subsequently do not believe they have the authority or the responsibility to make a binding decision for the entire group of owners.[94] At other times, the banks, as a fiduciary, cannot advise these investors to follow through on the foreclosures, as that would destroy the investment.[95] So, many times, it is more cost-effective to ignore the problem and allow the property to continue to deteriorate, which decreases the property values of the surrounding communities.[96] These types of properties are referred to as "zombies."[97] Even if, miraculously, all owner-defendants allow the foreclosure process to proceed, there are very good chances that the property will be sold to another delinquent property speculator who will sit on the property waiting for the market to support a rehab or resale.[98]

Allowing the private market and the foreclosure process to play itself out is rarely the best weapon within a municipality's arsenal for eliminating blight. So, many jurisdictions use a code enforcement approach. For example, housing codes were first introduced in the United States in New York City in the early twentieth century.[99] New York enacted these laws to specifically combat tenement landlords who deliberately allowed their properties to deteriorate while simultaneously charging exorbitant rates to their tenants.[100] These codes were quickly replicated across other major industrial cities throughout North America.[101] These housing codes concerning vacants have evolved more in recent history to protect neighbors

---

[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] Hulsey, *supra* note 90.
[97] David P. Weber, *Taxing Zombiess: Killing Zombie Mortgages with Differential Property Taxes*, 2017 U. Ill. L. Rev. 1135, 1136 (2017).
[98] Melanie B. Lacey, *A National Perspective on Vacant Property Receivership*, 25 J. AFFORDABLE HOUS. & CMTY. DEV. L. 133, 135 (2016).
[99] *Id.* at 140.
[100] *Id.* at 140-41.
[101] *Id.* at 141.

more so than tenants or landlords.[102] The common denominator of these ordinances is twofold: (1) tracking vacants in a given jurisdiction; and (2) enforcement of basic levels of safety and public health. Many local governments have implemented vacant property registration ordinances (VPROs).[103] One can understand why vacants pose a serious threat to public safety.[104] Aside from the simple fact of knowing where exactly these vacant properties are located and who owns them, VPROs offer a small incentive for property owners to "get their act together."[105] By requiring abandoned structures to register and pay a fee – sometimes on a sliding scale based on the length of vacancy – it can motivate some owners to sufficiently rehabilitate the property to meet the jurisdiction's housing codes just to avoid either the stigma of being on the vacant registration list or the costs required to be lawfully registered.[106]

Additionally, being on the list gives local communities and neighbors the means to hold someone accountable when making complaints to the city, whether it be about litter, graffiti, squatters, etc. If there is a register, the city can easily look up the responsible party and issue the appropriate citations.[107] These types of actions then enable other forms of code enforcement like the one implemented in Tennessee.[108] Tennessee enacted the Tennessee Neighborhood Preservation Act, which mandates that all vacant properties on the VPRO register be made public to local communities, neighbors, or any other party with standing to complain.[109] Then, if the citations go unanswered for a period of time – that is to say, if the owner fails to bring his property up to code in an appropriate amount of time – the community can bring suit against the owner to petition the court for demolition.[110] The burden is on the defendant-owner to prove that his building is up to code, which makes winning these types of litigations that much easier.[111] This tactic has been so

---

[102] *Id.*
[103] Weber, *supra* note 97, at 1150.
[104] *See supra* Section II.B.
[105] *See* Weber, *supra* note 97, at 1150-51.
[106] *See* Joan Jacobson, *Vacants to Value: Baltimore's Bold Blight-Elimination Effort Is Making Modest Progress Despite Limited Renovation Funds and Questionable Accounting*, 28 THE ABELL REP. 1, 10 (2015) (Baltimore's code enforcement and vacancy registration prove to be effective as hundreds of properties that are registered on the city's vacancy rolls have been "shamed" into bringing their properties up to code and all the way through to applying for occupancy permits).
[107] *See generally* Daniel M. Schaffzin, *(B)light at the End of the Tunnel? How a City's Need to Fight Vacant and Abandoned Properties Gave Rise to a Law School Clinic Like No Other*, 52 WASH. U. J. L. & POL'Y 115 (2016).
[108] *See generally id.*
[109] *Id.* at 135.
[110] *Id.*
[111] *Id.* at 136.

successful that the local law school created a clinic specifically for that purpose: to bring delinquent property owners to court in order to get their properties demolished.[112]

Another form of code enforcement is using tax differentials. Tax differentials are an effective tool for local governments to utilize in managing its vacant inventory.[113] Essentially, the government using the tax code to tax vacants at different (higher) rates than occupied structures.[114] These are best employed when there is an accurate VPRO register, it incentivizes owners to do what is required to get their structures up to code and occupied.[115] These are also effective with zombie mortgages. Zombie mortgages (or just simply "zombies") is a term used to describe a property whose mortgagee had initiated foreclosure proceedings.[116] After the initiation of the proceedings, the mortgagor is under the impression that he no longer has title to the property and simply abandons it.[117] After the abandonment, the mortgagee – for whatever reason – stops the foreclosure proceedings thereby defaulting the title back to the original owner-mortgagor unbeknownst to that particular owner-mortgagor.[118] What results is an abandoned property that has a mortgagee not interested in foreclosing (most likely because it would not recoup its investment) and an owner-mortgagor who abandoned the property under the mistaken pretense that he no longer owns it, leaving the property to deteriorate.[119] These properties then continue to fall apart and accrue unpaid property taxes.

Tax differentials are a very effective tactic at promoting blight reduction. However, there are legal challenges to overcome. At first glance, these varying tax rates are discriminatory because they are taxing identical classes of people (owners of both occupied and vacant buildings) at unidentical rates.[120] The Equal Protection Clause of the Fourteenth Amendment generally does not prohibit differential treatment between classes of people.[121] The Supreme Court held that to prevail on an Equal Protection claim, it must survive a rational basis review.[122] If the

---

[112] *Id.* at 141.
[113] *See* Weber, *supra* note 97, at 1138.
[114] *Id.* at 1138.
[115] *Id.*
[116] *Id.* at 1136.
[117] *Id.* at 1136-37.
[118] *Id.* at 1136.
[119] Weber, *supra* note 97, at 1136-37.
[120] *Id.* at 1138.
[121] *Id.*
[122] *E.g.*, Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 107 (2003).

classifications are not capricious nor arbitrary, then the tax can withstand a Fourteenth Amendment challenge.[123] Since states have broad taxing power and "a State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable," this policy survives.[124] If the classifications are not capricious nor arbitrary, then the tax can withstand a Fourteenth Amendment challenge.[125]

However, if the tax differential ordinance survives a federal challenge, these laws still may be open to challenges via a state's constitution.[126] Some states have a "uniform tax treatment" provision in their constitutions.[127] This provision, theoretically, can prohibit different tax rates for similar classes of people, regardless of whether there is a rational basis.[128] Although difficult, some tax differential schemes have survived state constitutional challenges through semantics.[129] So long as a taxing authority can claim that the extra amount an owner of a vacant must pay is a "fee" and not a tax, it can survive a constitutional challenge in a "uniform tax treatment" state.[130]

Tax differentials have proven successful in jurisdictions such as Louisville, Kentucky and Providence, Rhode Island.[131] These jurisdictions' ordinances are drafted in such a way that if it is taxing a zombie, then the taxes are shifted away from the absent mortgagor-owner to the lender.[132] This shift in tax burdens is enough of a motivator for lenders to finish the foreclosure process and (hopefully) find a new buyer who can make better use of the property.

Some jurisdictions, like Chicago and Detroit, use quasi-government entities called "land banks."[133] Land banks are depositories that coordinate the sale of government-owned vacant buildings after clearing liens.[134] Land banks can acquire vacant lots or properties via gift or through device,

---

[123] Weber, *supra* note 97, at 1140.
[124] Alleghany Pittsburgh Coal Co. v. Cty. Comm'n, 488 U.S. 336, 344 (1989) (citing Allied Stores of Ohio v. Bowers, 358 U.S. 522, 526-27 (1959)).
[125] Weber, *supra* note 97, at 1140.
[126] *Id.* at 1141.
[127] *Id.*
[128] *See* Steve R. Johnson, *Uniformity Clause Limitations on State Taxes*, 27 ABA SECTION OF TAX'N NEWSQUARTERLY 12, 12-13 (2008).
[129] Weber, *supra* note 97, at 1144.
[130] *See id.*
[131] *Id.* at 1147-48.
[132] *Id.* at 1148.
[133] David E. Mischiu, *Banking on land: A Critical Review of Land Banking in the United States* 1, 5, 6
(2009) (MUP thesis, University of Illinois at Urbana-Champaign).
[134] Jacobson, *supra* note 106, at 21.

purchase, or foreclosure.[135] Their mission is to return these properties to subsequent productive use as quickly as possible.[136] Land banking works best when the properties are slated for demolition, in which case there is not a lot of leg work to do in order to find a potential buyer to rehab the property.[137] So, for cities like Detroit that have a declining population with large swathes of the city abandoned, it can be very effective.[138] For instance, the local government there has instituted a program that allows property owners to "annex" neighboring lots available in the city's land bank, so long as the lot is not worth more than $75,000 and they pay the costs of clearing the liens and delinquent taxes, many times at a discounted rate.[139]

Land banking is also very effective at clearing large blocks of vacants.[140] The land bank acquires these lots, demolishes them wholesale, and either sells the lots to developers or donates them to the local community to be transformed into parks or other types of green community spaces.[141] In fact, land banks work best when they are working in tandem with other entities that prefer the structures be demolished as opposed to rehabilitated.[142] The main drawback to land banks is that they are costly to run.[143] Although they are great at clearing out large pockets of vacants and they are able to pass on clean title, the land banks still must front the money necessary to either (1) maintain the building structurally until a buyer is lined up; or (2) pay the costs of demolition, which can easily add up to the tens of thousands per house.[144]

Ultimately, land banks' efficacy is heavily dependent on their state's foreclosure laws.[145] If that state has a drawn-out foreclosure process, a land bank probably will not make sense, but if the foreclosure process is streamlined (like in Illinois and Michigan) the two processes can be married up quite successfully.[146]

---

[135] Weber, *supra* note 97, at 1153.
[136] Kelly, *supra* note 1, at 131.
[137] *Id.* at 110.
[138] *See generally* Jacobson, *supra* note 106, at 22-23.
[139] Kelly, *supra* note 1, at 117.
[140] *Id.* at 131.
[141] *Id.* at 131, 138.
[142] *See id.* at 131.
[143] Weber, *supra* note 97, at 1153.
[144] *Id.* at 1153-54, 1161.
[145] *Id.* at 1154.
[146] *Id.*

B. How Baltimore Copes with Blight.

One of the last methods of blight elimination is through receivership. This method remains one of the most potent weapons in a local jurisdiction's arsenal. Receivership is a public nuisance proceeding that gives a third party the ability to petition a court for the right to rehabilitate or demolish a decrepit property.[147] Historically, receivership was a legal remedy that was used in litigation to help settle disputes of contested assets.[148] A court would appoint a receiver to preserve and manage the assets during litigation.[149] That receiver's appointment would terminate upon the conclusion of the litigation – usually with a judge directing the disposition of the contested assets.[150]
Receivership may sound like eminent domain, but there are three key differences that set it apart from a "taking". First, receivership is not a direct condemnation.[151] Direct condemnation (when a government wishes to take a piece of property from a private entity for a public use) requires the government to hale the owner into court to exchange the property for "just compensation".[152] However, in receivership proceedings, a property owner can avoid the "taking" so long as he brings his property up to code, i.e., make the necessary renovations.[153] Therefore, the owner can avoid the interference of his property rights so long as he abides by the relevant housing laws.
Second, receivership is not an inverse condemnation.[154] An inverse condemnation is like a regulatory taking by a government agent through the creation of economic burdens so severe that it effectively deprives the owner of his property.[155] Receivership only seeks to "restore economic value to the nuisance property and the surrounding area by inducing the owner to act or by enforcing repairs through an appointed receiver".[156]

Lastly, receivership does not equate to a judicial taking.[157] A receiver does not deprive an owner of a pre-existing, established right so much as it is seeking to enforce compliance with the appropriate housing codes.[158] Furthermore, the Supreme Court held that the state has a right to regulate

---

147 Lacey, *supra* note 98, at 135.
148 *Id.* at 136.
149 *Id.*
150 *Id.*
151 *Id.* at 137.
152 *Id.* at 137 n.23.
153 Lacey, *supra* note 98, at 137.
154 *Id.* at 138.
155 *Id.*
156 *Id.*
157 *Id.*
158 *Id.*

property through enforcement actions when the property is being used for illegal purposes – including compromising public health and safety.[159]

Baltimore enacted its first receivership statute in 1991 – at the behest of a nonprofit legal advocacy group that specialized in helping local communities eradicate blight.[160] Initially, it was difficult for lawyers to convince city judges that it was not a government taking, but rather a legal proceeding to eliminate a public nuisance.[161] And in its early stages – until around 2014 – the city was only using receivership sparingly.[162] Up until 2014, Baltimore was relying on the normal tax foreclosure process to transfer titles from a delinquent owner to a new one.[163] Even before the recession of 2008-2009, these foreclosure proceedings proved inadequate, as they usually just passed title from one delinquent owner to a new delinquent owner (many times it is an investor who scoops up properties and sits on them to wait out the market).[164]

From the 1970s to 2010, Baltimore was using ad hoc tools like the "Dollar House".[165] Ex-Mayor Donald Shaeffer implemented the Dollar House Program whereby the city made vacant lots it acquired though tax foreclosure proceedings available to prospective buyers for (as the name suggests) one dollar.[166] Although this proved popular with residents, it was unsurprisingly ineffective.[167] The city's vacant inventory did not decrease and, in the majority of instances where individuals purchased Dollar Homes, most could not see the project to completion.[168] Securing a construction loan and finding the right contractor to see a renovation through to the end is a daunting task for an experienced buyer and nearly impossible for an inexperienced one.[169]

---

[159] Mugler v. Kansas, 123 U.S. 623, 666 (1887) (holding that a taking of a property that is being used for illegal purposes [in this case for an unlawful distillery] cannot be construed as a taking for public benefit, but rather a declaration by the state that its use was injurious to public interests).
[160] Jacobson, *supra* note 106, at 17.
[161] *Id.* at 18.
[162] *Id.* at 17.
[163] Jacobson, *supra* note 106, at 17-18.
[164] *Id.* at 7.
[165] Caroline Cournoyer, *To Get Rid of Blight, Baltimore Tries Something New*, GOVERNING THE FUTURE OF STATES & LOCALITIES, (Oct. 16, 2018), https://www.governing.com/archive/gov-baltimore-blight-vacants-to-value.html.
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*

It was not until the financial crash of 2008 and the subprime housing crisis that followed that the city decided to change tactics.[170] Then, Mayor Martin O'Malley implemented "Project SCOPE" with the goal of renovating and selling city-owned vacant lots to individuals which proved a flop as financing was near impossible to find.[171] In the end, Project SCOPE only managed to sell two houses.[172] By 2010, Mayor Stephanie Rawlings-Blake changed course and initiated what remains the city's main effort in combatting blight: the Vacants to Value Program ("V2V").[173]

The V2V's mission is to stage a public intervention in the city's housing market, specifically in neighborhoods that showed potential for a strong market for redevelopment.[174] Eighty-six neighborhoods (out of 250) were selected to participate in the V2V program.[175] The city already owned many of the vacants in these preselected neighborhoods.[176] It aimed to: (1) streamline the disposition of city-owned properties; (2) streamline code enforcement in these neighborhoods; (3) promote investment in these and surrounding neighborhoods; and (4) target homebuying incentives from the federal and state governments.[177] Receivership plays a large part in this strategy by incentivizing owners to maintain their properties (or risk losing them) and motivating their neighbors to keep them honest.[178]

Overall, the V2V program has been successful. It is responsible for many neighborhoods' recoveries.[179] Its success is largely due to the city's decision to target only promising communities whose markets could support redevelopment, thereby postponing investment in severely distressed communities.[180] However, that same decision also becomes a sore spot for many Baltimoreans – especially those who live in or near those distressed communities. Of all the program's shortcomings, this one gets the most coverage. But it is the city's ramped-up use of its receivership process that makes the V2V program a promising prospect for Baltimore.[181] Other forms of blight-elimination tools consistently get bogged down by obstinate, absent,

---

[170] Jacobson, *supra* note 106, at 7.
[171] *Id.* at 7, 14.
[172] *Id.*
[173] *Id.* at 2.
[174] *Id.*
[175] *Id.* at 2-3.
[176] Jacobson, *supra* note 106, at 3.
[177] *Id.* at 3-4.
[178] *Id*. at 17.
[179] The author of this paper is, in fact, living in one of those restored neighborhoods thanks to the Vacants to Value Program: Greenmount West.
[180] Jacobson, *supra* note 106, at 4.
[181] *Id*. at 18.

or unknown owners.[182] Taking possession of nuisance properties from these folks takes too much time and resources.[183] Receivership, on the other hand, does not get bogged down with tangled-up claims of title.[184] It cuts through the smoke and mirrors and gives the nuisance owner an ultimatum to fix the property or lose it.[185]

There are other weaknesses in the program. For instance, the V2V program has done little in addressing serious or petty crime rates.[186] And although one of the goals of the V2V program has been to shrink the city's vacant numbers, the city's inventory of vacants remains stubbornly high (estimated to be in the mid 16,000's).[187] Lastly, the program does not address Baltimore's affordable housing problem.[188]

It is this last blind spot, not addressing the affordable housing problem in Baltimore, where there is hope. If the city can solve the conundrum of access to financing for prospective individual buyers, it can go far in addressing affordable housing. Currently, receivership is transferring properties from delinquent owners to large for-profit developers.[189] Although this is the most effective method to ensure that development occurs, the perception remains that the city is favoring wealthy developers over individual home buyers. For instance, individuals cannot participate in the V2V program; the court will not transfer title out of receivership to an individual who does not have, at a minimum, $90,000 cash up front to demonstrate that they are able to see a rehabilitation from beginning to end.[190] Obtaining the down payment proves just as difficult as obtaining a construction loan – which is a different type of loan from a typical mortgage.[191] It is more expensive and more difficult to be approved for.[192]

C. The Solution: How Baltimore Can Improve Its Blight-Elimination Initiative.

---

[182] *Id*. at 2, 9.
[183] *Id*. at 17.
[184] *Id*.
[185] *Id*.
[186] Jacobson, *supra* note 106, at 16 (since the program is targeted at neighborhoods that are geographically located near healthier, stronger communities, the crime rates in these locations are already minimal and thus V2V's effects on crime is negligible).
[187] *Id*. at 2.
[188] *Id*. at 3.
[189] *Id*.
[190] *Id*. at 18
[191] *Id*. at 14.
[192] Jacobson, *supra* note 106, at 14.

The area to focus on in improving the city's receivership strategy remains access to financing for individual prospective homebuyers. An individual will need a construction loan versus a standard mortgage from a lender, and those are expensive and laborious to obtain.[193] The U.S. already experimented with a deregulated and virtually unsupervised mortgage industry which resulted in the subprime mortgage crises of 2007.[194] That crisis hit communities and homeowners of color particularly hard.[195] So, this paper is not proposing to go back to a pre-2007 mortgage mindset of giving out unrestricted loans to low-income folks. Instead, this paper is proposing that Baltimore use its affordable housing trust fund to help certain low-income prospective home buyers obtain the necessary financing to take ownership and begin construction on a property from the city's receivership V2V program. Instead of borrowing from a bank, prequalified borrowers could borrow from the city's trust fund, or another quasi-governmental agency established to help folks find financing for home rehabilitation.

There is a market in Baltimore for the working poor to have an opportunity to become a first-time homeowner. The city can address its affordable housing crisis by extending a city-backed and city-supported credit to certain applicants who could meet certain qualifications, such as: (1) ability to prove steady employment for a certain amount of time; (2) can prove that they meet a threshold income requirement; (3) is current on their taxes; and (4) has a minimum amount of savings as collateral. Credit is nothing more than a shift in one's capital from a future self to a present self,[196] and one of the largest sources of future capital continues to be one's home.[197] Post-World War II, the federal government established several similar programs, chief among them was the National Housing Act which ushered in immense advances in state-backed, private credit subsidies.[198] These subsidies then led to the nation's largest boom in home building and ownership in its history.[199] There is good reason to replicate that success on a vastly smaller scale in Baltimore City.

Another proposal to improve the city's V2V program – on a smaller and more manageable scale – is to fully staff a section of Baltimore's

---

[193] *See generally id*. at 14-15 (discussing the lack of financing and the challenges facing individual owner-occupants).
[194] Kelly, *supra* note 1, at 109, 120.
[195] *Id*. at 120.
[196] Abbye Atkinson, *Rethinking Credit as a Social Provision*, 71 STAN. L. REV. 1093, 1098 (2019).
[197] *See id.*
[198] *Id.* at 1099.
[199] *Id.* at 1100.

Department of Housing and Community Development (DHCD) that liaises with the Governor and the General Assembly.[200] This office in the DHCD would focus on working with its counterparts in Annapolis, the state capital, to secure sources of funding (e.g., tax credits, state grants, etc.) in helping low-income Baltimoreans acquire home ownership. Governor Larry Hogan even acknowledged that the state must do more to help Baltimore address its vacant problem.[201] If the offices of the DHCD and its counterpart in Annapolis were consistently working together, then their ability to marshal state and local and private resources could cover triple the distance in decreasing Baltimore's inventory of vacants.

The Abell Foundation, who recently assessed the V2V's efficacy, made additional suggestions for improvements.[202] They include that the city: (1) create an independent advocacy group to lobby city and state officials on issues that affect vacancies; (2) create more support systems for homebuyers including sliding scale incentives for folks buying in the city; (3) revamp the V2V's website giving more access to prospective buyers concerning homes in the V2V program; and (4) expand financial access to nonprofit developers through Community Development Financial Institutions.[203]

All these ideas are great and would do wonders for the V2V program, but the solution that could have the most impact remains directly supporting prequalified homebuyers through Baltimore's designated affordable housing fund.

III. Conclusion.

Baltimore continues to be a unique city with common problems. Its V2V program is a work in progress but is showing promising results. There are not any other cities with a program like Baltimore's, and that is thanks, in large part, to its implementation of receivership. In its early stages, Baltimore was only filing a few dozens of receivership cases per year, but by 2015, it was doing nearly thousands.[204] This means that those hundreds of properties that are appointed new owners are now either occupied, renovated, or in the process of renovation – a development that would not have been possible otherwise.

---

[200] Jacobson, *supra* note 106, at 24.
[201] *Id*.
[202] *See also id*.
[203] *Id*. at 23-24.
[204] *Id*. at 17.

Receivership, above all other tools for blight-elimination, offers local governments a proven method that shows results. It drastically cuts down on bureaucratic red tape and court costs and resources while simultaneously limiting a vacant owner's ability to continue to be a nuisance to his neighbor's and community's properties. As described in the second section of this paper, other methods of blight-elimination have not had as much success as receivership.[205] These other methods give too much opportunity for nuisance property owners to continue to neglect their properties, to allow these properties to fester and enable criminal activity, to further drag down its neighborhoods and communities, and to avoid paying their due taxes and fees to local governments.

Baltimore needs to ramp up its receivership process while concurrently locating new streams of credit and revenue to pass onto prequalified homebuyers.

[205] *See supra* Part II.

COMMENT

TRACING PROPERTY INTERESTS: HOW MANDATORY COVID-19 CONTACT TRACING CONFLICTS WITH THE MARYLAND CONSTITUTION AND TRADE SECRET LAW

By: Marianne "Marnie" Gluckert Smith*

I. INTRODUCTION

Among the ninety-seven percent of Americans who own a cellphone of some kind, eighty-five percent own a smartphone.[1] At ninety-six percent, smartphone usage is highest among eighteen-to-twenty-nine-year-olds, and lowest among those sixty-five and older at sixty-one percent.[2] Since 2015, the availability of mobile health applications has doubled, with 318,000 of such applications available across application stores in 2019.[3]

Throughout 2020, various governments or quasi-governmental authorities contemplated the use of COVID-19 contact tracing apps; other authorities mandated compliance.[4] Statistical models predict that the

---

* Marianne "Marnie" Gluckert Smith: J.D. Candidate, 2023, University of Baltimore School of Law. I wish to acknowledge and thank the 2021-2022 University of Baltimore Law Forum executive board and staff for their support during the editorial process. For their encouragement during the writing process, I extend my gratitude to my faculty advisor, William Hubbard and 2020-2021 comments editor, Paulina Taniewski. For being available at crazy hours to answer crazy citation questions, I acknowledge and thank Carole Roche and the team of University of Baltimore School of Law Reference Librarians. Finally, to my law school "family," you supported me when I needed it most, thank you; I could not have survived law school without you.

[1] *Mobile Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021) [hereinafter *Mobile Fact Sheet*], https://www.pewresearch.org/internet/fact-sheet/mobile/ (scroll to "Who owns cellphones and smartphones" and select "Total" tab).

[2] *Mobile Fact Sheet, supra* note 1 (scroll to "Who owns cell phones and smartphones" and select "Ages 18-29" tab).

[3] Remy Franklin, *11 Surprising Mobile Health Statistics*, MOBIUS MD (Mar. 20, 2019) https://www.mobius.md/2019/03/20/11-mobile-health-statistics/.

[4] E-mail from Kurt L. Schmoke, President, University of Baltimore, to UB Community (UB Faculty, UB Staff, UB Students) (July 29, 2020, 12:35 PM EST) (on file with author) (proposing mandatory COVID-19 contact-tracing using a specific tracing app, namely REDCap, before interested parties would be permitted entry into University of Baltimore facilities); *see What is REDCap,* UNIV. OF MD., BALT.: INST. FOR CLINICAL AND TRANSLATIONAL RSCH. (2020), https://www.umaryland.edu/ictr/investigator-resources/data-and-data-handling/data-management-/redcap/; Vanderbilt University, *REDCap Mobil App* (2020), https://www.project-redcap.org/software/mobile-app/; Press Release, The Office of Governor Larry Hogan, Governor Hogan Announces Beginning State Three of Maryland's COVID-19 Recovery, Additional Safe and Gradual Reopenings

adoption of digital contact tracing by fifty percent of smart device users, without employing physical distancing or testing, would reduce recurring outbreaks to the point that the COVID-19 pandemic would be eliminated.[5] With digital contact tracing, the trouble lies in the type of data collected, the duration of collection and storage, and other factors.[6] App developers frequently collect user data that is unrelated to the functionality of the app.[7] As a consequence, smartphone users regularly and voluntarily disclose information without understanding why or how data will be used when such apps are installed on their devices.[8] These concerns are particularly troublesome if contact tracing is mandated and associated with a device used for business purposes.[9]

Problems arising from the intersection between health information and personal or secret information are not unknown.[10] For example in 2018, Strava Inc. released a Global Heatmap that illustrated where Fitbit and other GPS device users were exercising.[11] The Heatmap inadvertently disclosed "secret" U.S. military bases and troop movements by illuminating parts of

---

(Sept. 1, 2020), https://governor.maryland.gov/2020/09/01/governor-hogan-announces-beginning-of-stage-three-of-marylands-covid-19-recovery-additional-safe-and-gradual-reopenings/ (announcing collaboration with Apple and Google on the launch of Exposure Notifications Express app).

[5] *Exposure Notification and Contact Tracing: How AI Helps Localities Reopen Safely and Researchers Find a Cure: Hearing Before the H. Comm. on Fin. Serv. Task Force on A.I.*, 116th Cong. 3 (2020) [hereinafter *Hearing*] (statement of Ramesh Raskar, PhD, Assoc. Prof. Mass. Inst. of Tech. & Founder & Chief Scientist, PathCheck Foundation); *see also* Alejandro de la Garza, *What is Contact Tracing? Here's How it Could be used to Help Fight Coronavirus*, TIME (Apr. 22, 2020, 11:29 AM), https://time.com/5825140/what-is-contact-tracing-coronavirus/ ("Some experts estimate [that] the country needs around 100,000 contract tracers to manage COVID-19 outbreaks.").

[6] *See infra* Part II.

[7] *Cf. Permission,* GOOGLE, https://support.google.com/googleplay/android-developer/answer/9888170 (last visited Oct. 12, 2020) (user consent is required to use data and consent is required from user before data may be used for other purposes); *cf. Requesting Permission*, APPLE INC., https://developer.apple.com/design/human-interface-guidelines/ios/app-architecture/requesting-permission/(last visited Oct. 12, 2020) (requests for personal information should only occur when there is clearly a need for the information).

[8] Lauren Goode, *App Permissions Don't Tell Us Nearly Enough About Our Apps*, WIRED (Apr. 14, 2018, 7:00 AM), https://www.wired.com/story/app-permissions/.

[9] *See id*.

[10] Teena Maddox, *The Dark Side of Wearable: How They're Secretly Jeopardizing your Security and Privacy*, COVER STORY (Oct. 7, 2015), https://www.techrepublic.com/article/the-dark-side-of-wearables-how-theyre-secretly-jeopardizing-your-security-and-privacy/.

[11] *Global Heatmap*, STRAVA INC., https://www.strava.com/heatmap#3.82/-105.21347/43.84593/hot/all (last visited Oct. 23, 2020).

the world with user activity.[12] By zooming in on the Heatmap, it was possible to obtain the full names and activities of individual users stationed at specific military bases.[13] The Heatmaps essentially established activity patterns not dissimilar to patterns and contacts that a COVID-19 contact tracing app will map.[14]

In response to criticism, Strava Inc. argued that users knowingly made personal information public when they uploaded personally identifiable information without exercising due diligence with respect to the device terms of service.[15] Significantly, the 2018 Strava Inc. Heatmaps were based upon several years of data, whereas COVID-19 contact tracing data is based upon "live" data.[16] If contact tracing data for specific individuals or a group of individuals were aggregated, the data may paint a data-analytic picture that could be employed for industrial espionage.[17]

---

[12] *E.g.*, Andrew Moseman, *U.S. Troops Accidentally Reveal Secret Bases by Going Jogging,* POPULAR MECHS. (Jan. 29, 2018), https://www.popularmechanics.com/technology/apps/a15912407/strava-app-military-bases-fitbit-jogging/; Ray Walsh, *US Military Bases and Personnel at Risk Because of Fitbit Devices*, PROPRIVACY (Jan. 31, 2018), https://proprivacy.com/privacy-news/us-military-fitbit-concerns; Liz Sly, *U.S. Soldiers are Revealing Sensitive and Dangerous Information by Jogging*, WASHINGTON POST (Jan. 29, 2018, 5:22 AM), https://www.washingtonpost.com/world/a-map-showing-the-users-of-fitness-devices-lets-the-world-see-where-us-soldiers-are-and-what-they-are-doing/2018/01/28/86915662-0441-11e8-aa61-f3391373867e_story.html; Jeremy Hsu, *The Strava Heat Map Shows Even Militaries Can't Keep Secrets from Social Data*, WIRED (Jan. 29, 2018, 7:14 PM), https://www.wired.com/story/strava-heat-map-military-bases-fitness-trackers-privacy/.

[13] *Compare* Sly, *supra* note 12 ("site does not identify app users") *with* Moseman, *supra* note 12 (leaderboards revealed names and locations over fifty service members and their habits), *and* Hsu*, supra* note 12 (data could reveal individual names), *and* Walsh, *supra* note 12 (individual running routes can identify patrol routes and deployment locations).

[14] Walsh, *supra* note 12 (track timing of movements and routes); Joseph K. Cole & Craig S. Horbus, *Corporate TIPS: Data Mapping – Why it's Important to Know What Data You Have and Where it Goes,* BROUSE MCDOWELL (Nov. 4, 2020), https://www.brouse.com/corporate-tips-data-mapping-why-its-important-to-know-what-data-you-have-and-where-it-goes (data mapping can collect geolocation and biometric data).

[15] Moseman, *supra* note 12.

[16] Hsu, *supra* note 12; *see Contact Tracing*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/contact-tracing.html (last visited Oct. 12, 2020).

[17] *Compare* Nicole Martin, *How Much Does Google Really Know About You? A Lot,* FORBES (Mar. 11, 2019, 7:24 PM), https://www.forbes.com/sites/nicolemartin1/2019/03/11/how-much-does-google-really-know-about-you-a-lot/?sh=2089db307f5d (Google knows as much about you as you give it permission to know) *with cf.* Terry Gross, *Fresh Air: Whistleblower Explains How Cambridge Analytica Helped Fuel U.S. 'Insurgency,'* NAT'L PUB. RADIO (Oct. 8, 2019, 2:45 PM) [hereinafter *Fresh Air*], https://www.npr.org/2019/10/08/768216311/whistleblower-explains-how-cambridge-analytica-helped-fuel-u-s-insurgency (mining Facebook data explicitly and implicitly

This comment will explore the problems with digital contact tracing and the potential consequences to Maryland trade secrets claimants.[18] Section II of this comment provides a brief overview of contact tracing[19], Maryland trade secret law[20], trade secret misappropriation,[21] the Governor's emergency powers,[22] and Maryland's approach to digital contact tracing.[23] Section III discusses the risk of disclosure due to Maryland's approach to digital contact tracing,[24] summarizes the impact of digital contact tracing on trade secret rights,[25] and explores regulatory takings of private property.[26] Section IV provides a combination solution to data sharing concerns.[27] The solution proposes to first summarize contact tracing data collection modeled after approaches implemented by MIT Technology Review and Apple, Inc.[28] The solution then proposes combining generated summary data with self-reported long form disclosures currently used by app developers.[29] The combination of short and long form disclosures is patterned after mortgage truth in lending statements, including penalties for noncompliance.[30]

II. HISTORICAL DEVELOPMENT

A. Brief Overview of Contact Tracing

Contact tracing is a decades-old practice that includes manual infection tracing by conducting interviews with patients and tracking their movements and contacts to create infection maps.[31] Once contacts are

---

contributed by users allowed Cambridge Analytica to develop user profiles subsequently used for propaganda campaigns and to understand how users interacted and engaged with the world)*; see* Charlie Warzel & Stuart A. Thompson, *They Stormed the Capital. Their Apps Tracked Them.*, N.Y. TIMES (Feb. 5, 2021), https://www.nytimes.com/2021/02/05/opinion/capitol-attack-cellphone-data.html (see article and satellite imagery from Microsoft Corporation and DitigalGlobe location ping "heat map").

[18] *See infra* Parts I-V.
[19] *See infra* Section II.A.
[20] *See infra* Section II.B.
[21] *See infra* Section II.C.
[22] *See infra* Section II.D.1.
[23] *See infra* Section II.D.2.
[24] *See infra* Section III.A.
[25] *See infra* Section III.B.
[26] *See infra* Section III.C.
[27] *See infra* Part IV.
[28] *See infra* Sections IV.A.2-IV.A.3.
[29] *See infra* Section IV.A.1.
[30] *See infra* Part V.
[31] Sascha Segan, *What is Cell Phone Contact Tracing?*, PCMAG.COM (May 1, 2020), https://www.pcmag.com/news/what-is-cell-phone-contact-tracing; Cole & Horbus, *supra*

identified, healthcare workers provide information and instructions to contacts to minimize the further spread of the pathogen under surveillance.[32] Digital contact tracing performs many of the same tasks as manual contact tracing but expends fewer personnel and financial resources.[33] With digital contact tracing, a user affirmatively downloads a contact tracing or exposure notification app onto a device.[34] Some Apple and Google operating systems may already have exposure notifications included.[35] For example, Maryland's COVID Alert App, a collaborative project between the Maryland Department of Health and Apple/Google Exposure Notifications Express platform, indicates that while exposure notifications may form a part of a device's operating system, functionalities cannot be enabled until an app is installed (Android) or affirmatively enabled by a user (iOS).[36] Disclosure documentation indicates that exposure notification functions will also be removed from devices upon the conclusion of the pandemic.[37] Not all digital contact tracing, however, requires an affirmative action by a user.[38]

Examples of existing digital contact tracing mechanisms include use of Global Positioning Systems ("GPS"), Wi-Fi, Bluetooth signals, a combination of GPS and Bluetooth, Quick Response ("QR") code scanning, and self-reporting.[39] GPS-based solutions provide geolocation data, have a resolution of ten to twenty meters, provide a one-for-one correlation between

---

note 14 (In their simplest form, infection maps are data maps that evaluate collected data and identify where the data is stored. A complete data map by contrast will identify the "simple" data plus potential uses of the data and what data is disclosed, shared, or sold to third parties).

[32] de la Garza, *supra* note 5.

[33] Segan, *supra* note 31.

[34] *Id*.

[35] Md. Dep't of Health, *MD COVID Alert*, GOOGLE PLAY [hereinafter *MD COVID Alert*], https://play.google.com/store/apps/details?id=gov.md.covid19.exposurenotifications (last visited Nov. 17, 2020).

[36] *Id.*

[37] *Id.*

[38] Segan, *supra* note 31; Radhika K. Raman, Ryand W. McBride & Lynda Zadra-Symes, *Contact Tracing: Balancing Privacy Concerns While Halting the Spread of COVID-19*, KNOBBE MARTENS BLOG (Aug. 31, 2020, 12:00 PM), https://www.knobbe.com/blog/contact-tracing-balancing-privacy-concerns-while-halting-spread-covid-19 (Disturbingly, digital contact tracing is not limited to a user affirmatively installing a contact or exposure notification app on a smart device. Maryland retailers posted notices encouraging credit/debit transactions because there was a "cash shortage" in the United States. Is this truth or fiction? Consider that South Korea implemented contact tracing through credit card usage, and based upon spending habits, could notify consumers of contact exposure).

[39] Segan, *supra* note 31; Raman et al., *supra* note 38.

app use and contact identification.[40] Unlike GPS-based solutions, Bluetooth apps do not provide geolocation data, rather they require two devices within a proximity zone share or exchange tokens to determine whether a user encountered an infected person.[41] To provide meaningful penetration among a population, Bluetooth-based contact tracing apps require exponentially greater adoption as compared to GPS-based apps.[42] The very feature that makes Bluetooth solutions attractive, namely, the constant sending of Bluetooth signals, also make devices vulnerable to malicious actors who should not have access to a user's device.[43]

Regardless of which digital contact tracing method is used, "high stakes" data, the type of data that users should not voluntarily surrender, is collected and potentially exploited.[44] Data collection examples can include: user name and e-mail; user contacts and contact logs; date, time and duration of contacts; geolocation history; employment information including company name, and job title/department and more.[45] Some of this information may be automatically collected and aggregated without a user's realization.[46] Furthermore, the collected data or information could include information that a business organization deems worthy of trade secret protection.[47]

B. Maryland Trade Secret Law

---

[40] *See* Anil Anathaswamy, *What do Public Health Authorities need for COVID-19? Thinking beyond Exposure Notification, Contact Tracing and Heatmaps,* PATHCHECK FOUND. (May 5, 2020), https://pathcheck.org/what-do-public-health-authorities-need-for-covid-19-thinking-beyond-exposure-notification-contact-tracing-and-heatmaps/.

[41] *Id.*

[42] *Id.*

[43] Lily Hay Newman, *Bluetooth's Complexity has Become a Security Risk,* WIRED (May 19, 2019, 7:00 AM), https://www.wired.com/story/bluetooth-complex-security-risk/.

[44] Anathaswamy, *supra* note 40.

[45] Jessica Gross, Justine Phillips & Morgan Forsey, *Up Close & Personal: Contact-Tracing Apps & Employee Privacy*, LAB. & EMP. L. BLOG (June 4, 2020) [hereinafter *Up Close & Personal*], https://www.laboremploymentlawblog.com/2020/06/articles/coronavirus/contact-tracing-apps-employee-privacy/; Cole & Horbus, *supra* note 14.

[46] *Privacy Policy for Maryland COVID Link,* MD. DEP'T OF HEALTH [hereinafter *COVID Link Privacy Policy*], https://phpa.health.maryland.gov/Documents/COVID%20Link%20Privacy%20Policy%20(for%20Short%20Code)%20-%20FINAL.pdf (last visited Oct. 12, 2020).

[47] *See id*.

Unlike patents, trademarks, and copyrights, trade secrets lose value if publicly exposed.[48] Patents and trademarks are "registered" with one or more governmental authorities that recognize the owner's proprietary rights.[49] With copyrights, once a work is fixed into a tangible form, protection is automatic.[50] Copyright registration becomes mandatory to enforce rights in litigation.[51] By contrast, the value of trade secrets is in their secrecy.[52] A classic trade secret example is the Coca-Cola formula comprising a closely guarded secret blend of ingredients.[53] When proprietary information becomes public knowledge, trade secret value to a business entity is permanently lost.[54] Furthermore, valuation is complex and not readily ascertainable.[55]

In Maryland, a trade secret is defined as

> information, including a formula, pattern, compilation, program, device, method, technique, or process that (1) Derives independent economic value . . . from not being generally known to . . . other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts . . . to maintain its secrecy.[56]

A trade secret may be embodied in a machine, process or method, a formula, industrial know-how, information, an idea, a story plot, product or service development, a work product, and monetary or time

---

[48] John Hull, *Protecting Trade Secrets: How Organizations can Meet the Challenge of Taking "Reasonable Steps"*, WORLD INTELLIGENT PROP. ORG. MAG. (Oct. 2019), https://www.wipo.int/wipo_magazine/en/2019/05/article_0006.html.

[49] U.S. CONST. art. I, § 8, cl.8; MD. CONST., Declaration of Rts., art. 43 (West 2021); 35 U.S.C.A §§ 1 — 389 (West 2021); 15 U.S.C.A. §§ 1051 — 1141 (West 2021); MD. CODE ANN. BUS. REG. §§1-401 — 415 (West 2021).

[50] *What is Copyright?*, U.S. COPYRIGHT OFF., https://copyright.gov/what-is-copyright/ (last visited Mar. 15, 2021).

[51] *Id.*; MD. CONST., Declaration of Rts., art. 43; 17 U.S.C.A. § 106 (West 2021) (stating that the owner of copyright under Title 17 has exclusive, enumerated rights).

[52] *See* MD. CODE ANN., COM. LAW § 11-1201(e) (West 2021).

[53] Bond v. PolyCycle, Inc., 127 Md. App. 365, 375, 732 A.2d 970, 975 (1999) (citing Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co., 107 F.R.D. 288 (D. Del. 1985)); *see also Trade Secrets: 10 of the Most Famous Examples*, VETHAN LAW FIRM, P.C. (Nov. 8, 2016) [hereinafter *Famous Examples*], https://info.vethanlaw.com/blog/trade-secrets-10-of-the-most-famous-examples.

[54] Daniel J. Melman, *Safeguarding Trade Secrets with a Newly Remote Workforce*, LAW360 (Mar. 23, 2020, 2:17 PM), https://www.law360.com/articles/1255731 (estimating that between $180-540 billion in U.S. trade secrets is annually lost to theft).

[55] MD. CODE ANN., COM. LAW § 11-1201(e) (West 2021).

[56] *Id.*

costs/expenditures.[57] Owing to various financial considerations, including the cost of acquiring other forms of protection, Maryland's small to midsized entities are more likely to rely on trade secrets for a competitive edge than on other forms of intellectual property protection.[58] Notwithstanding the 1989 adoption of the Maryland Uniform Trade Secrets Act ("MUTSA"), Maryland courts continue to rely on Restatement (First) of Torts (1939) to identify six factors for determining whether proprietary information is in fact worthy of trade secret classification:

> (1) The extent to which the information is known outside of [the] business;
> (2) The extent to which [the information] is known by employees and others involved in [the] business;
> (3) The extent of measures taken by [the business] to guard the secrecy of the information;
> (4) The value of the information to [the business] and to [the business'] competitors;
> (5) The amount of effort or money expended by [the business] in developing the information; [and]
> (6) The ease or difficulty with which the information could be properly acquired or duplicated by others.[59]

---

[57] Space Aero Prod. Co. v. R.E. Darling Co., 238 Md. 93, 105, 208 A.2d 74, 82 (1965), *cert. denied*, 382 U.S. 843 (1965).

[58] Press Release, U.S. Small Business Administration, Office of Advocacy, Small Businesses Generate 44 Percent of U.S. Economic Activity, Release No. 19-1 ADV (Jan. 30, 2019), https://advocacy.sba.gov/2019/01/30/small-businesses-generate-44-percent-of-u-s-economic-activity/ (finding small businesses generate forty-four percent of the national economy); U.S. SMALL BUS. ADMIN., OFF. OF ADVOC. SMALL BUSINESS PROFILE: MARYLAND (2017), https://www.sba.gov/sites/default/files/advocacy/Maryland_1.pdf (finding ninety-nine percent of Maryland businesses are small businesses); MD. CODE REGS. 21.11.01.04 (2020) (finding small businesses are defined as entities employing 250 or fewer people or having annual gross receipts of $100,0000,000 or less); Hull, *supra* note 48; FRANK L GERRATANA ET AL., REPORT OF THE ECONOMIC SURVEY 2019, AIPLA I-89, I-97, I-101 (Ass'n Rsch. ed., 2019) (On average, attorney service fees in the D.C. metro area for conducting a trademark clearance search, preparing a clearance opinion, and filing a new application total $1,895. Average attorney services fees in the D.C. metro area for conducting a prior art search, preparing a patentability opinion and drafting a minimally complex nonprovisional patent application total $11,530); U.S. PATENT AND TRADEMARK OFFICE, CURRENT FEE SCHEDULE, https://www.uspto.gov/learning-and-resources/fees-and-payment (follow "List of patent fees" and "List of trademark fees" hyperlinks) (Government fees for a new trademark application start at $250 per goods and services class. Government fees for a small new entity utility patent application start at $830).

[59] Bond, 127 Md. App. 365, 372, 732 A.2d 970, 973 (1999) (citing *Space Aero Prod. Co.*, 238 Md. at 110, 206 A.2d at 82 (quoting RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. LAW INST. 1939))).

Where the MUTSA is broader than the Restatement, a court will apply the MUTSA.[60]

The duty a trade secret owner or possessor must exercise to protect trade secrets is fact-specific and may be determined by the industry and channels of trade in which a business operates. [61] Depending on the industry, complex efforts at concealment could call attention to such attempts; plain sight concealment could be a better option.[62] As to the extent to which information is known outside of the business, the Coca-Cola formula provides an example.[63] Most of the product's ingredients are public knowledge; it is only the missing component, publicly known as "Merchandise 7X," that is the closely guarded secret.[64] But, as the Coca-Cola example demonstrates, reasonable security measures are still used to guard the trade secret.[65]

C. Trade Secret Misappropriation

Trade secret law developed from the balancing of two competing objectives: free competition versus the use of initiative and acquired knowledge.[66] Any exercise of initiative or use of acquired knowledge must be completed without violating contractual or fiduciary obligations.[67] While mixtures, methods and processes may qualify for trade secret protection, the starting point in a misappropriation inquiry is not the property right or due process of law.[68] Rather, the initial inquiry is whether there is a confidential

---

[60] *Bond*, 127 Md. App. at 372, 732 A.2d at 973 (citing Optic Graphics, Inc. v. Agee, 87 Md. App. 770, 591 A.2d 578, *cert. denied*, 324 Md. 658, 598 A.2d 465 (1991)).
[61] DTM Research, LLC v. AT&T Corp., 245 F.3d 327, 332 (4th Cir. 2001) (holding that the value in a trade secret is not just to the trade secret owner; one who possesses a trade secret may demand redress for misappropriation); DePuy Synthes Prod., Inc. v. Veterinary Orthopedic Implants, Inc., 990 F.3d 1364, 1371-72 (2021); *Space Aero Prod. Co.*, 238 Md. at 112, 208 A.2d at 83-84.
[62] *Space Aero Prod. Co.*, 238 Md. at 112, 208 A.2d at 83-84.
[63] *Bond*, 127 Md. App. at 375, 732 A.2d at 975 (1999) (citing Coca-Cola Bottling Co. of Shreveport, Inc v. Coca-Cola Co., 107 F.R.D. 288 (D. Del. 1985)).
[64] *Id.*
[65] *Cf. DePuy Synthes Prod., Inc.*, 990 F.3d at 1371-72 (holding that a manufacturer's identity was not a trade secret because the manufacturer's identity was publicly known; not subject to an express or implied obligation to not disclose; and not subject to reasonable security measures).
[66] *Space Aero Prod. Co.*, 283 Md. at 113, 208 A.2d at 84.
[67] *Id.*
[68] E.I. Du Pont Nemours Powder Co. v. Masland, 244 U.S. 100, 102 (1917); *DePuy Synthes Prod.*, Inc. 990 F.3d at 1371-72.

relationship between the parties.[69] A trade secret is misappropriated only if it is disclosed or used without consent, or when a duty to maintain or limit use of the secret is breached.[70] Unlawful acquisition of proprietary information is not required for misappropriation, but may instead result from violating a duty of fidelity and trust with respect to lawfully acquired proprietary information.[71]

Malicious or unlawful use of data analytics could target patterns of behavior for the purpose of misappropriating trade secret data.[72] Based upon precise geolocation, including contact tracing notifications, data analytics could reveal the persons with whom an app user interacted and the places the app user frequented, including confidential interactions with business partners.[73] Compare exemplary trade secrets data against possible contact tracing data collection.[74]

Digital contact tracing apps collect data.[75] Apps analyze data.[76] App developers may themselves claim that the scope and content of data collection is protected by trade secret laws.[77] Data analytics is useful to competitors.[78]

D. The Governor's Emergency Powers and COVID-19 Contact Tracing

---

[69] *Du Pont*, 244 U.S. at 102; *Bond*, 127 Md. App. at 376, 732 A.2d at 975 (citing Head Ski Co. v. Kam Ski Co., 158 F. Supp. 919 (D. Md. 1958)).

[70] *Space Aero Prod. Co.*, 238 Md. at 115, 208 A.2d at 85; MD. CODE ANN., COM. LAW §§ 11-1201(b), (c) (West 2021).

[71] *Masland*, 244 U.S. at 102.

[72] *Cf. Fresh Air*, *supra* note 17 (Facebook and other data was compiled to understand how users interacted and engaged with the world).

[73] *Up Close & Personal*, *supra* note 45.

[74] *Compare Up Close & Personal*, *supra* note 45 (listing of data collection examples) *with Space Aero Prod. Co.*, 238 Md. at 105 (listing trade secret examples), *and* MD. CODE. ANN., COM. LAW § 11-1201(e) (defining trade secrets), *and Famous Examples*, *supra* note 53 (listing trade secret examples).

[75] *MD COVID Alert*, *supra* note 35; *COVID Link Privacy Policy*, *supra* note 46.

[76] *See* Martin, *supra* note 17.

[77] *Hearing*, *supra* note 5; *Coronavirus Contact-Tracing Apps Put Users at Risk, EU Lawmaker Says*, DEUTSCHE WELLE (May 15, 2020), https://www.dw.com/en/coronavirus-contact-tracing-apps-put-users-at-risk-eu-lawmaker-says/a-53457663 ("Apple and Google [are] changing the operating systems of all smartphones to make [contact tracing] possible. Nobody knows exactly what they're changing because they don't let anyone look into it by saying it is a trade secret.").

[78] *Cf.* Kayla Matthews, *Big Data Analytics Market to Grow to $40.6 Billion by 2023*, INSIDEBIGDATA (Dec. 23, 2018), https://insidebigdata.com/2018/12/23/big-data-analytics-market-grow-40-6-billion-2023/ (data analytics provided seventy-two percent of survey respondents with valuable information).

1. The Governor's Emergency Powers

In response to the COVID-19 outbreak, on March 5, 2020, Maryland Governor Larry Hogan declared a state of emergency.[79] Section 14-107 of the Public Safety Code grants the Governor the authority (1) to declare a state of emergency; (2) under the umbrellas of public health, welfare, or safety protection to suspend any statute, rule, or regulation; and (3) to authorize the use or seizure of private property with just compensation for such use.[80] After proclaiming a state of emergency, the Governor may promulgate "reasonable orders, rules or regulations necessary to protect life and property or calculated to effectively control and terminate the public emergency."[81] Not listed among the ten itemized controls is a discussion of property seizure.[82] Property seizure powers may be implied under section 14.3A-03(b)(1)(i).[83] The Governor's powers also extend to requiring individuals to submit to medical examinations/ testing to prevent or reduce the spread of disease or outbreak.[84]

2. Maryland's Approach to COVID-19 Contact Tracing

The CovidLINK [*sic*] website is Maryland's "hub" for information about COVID-19.[85] The privacy policy for Maryland COVID Link indicates that it automatically collects "Information about your browser; Your activities on the Services; IP address; Mobile or Internet Carrier; Browser type; Browser identifier; [and] Referring URL."[86] The website's privacy policy also states that location information is not requested or collected

---

[79] Md. Exec. Proclamation (Mar. 5, 2020), https://governor.maryland.gov/wp-content/uploads/2020/03/Proclamation-COVID-19.pdf; 47-6 Md. Reg. 335 (Mar. 13, 2020) (publishing proclamation).

[80] MD. CODE ANN., PUB. SAFETY §§ 14-107(d)(1)(i)-(v) (West 2021); *see also* MD. CODE ANN., PUB. SAFETY § 14-308 (West 2021) ("The State shall repair or replace any . . . property that is damaged while being used in accordance with the proclamation of a state of emergency.").

[81] PUB. SAFETY § 14-303(b) (West 2021).

[82] *Id.* (Enumerated powers include: (1) control of traffic; (2) designate emergency zone building and vehicle access; (3) control movement "into, in or from designated zones;" (4) control places of amusement and assembly; (5) control individuals on public streets; (6) establish curfews; (7) alcoholic beverage control; (8) firearm and ammunition control; (9) explosives control; and (10) authorize the use of field hospitals.).

[83] PUB. SAFETY § 14-3A-03(b)(1)(i) (West 2021) ("The Governor may order . . . [a] designated official to: seize immediately *anything* needed to respond to the medical consequences of the catastrophic health emergency . . . .") (emphasis added).

[84] PUB. SAFETY § 14-3A-03(b)(3) (West 2021).

[85] *CovidLink*, MD. DEP'T OF HEALTH, https://covidlink.maryland.gov/content/ (last visited Nov. 21, 2020).

[86] *COVID Link Privacy Policy*, *supra* note 46.

through a device, but where "legally permissible," aggregated data information may come from at least one of: the user, public sources, and third-party sources.[87] Upon aggregation, the data will be considered "personally identifiable information" or "protected health information" that is protected by federal and state privacy laws.[88]

Privacy concerns regarding contact tracing extend well beyond Maryland's borders. Thirty-nine attorneys general, including Maryland Attorney General Brian Frosh, signed a June 16, 2020 letter addressed to the Chief Executive Officers of Apple and Google expressing concerns over the "proliferation" of contact tracing apps available to consumers and inadequate consumer protection.[89] While the letter praised the development of application programing interfaces (APIs)[90] for Bluetooth enabled, decentralized exposure notification and contact tracing, concerns centered around "purportedly 'free' apps that utilize GPS tracking, contain advertisements and/or in-app purchases, and are not affiliated with any public health authority or legitimate research institution."[91] The letter went on to urge Apple and Google to verify that apps were affiliated with governmental authorities working with public health authorities, remove apps not legitimately affiliated with public health authorities, and remove all COVID-19 exposure notification and contact tracing apps at the conclusion of the public health emergency.[92]

---

[87] *Id*.

[88] *Id*. (citing Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. §§ 1320d et seq., and the implementing regulations at 45 C.F.R. Parts 160 and 165, the Maryland Confidentiality of Medical Records Act (MCMRA), MD. CODE ANN., HEALTH-GEN. §§ 4-301 et seq., and the Protection of Information by Government Act, MD. CODE ANN., STATE GOV'T §§ 10-1301 et seq). HIPAA compliance and related federal and state health privacy laws are outside of scope of comment.

[89] Letter from Nat'l Ass'n of Att'y Gen. to Sundar Pichai, CEO, Google, LLC and Tim Cook, CEO, Apple, LLC (June 16, 2020) [hereinafter *NAAG Letter]*, https://www.marylandattorneygeneral.gov/news%20documents/061620_Final_Letter.pdf.

[90] IBM Cloud Education, *What is an Application Programming Interface (API)?*, IBM (Aug. 19, 2020), https://www.ibm.com/cloud/learn/api (APIs "enable[] companies to open up their application's data and functionality to external third-party developers, [and] business partners . . . [to allow] services and products to communicate with each other and leverage each other's data and functionality through a documented interface. Developers don't need to know how an API is implemented; they simply use the interface to communicate with other products and services.").

[91] *NAAG Letter*, *supra* note 89 (internal citation omitted); Press Release, Attorney General Frosh, Attorney General Frosh Asks Apple and Google to Ensure All Contact Tracing Apps Serve a Public Health Purpose (Jun. 16, 2020), https://www.marylandattorneygeneral.gov/press/2020/061620a.pdf (Contact tracing "poses a risk to consumers' personally identifiable information . . . that could continue long after the present public health emergency ends.").

[92] *NAAG Letter*, *supra* note 89 (internal citation omitted).

Subsequent to the letter authored by the attorneys general, Governor Hogan announced a collaborative partnership with Apple and Google on September 1, 2020, but the MD COVID Alert app did not officially launch until November 10, 2020.[93] Concurrent with the Governor's announcement, Google also released its Exposure Notifications Frequently Asked Questions guide ("Exposure Notifications FAQ").[94] The Exposure Notifications FAQ provides that developer criteria is restricted, API data collection will not request access to location services, and data use will be restricted.[95] In a separate document, Google reiterated that safeguards prohibit apps using the Exposure Notification System from accessing a device location or inferring a device location by aggregating data.[96] For Bluetooth scanning to work, however, device location settings must be enabled for all apps, not just Exposure Notification apps.[97] A brief investigation into why location functions must be enabled for Bluetooth scanning revealed conflicting information, suggesting that activation of location settings (1) helps improve user privacy by informing users that apps are collecting location data or (2) an intentional operating system design feature intended to collect copious amounts of data.[98]

---

[93] Press Release, The Office of Governor Larry Hogan, Governor Hogan Announces Beginning Stage Three of Maryland's COVID-19 Recovery, Additional Safe and Gradual Reopenings (Sept. 1, 2020), https://governor.maryland.gov/2020/09/01/governor-hogan-announces-beginning-of-stage-three-of-marylands-covid-19-recovery-additional-safe-and-gradual-reopenings/; Press Release, The Maryland Department of Health, Maryland Department of Health Launches MD COVID Alert: Marylanders Can Now Use MD COVID Alert to Receive COVID-19 Exposure Notification on Smartphones (Nov. 10, 2020), https://health.maryland.gov/newsroom/Pages/Maryland-Department-of-Health-launches-MD-COVID-Alert.aspx.

[94] *Exposure Notifications, Frequently Asked Questions, Preliminary – Subject to Modification and Extension*, GOOGLE LLC 1, 2 (Sept. 2020) [hereinafter *Exposure Notifications FAQ*], https://covid19-static.cdn-apple.com/applications/covid19/current/static/contact-tracing/pdf/ExposureNotification-FAQv1.2.pdf.

[95] *Id.* at 6; About the Exposure Notifications System and Android locations settings, GOOGLE LLC (Sept. 2020) [hereinafter *About the Google Exposure Notifications System*], https://support.google.com/android/answer/9930236.

[96] *Exposure Notifications FAQ, supra* note 94, at 4-5.

[97] *Id.* at 3, 5-6.

[98] *About Privacy and Location Services in iOS and iPads OS*, APPLE, INC. [hereinafter *About Privacy and Location Services]*, https://support.apple.com/en-us/HT203033 (last visited Feb. 14, 2021) (stating user privacy is improved by informing users that apps are collecting location data); *cf.* ANDREAS SOLTI, SUSHANT AGARWAL & SARAH SPIEKERMANN, *Privacy in Location-Sensing Technologies*, *in* HANDBOOK OF MOBILE DATA PRIV. 35, 39-43, 52-54 (Aris Gkoulalas-Divanis & Claudio Bettini eds., 2018), https://ssrn.com/abstract=3611574 (location data assists with training Bluetooth's

III. IF MARYLAND'S GOVERNOR WERE TO EXERCISE EMERGENCY POWERS BY MANDATING COVID-19 CONTACT TRACING, MARYLAND BUSINESSES COULD LOSE TRADE SECRETS RIGHTS.

A. Maryland's Approach to Contact Tracing Puts Trade Secrets at Risk of Disclosure

While the Maryland COVID Link will not request personally identifiable information, app developers may be using information collected and provided by third-party partners.[99] By partnering with Apple and Google, entities that can compile and analyze data to produce user profiles, a user's permission to access personally identifiable information may not be necessary because users are volunteering the information without understanding the consequences to trade secrets.[100] For example, personally identifiable information is collected and stored without any "guarantee that your communication with the Services will never be unlawfully intercepted or that your data will never be unlawfully accessed by third parties.[101] Any transmission of information is at the user's risk."[102] By simply using the Maryland COVID Link website, personally identifiable information (including confidential business information) is automatically collected, perhaps without a user's educated, informed consent, and aggregated with public and third-party data.[103]

Data collected without informed consent could be shared with or collected by third-party data brokers.[104] Once collected, data could be aggregated to form insights that are not related to overt contact tracing

---

estimation of location through walls, street canyons, roofs, floors, etc., leading to surveillance and secondary uses of collected data).

[99] *COVID Link Privacy Policy*, *supra* note 46.

[100] *COVID Link Privacy Policy*, *supra* note 46; Martin *supra* note 17; Michael McFarland, SJ, *Ethical Implications of Data Aggregation*, MARKKULA CENTER FOR APPLIED ETHICS, SANTA CLARA UNIV. (Jun. 1, 2012), https://www.scu.edu/ethics/focus-areas/internet-ethics/resources/ethical-implications-of-data-aggregation/; Jay Stanley and Barry Steinhard, *Weaker Chains: The Growth of an American Surveillance Society*, AM. CIV. LIBERTIES UNION (Jan. 2003), https://www.aclu.org/sites/default/files/FilesPDFs/aclu_report_bigger_monster_weaker_chains.pdf.

[101] *COVID Link Privacy Policy*, *supra* note 46.

[102] *Id.*

[103] *Id.*

[104] *Hearing*, *supra* note 5.

purposes.[105] Collected and aggregated data could be used for mass surveillance, to analyze a select community, group, business, or individual user.[106] Data analysis could exceed the published scope of the service.[107] For example, supposedly anonymous data, including approximately 100,000 location pings derived from GPS sensors, Bluetooth signals and other sources for thousands of smartphones, revealed around 130 devices inside the U.S. Capital on January 6, 2021.[108]

> About 40 percent of the phones tracked near the rally stage on the National Mall during the speeches were also found in and around the Capitol during the siege – a clear link between those who'd listened to the president and his allies and then marched on the building. . . While there were no names or phone numbers in the data, [New York Times staff] were once again able to connect dozens of devices to their owners, tying anonymous locations back to names, home addresses, [and] social networks. . . But to think that the information will be used against individuals only if they've broken the law is naïve; such data is collected and remains vulnerable to use and abuse whether people gather in support of an insurrection or they justly protest police violence . . . .[109]

Geolocation services allow apps to use information from Bluetooth to determine a user's approximate location.[110] While safeguards ensure that a government cannot infer a user's location from a contact tracing app, "[f]or Bluetooth scanning to work, the device location setting needs to be turned on for all apps, not just apps built with the Exposure Notifications System."[111] Aggregated data could be analyzed to build profiles about app user activity and behaviors.[112] Data collected from the January 6, 2021 rally and riot was able to track users from their homes to the U.S. Capital and back, including every stop in between.[113] Collected data is available not only to law

---

[105] Manish Shukla, Rajan M A, Sachin Lodha, Gautam Shroff, Ramesh & Raskar, *Privacy Guidelines for Contact Tracing Applications* ¶3 (arXiv, Working Paper No. 2004.13328, 2020), https://arxiv.org/pdf/2004.13328.
[106] *Id.*
[107] *Id.*
[108] *Cf.* Warzel & Thompson, *supra* note 17 (see article for satellite imagery from Microsoft Corporation and DigitalGlobe location ping "heat map").
[109] *Id.*
[110] *About Privacy and Location Services, supra* note 98.
[111] *See About the Google Exposure Notifications System*, *supra* note 95.
[112] *See Up Close & Personal*, *supra* note 45.
[113] Warzel & Thompson, *supra* note 17.

enforcement, but hedge funds, financial institutions, advertisers and anyone else industrious enough to analyze collected data.[114]

This raises myriad questions, the type of which prompted the attorneys general letter discussed in this comment: what type of consent should a user provide before personal data is collected; should there be limits on the quality of personal data collected; can the collected data be used for purposes outside of contact tracing; how long will data be stored, where will it be stored, will it be encrypted and when and how will it be disposed; and what rights to raw data or data analytics should users have to access, correct or delete their personal data? [115]

The Google Play description for MD COVID Alert indicates that the "framework is designed to avoid correlating any personal data and location information," and that "Apple and Google will delete exposure notification service tools from their respective operating systems once the pandemic . . . no longer requires use of this technology."[116] Separately, the privacy policy for MD COVID Alert, issued by the Maryland Office of Enterprise Technology, provides that use of the service is voluntary, requiring affirmative, nonconditional, express consent.[117] The app proports to "not collect or exchange any personal information of the user receiving notifications."[118] As previously discussed, because the MD COVID Alert App is built on the Apple/Google API, there may be no need for the State to collect personally identifiable information.[119] Users are giving away the data without understanding app permission settings and the consequences of enabling features.

Another area for concern regarding the MD COVID Alert App comes from the explicit language in the policy.[120] For example, the definition for the term "voluntary" comes from the proposed Exposure Notification Privacy Act, introduced as Senate Bill 3861 on June 1, 2020, without further action.[121]

---

[114] *Id.*

[115] *See supra* Section II.D.2; *NAAG Letter*, *supra* note 89; see also Raman, *supra* note 38 (Australia's COVIDSafe app protects user privacy by granting users access to collected data, as well as the right to correct and delete personal data); *see Up Close & Personal*, *supra* note 45.

[116] MD COVID Alert, *supra* note 35.

[117] MD. DEP'T OF HEALTH OFFICE OF ENTERPRISE TECHNOLOGY, MDH POLICY #03.02.03, at 2 (Nov. 6, 2020) [hereinafter *MDH Policy*], https://health.maryland.gov/Pages/ENXPrivacy.aspx.

[118] *Id.* at 3.

[119] *See Martin*, *supra* note 17; *see* Warzel & Thompson, *supra* note 17; *see* McFarland, *supra* note 93 (State subsidization of private conduct in conflict with the Fourteenth Amendment is outside the scope of this Comment).

[120] *MDH Policy*, *supra* note 117, at 2, 3.

[121] *Id.;* Exposure Notification Privacy Act, S. 3861, 116th Cong. § 2(1) (2020).

The first reference to the "Exposure Notification Act" in the privacy policy is silent as to the status of the legislation.[122] Only after scrolling through the entire Privacy Policy to the References section is the reader informed that the "act" is Senate Bill 3861.[123] While the explicit language of the Privacy Policy may be unambiguous to the marginally sophisticated reader, the general public, including business users, could be misled into believing that the Exposure Notification Act and its definitions have the force of law.

Further concern comes from Senate Bill 3861 itself.[124] By relying on pending legislation that is not backed by the force of law, the State in its COVID Alert privacy policy is abdicating its authority to protect Maryland businesses from security breaches and false claims.[125] Senate Bill 3861 charges the Federal Trade Commission ("FTC") with policing security incidents.[126] It is noted that in the FTC's complaint against Zoom Video Communications, Inc. ("Zoom"), Zoom engaged in misleading trade practices, including claims that provided consumers with a "false sense of security" and risked remote surveillance by third parties.[127] According to settlement terms, "Zoom is not required to offer redress, refunds, or even notice to its consumers that material claims regarding the security of its services were false."[128] If Zoom is not required to protect consumers or businesses, little imagination is necessary to speculate that neither Apple nor Google would be required to protect consumers if an express notifications breach occurred.

B. Digital Contact Tracing and the Impact on Trade Secret Rights

If contact tracing is made mandatory for entry into public buildings, understanding the type of data overtly and covertly collected becomes essential to a trade secret claimant. It is therefore incumbent upon trade secrets claimants to be fully informed as to whether confidential business information is in fact secret and well-hidden or whether the information is

---

[122] *See MDH Policy*, *supra* note 117 at 2.
[123] *MDH Policy*, *supra* note 117 at 5.
[124] *See* S. 3861.
[125] *MDH Policy*, *supra* note 117 at 5-6.
[126] S. 3861 §§ 7(b)(3), 10.
[127] Press Release, Federal Trade Commission, FTC Requires Zoom to Enhance its Security Practices as Part of Settlement (Nov. 9, 2020), https://www.ftc.gov/news-events/press-releases/2020/11/ftc-requires-zoom-enhance-its-security-practices-part-settlement.
[128] In the Matter of Zoom Video Commc'n, Inc., Commission File No. 1923167 at 4 (Nov. 9, 2020) (dissenting Statement of Comm'r Rebecca Kelly Slaughter, Fed. Trade Comm'n), https://www.ftc.gov/system/files/documents/public_statements/1582918/1923167zoomslaughterstatement.pdf.

"out there" waiting to be mined.[129] The listing of potential trade secret data recited in Section II.B. overlaps with a non-exclusive listing of the type of data that conceivably resides on a smart device.[130] The Strava Heatmap and other examples provided throughout this Comment illustrate the importance of understanding app terms of service.[131] As discussed in Section II.D.2., Maryland states that it has no interest in collecting personally identifiable information from users but is willing to receive data freely given away by users and aggregated by third parties.[132]

C. Regulatory Takings

"The General Assembly shall enact no Law authorizing private property to be taken for public use without just compensation."[133] Guarantees that private property is not taken without "just compensation" are designed to prevent private parties from bearing public burdens that should be distributed across the public.[134] Trade secrets possessed by Maryland businesses are protected by Article III, section 40 of the Maryland Constitution and the Fifth and Fourteenth Amendments because of protections afforded by the MUTSA.[135] COVID-19 contact tracing requirements may be more than an incidental burden on the trade secrets that may reside on rights claimant's devices.[136]

The Supreme Court recognizes three types of regulatory takings: "1) a permanent physical occupation authorized by government, 2) a regulation permanently require[ed] a property owner to sacrifice all economically beneficial use of his or her [property], [and] 3) the facts and circumstances of the particular case show a taking has occurred."[137] Regulatory takings are grounded in state law having a "high degree of control

---

[129] *Cf. DePuy Synthes Prod., Inc.*, 990 F.3d at 1372 (holding that internal efforts to maintain confidentiality of a confidential relationship with a third party are not enough to establish "reasonable efforts" to protect trade secrets).
[130] *See supra* Section II.B.
[131] *See* Hsu, *supra* note 12; *see also Global Heatmap*, *supra* note 11.
[132] *See COVID Link Privacy Policy*, *supra* note 46; *see supra* Section II.2.D.
[133] MD. CONST. art. III, § 40 (2021).
[134] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 140 (1978) (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).
[135] Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003-04 (1984); MD. CODE ANN., COM. LAW § 11-1201(e) (West 2021).
[136] Blackburn v. Dare County, 486 F. Supp. 3d 988, 999 n.5 (E.D.N.C. 2020), *appeal docketed*, No. 20-2056 (4th Cir. Oct. 2, 2020) (holding that takings can arise from public programs designed to promote the greater good and that the regulation of travel is an incidental burden on property use).
[137] *Blackburn*, 486 F.Supp.at 997 (citing Arkansas Game & Fish Comm'n, 568 U.S. 23, 31-32 (2012)).

over commercial dealings" which will therefore defeat a taking claim.[138] A taking may occur regardless of whether the property is tangible real, or intangible intellectual property.[139]

No set formula for what constitutes a regulatory taking has been established by the Supreme Court, rather, a court will conduct a factual inquiry applying the following factors: "the economic impact of the regulation on the claimant . . ., the extent to which the regulation has interfered with distinct investment-backed expectations . . .,[and] the character of the governmental action."[140] Analysis of these factors requires a balancing of competing objectives, mainly the claimant's freedom to exercise and retain an interest in private property and the government's power to adjust rights for the greater good.[141]

A taking is more likely to occur when the government interference is characterized as an invasion than when the interference is the result of a shifting of economic benefits and burdens designed to promote the greater good.[142] For example, a taking does not occur when the "health . . . or general welfare is promoted by prohibiting particular contemplated uses of [property]," such as the destruction of red cedar trees owned by one class of property owners to prevent the spread of a fungal disease to the apple trees of another class of property owners. [143] A taking does not occur when the value in one class of property is destroyed to save another having a greater public value, such as restrictions on the sale in interstate commerce of salmonella infected eggs and poultry.[144] Nor is there a taking where a company receives a government license in exchange for submission of trade secret data subsequently used by the government to award similar licenses to competitors.[145]

If the property taken for the public benefit requires the claimant to surrender to the public that which is not also surrendered by other members of the public, then following a judicial inquiry "a full and just equivalent shall

---

[138] Md. Shall Issue v. Hogan, 963 F.3d 356, 365 n.4, 372-73 (holding that "classical" physical takings are distinct from regulatory takings and require that the property be physically surrendered to the government); *see also Md. Shall Issue*, 963 F.3d at 372-73 (Richardson, J. dissenting) (holding that a classic taking or a total regulatory taking always requires just compensation, whereas a regulatory taking grounded in state law having a "high degree of control over commercial dealings" will defeat a taking claim).
[139] E. Enters. v. Apfel, 524 U.S. 498, 554 (1998) (Breyer, J., dissenting).
[140] *Penn. Cent. Transp. Co.*, 438 U.S. at 124.
[141] Murr v. Wisconsin, 137 S.Ct. 1933, 1943 (2017).
[142] *Penn Cent. Transp. Co.,* 438 U.S. at 124.
[143] *Id.* at 125, 133, 144-45; *see also* Miller v. Schoene, 276 U.S. 272, 277-78 (1978).
[144] *Penn Cent. Transp. Co.,* 438 U.S. at 125, 133, 144-45; *see also* Rose Acre Farms, Inc. v. United States, 559 F.3d 1260, 1263 (Fed. Cir. 2009).
[145] *Ruckelshaus*, 467 U.S. at 1007.

be returned to him."[146] Promotion of utilitarian principles that have an "unduly harsh impact" on the claimant occurs where government interference results in the destruction of the claimant's rights.[147] Destruction or nonconsensual servitude to which other similar properties have not been subjected is impermissible regardless of whether the rights claimant exercised or used their property rights.[148]

With respect to personal property, a rights claimant should understand that state regulation could render the property "economically worthless" and not result in a taking.[149] This is especially true where a claimant voluntarily submits trade secrets to the government in exchange for an economic advantage.[150] To determine whether a claimant has a reasonable investment-backed expectation that a government will maintain the secrecy of disclosed information, turns on three possibilities.[151] First, the legislation prohibits disclosure or use of trade secrets for the benefit of another.[152] Second, the legislation provides for disclosure of the trade secret and the conditions for disclosure are rationally related to a legitimate government interest in return for an economic advantage.[153] Under a third alternative the legislation is silent as to whether trade secret disclosure is likely and a claimant is neither forewarned of disclosure nor assured of continued secrecy, but the claimant has a reasonable expectation of continued secrecy.[154]

Of the three-investment backed expectation disclosure types, Maryland's COVID Alert, is a hybrid of the second and third disclosure types.[155] Conditions for disclosure are rationally related to a legitimate government interest, but users are informed that the State will not collect certain classes of information while simultaneously receiving no assurance as to continued secrecy of collected data.[156] It is questionable whether contact tracing app users are receiving an economic advantage – entry into public buildings – in exchange for disclosing trade secret data.[157] The State is

---

[146] *Penn Cent. Transp. Co.,* 438 U.S. at 147-48, 151 (citing Monongahela Navigation Co. v. United States, 148 U.S. 312, 325, 327 (1893)).
[147] *Penn Cent. Transp. Co.,* 438 U.S. at 127.
[148] *Id.* at 143 n.6.
[149] *Md. Shall Issue*, 963 F.3d at 365-66.
[150] *Ruckelshaus*, 476 U.S. at 1007.
[151] Ira S. Matsil, *Government Seizures of Trade Secrets: What Protections Does the Takings Clause Provide*, 48 SMU L. REV. 687, 707-08, 710 (1995), https://scholar.smu.edu/smulr/vol48/iss3/8.
[152] *Id.* at 707.
[153] *Id.* at 707-08.
[154] *Id.* at 707, 710.
[155] *COVID Link Privacy Policy, supra* note 46; Matsil, *supra* note 151, at 707-08, 710.
[156] *COVID Link Privacy Policy, supra* note 46; Matsil, *supra* note 151, at 707-08, 710.
[157] The constitutional right to freedom of movement is beyond the scope of this comment.

assuring app users that certain classes of information will not be collected, but aggregated data can be received from third parties.[158] Furthermore, the MD COVID Alert Privacy Policy relies on Senate Bill 3861, which in turn gives security enforcement authority to the FTC.[159] As the FTC complaint against Zoom Video Communications, Inc. illustrates, the FTC does not always punish obligations to consumers that are subsequently breached.[160] Takings jurisprudence relies upon fact-specific inquiries.[161] Litigation would be necessary to resolve whether mandatory contact tracing conflicted with the Maryland Constitution.[162] Fact findings would be required to determine whether a confidential relationship exists between a user, the State, contact tracing app developer and/or device manufacturer.[163] If a confidential relationship exists, fact findings would be required to determine whether trade secrets protected under the MUTSA were voluntarily disclosed to the State (app developer and/or device manufacturer) based on an investment-backed expectation and whether there was an expectation that the trade secrets would not be disclosed.[164] Fact findings will also be required to determine whether a disclosure breached a duty of fidelity and trust.[165]

IV. SOLUTION

The MUTSA and common law provide inadequate protections. Applying the six trade secret classification factors set forth in Section II.B., digital contact tracing could expose trade secrets.[166] Trade secret information is potentially known outside of the business.[167] Employees using smart devices can reasonably be expected to understand that data on their devices can include trade secrets.[168] If contact tracing is mandated by the State, a business may be powerless to guard the secrecy of trade secret information in the face of claims by the State that no guarantees as to secrecy will be

---

[158] *COVID Link Privacy Policy*, *supra* note 46.
[159] *MDH Policy*, *supra* note 117 at 2-3, at 2-3; S. 3861, *supra* note 121 at § 10(a)(1)(A).
[160] *See Zoom Video Commc'n, Inc.*, *supra* note 128.
[161] *Penn. Cent. Transp. Co.,* 438 U.S. at 124.
[162] *Id.*
[163] *See supra* Section II.B.
[164] *See supra* Part III.
[165] *See supra* Part III.
[166] *See Bond*, 127 Md. App. 365, 372, 732 A.2d 970, 973 (1999) (citing *Space Aero Prod. Co.*, 238 Md. at 110, 206 A.2d at 82 (quoting RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. LAW INST. 1939))).
[167] *See* Moseman, *supra* note 12; *see* Walsh, *supra* note 12; *see* Sly, *supra* note 12; *see* Hsu, *supra* note 12; see Warzel & Thompson, *supra* note 17.
[168] *See Bond*, 127 Md. App. 365, 372, 732 A.2d 970, 973 (1999) (citing *Space Aero Prod. Co.*, 238 Md. at 110, 206 A.2d at 82, (quoting RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. LAW INST. 1939))); *see also COVID Link Privacy Policy, supra* note 46.

maintained.[169] Trade secrets by their very nature are valuable in competitive marketplaces.[170] Fact findings are necessary to determine the amount of effort or money spent in developing the trade secrets in question.[171] Finally, identification of trade secret type information is easily acquired from compiled smart device data.[172] Trade secrets claimants must therefore understand what data they have and how it is potentially being disclosed. If trade secrets reside on devices that include data that can be aggregated from multiple sources and later revealed, the question of whether trade secrets have been lost through a failure to exercise due diligence, misappropriation, or a government taking will require a fact-specific inquiry.[173] As a starting point, businesses should understand the types of data they possess; how the data could be aggregated; whether any restrictions could be implemented to limit aggregation; and whether data can legitimately be de-identified or whether de-identification is a fiction.[174] From there, businesses and their employees can determine whether to participate in activities for which data is collected and transmitted to others, such as digital contact tracing.

A. If Contact Tracing Remains Voluntary, App Developer Disclosures Require Improvement.

The MD COVID Alert Privacy Policy explicitly defines "voluntary" as "an affirmative express consent that shall be freely given and nonconditional."[175] Notably, the policy does not use the word "informed." Informed consent, by contrast, is defined as "a person's agreement . . . made with full knowledge of the risks involved and the alternatives."[176]

1. Maryland Should Adopt a Mortgage "Truth in Lending" Approach to App Disclosures.

---

[169] *See generally Ruckelshaus*, 467 U.S. at 987 (1984).
[170] *See* Hull, *supra* note 48.
[171] *See generally Penn Cent. Transp. Co*., 438 U.S. at 124.
[172] *E.g., Global Heatmap*, *supra* note 11; *see also* Warzel & Thompson, *supra* note 17.
[173] *See Space Aero Prod. Co.*, 238 Md. at 112-15, 208 A.2d 883-85; *Penn Cent. Transp. Co.*, 438 U.S. at 124.
[174] Eric J. Pennesi and Katherine B. O'Keefe, *Use of Aggregated Data in Artificial Intelligence Solutions*, TECH & SOURCING @ MORGAN LEWIS (Oct. 28, 2020), https://www.morganlewis.com/blogs/sourcingatmorganlewis/2020/10/use-of-aggregated-data-in-artificial-intelligence-solutions#page=1; *See also How Crisis Sparks Innovation: Intellectual Property in Distress Markets*, AON: THE ONE BRIEF (Aug. 26. 2020), https://theonebrief.com/how-crisis-sparks-innovation-intellectual-property-in-distressed-markets/; Warzel & Thompson, *supra* note 17.
[175] *MDH Policy*, *supra* note 117, at 2.
[176] *Informed Consent*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Maryland should adopt a two-prong approach to app privacy policy disclosures to facilitate understanding of the type and quantity of data collected by apps. The two-prong approach would utilize summary and long form disclosures backed by civil penalties for non-compliance. Summarizing data collection using methods employed by MIT Technology Review, the Apple "nutrition label," or some other summary approach together with long-form disclosures will facilitate a better understanding of the type, scope, storage duration, and other factors in language that is easy to understand and not disguised in the mystique of "the app will not function properly if permission is not granted."[177] Such language is often self-serving to the interests of the app develop and of marginal benefit to the non-tech-savvy user.

Mortgage truth in lending statements may provide a model.[178] In accordance with Maryland's Commercial code, a lender shall provide the borrower with a written statement detailing: the total loan principal to be paid; total amount financed; annual effective interest rate; and payment itemization including interest.[179] This one page document summarizes what is otherwise included in a packet comprising tens of pages.

By adopting a truth in lending approach to app disclosures, trade secret claimants can be assured that developer self-reported content is backed by the force of law that will include penalties for misrepresentations or non-compliance.[180] For example, civil penalties for non-compliance with federal truth in lending requirements can include damages awards to borrowers for actual damage.[181] By comparison, violators of Maryland's usury laws could forfeit to the borrower up to three times the amount of interest and charges collected in excess of statutory limits and be found guilty of a misdemeanor subject to a $1,000 fine and/or up to one year in prison.[182] The MD COVID Alert Privacy Policy charges the FTC with policing compliance.[183] As recent new headlines indicate, data breach disclosures are not always reported to victims.[184]

---

[177] *See generally* Patrick Howell O'Neill, Tate Ryan-Mosley & Bobbie Johnson, *A Flood of Coronavirus Apps are Tracking Us. Now it's Time to Keep Track of Them*, MIT TECH. REV. (May 7, 2020), https://www.technologyreview.com/2020/05/07/1000961/launching-mittr-covid-tracing-tracker/.
[178] MD. CODE ANN., COM. LAW §§ 12-106(b)(1), (c) (West 2021).
[179] *Id.*
[180] *Cf.* COM. LAW § 12-114(c) (West 2021) (defining civil penalties for violations of §§ 12-106(b), (c)).
[181] 15 U.S.C.A. § 1640(a)(1) (West 2021).
[182] COM. LAW § 12-114 (West 2021).
[183] *MDH Policy*, *supra* note 117 at 5.
[184] *Zoom Video Commc'n, Inc., supra* note 128, at 4.

2. MIT Technology Review's Approach to Understanding Contact Tracing Apps

MIT Technology Review published an article detailing the features of the multitude of available contact tracing apps.[185] Magazine staff captured principles informed by the American Civil Liberties Union and asked five questions of worldwide contact tracing apps: "Is it voluntary . . . Are there limitations on how the data gets used . . . Will data be destroyed after a period of time . . . Is data collection minimized . . . Is the effort transparent . . . ." [186] For the Maryland COVID Alert, MIT Technology Review Staff identified an assortment of features including population; target penetration; voluntariness; non-public health use restrictions; data destruction; data collection minimization; and transparency.[187] More can be learned and quickly digested about Maryland's COVID Alert from the MIT Technology Review COVID Contact Tracing Tracker summary than from any of several the official pieces of documentation associated with the app.[188]

3. Apple "Nutrition Labels"

To help users better understand the type of data collected and privacy practices employed by specific apps, Apple requires that developers provide consumers with both summary and long-form privacy policy disclosures.[189] Colloquially referred to as the Apple "nutrition label," apps will employ iconography and use concise language to assist users in understanding the

---

[185] O'Neill, Ryan-Molsey & Johnson, *supra* note 177.

[186] *MIT Technology Review's Covid [sic] Tracing Tracker DB*, MIT TECH. REV. [hereinafter *COVID Tracing Tracker DB*], https://docs.google.com/spreadsheets/d/1ATalASO8KtZMx__zJREoOvFh0nmB-sAqJ1-CjVRSCOw/edit#gid=1464910624 (last updated Jan. 25, 2021, 12:05 PM) (Selecting Excel tab for the United States, seven of twenty-eight states utilized the Google Apple Exposure Notification Express platform for contract tracing.); O'Neill, Ryan-Molsey & Johnson, *supra* note 177 (The database also investigated the technology employed by the app which included: tracking a device's movements using GPS or cell tower triangulation; Bluetooth proximity tracking; joint Google/Apple API and whether the app employs Bluetooth-based, open-source decentralized privacy-preserving proximity tracing ("DP-3T") that only stores contact logs on a user's device "so that no central authority can know who has been exposed.").

[187] *COVID Tracing Tracker DB*, *supra* note 186.

[188] *See MDH Policy*, *supra* note 117, at 1; *see MD COVID Alert*, *supra* note 35.

[189] *Compare COVID Tracing Tracker DB, supra* note 186, *with App Privacy Details on the App Store*, APPLE, https://developer.apple.com/app-store/app-privacy-details/ (last visited Nov. 10, 2020).

type and scope of data collected.[190] The collected information list is lengthy and can include: health information; precise or coarse location of a user or device; user personally sensitive information (including trade secrets); how data types are linked to a user's identity by the developer or third-party partners; whether the developer or third-party partner uses app data to track users and for what purpose; and more.[191] While this listing of potentially collected information is extensive, the onus remains with the user to assess trust or benefits of disclosure to the app developer against the risk that the developer is not exercising fair play.[192] All developer provided information is self-reported.[193]

V. CONCLUSION

There is a need to balance legitimate societal health concerns against corporate trade secret concerns. Unfortunately, there is no mathematical formula for determining whether a claimant possesses trade secrets, or whether trade secrets have been misappropriated or taken. In all cases, fact-specific inquiries are required, and litigation is costly.

By implementing a truth in lending approach to voluntary COVID-19 contact tracing disclosures and including civil penalties for non-compliance, businesses are in a better position to assess the risks and benefits of including trade secret data on smart devices.

A solution that takes into consideration competing business, privacy and governmental interests is complicated but necessary because of the possible deleterious effects that extend beyond Maryland's borders. Litigating trade secret misappropriation in response to unauthorized disclosures or takings resulting in the destruction of trade secret value could harm Maryland small businesses or the State treasury. A more proactive approach of having business understand the scope, duration, retention, and destruction policies in easy-to-understand language will help trade secrets claimants determine whether to sequester commercially sensitive information and activities away from government mandated or voluntary contact tracing apps. Once disclosed, it is almost impossible to reclaim trade secrets.

---

[190] Ian Carlos Campbell, *Apple Will Require Apps to Add Privacy 'Nutrition Labels' Starting December 8th,* THE VERGE (Nov. 5, 2020, 8:42 PM), https://www.theverge.com/2020/11/5/21551926/apple-privacy-developers- nutrition-labels-app-store-ios-14.

[191] *App Privacy Details on the App Store,* APPLE, https://developer.apple.com/app-store/app-privacy-details/ (last visited Nov. 10, 2020).

[192] Campbell, *supra* note 190.

[193] *Id.*

COMMENT

REGULATING MEDICAL DEBT COLLECTION: HOW MARYLAND SHOULD IMPROVE PROTECTIONS FOR THOSE WHO CANNOT AFFORD CARE.

By: Lauren Stone*

I. INTRODUCTION

The primary intention of the Affordable Care Act was to make healthcare more accessible to everyone.[1] In spite of this goal, an increasing number of individuals avoid seeking care because of costs.[2] Due in part to decreasing rates of individuals who are insured, high deductibles, and a decrease in the amount of funding hospitals spend on charity care, many people are faced with medical bills not compensated by their insurers.[3] Many people simply cannot afford these bills.[4] According to a study by the Kaiser Family Foundation and the New York Times, twenty-six percent of Americans have struggled with paying medical bills.[5]

The median amount of these bills is often less than $1,000.[6] Despite the relatively low amounts of uncompensated bills, medical providers still

---

* Lauren Stone: J.D. Candidate, 2023, University of Baltimore School of Law. Special thanks to the University of Baltimore Law Forum staff for their collaboration during the editorial process. I would also like to thank my faculty advisor, Professor Emily Poor, for her insights, mentorship, and encouragement as I developed this comment. Finally, I would like to extend my gratitude to my fiancé, friends, and family for their patience, understanding and support.

[1] *See* Abbe R. Gluck & Thomas Scott-Railton, *Affordable Care Act Entrenchment*, 108 GEO. L.J. 495, 508 (2020) ("[M]ost policy experts agree that the ACA's primary focus is access--getting everyone insured so, in turn, everyone can access healthcare.").

[2] Lydia Saad, *More Americans Delaying Medical Treatment Due to Cost*, GALLUP NEWS (Dec. 9, 2019), https://news.gallup.com/poll/269138/americans-delaying-medical-treatment-due-cost.aspx.

[3] *See* Megan Leonhardt, *Nearly 1 in 4 Americans are Skipping Medical Care Because of the Cost*, CNBC: MAKE IT, (Mar. 12, 2020, 10:12 AM) https://www.cnbc.com/2020/03/11/nearly-1-in-4-americans-are-skipping-medical-care-because-of-the-cost.html.

[4] *Id.*

[5] Liz Hamel et al., *The Burden of Medical Debt: Results from the Kaiser Family Foundation/New York Times Medical Bill Survey*, KAISER FAMILY FOUND. 1 (Jan. 5, 2016), https://www.kff.org/wp-content/uploads/2016/01/8806-the-burden-of-medical-debt-results-from-the-kaiser-family-foundation-new-york-times-medical-bills-survey.pdf.

[6] *Id.* at 8.

sue their patients to recover the balance.[7] The impact of a judgment on a health care provider's budget is minimal, but the impact on a patient can be catastrophic.[8] In some parts of the country, patients are arrested and brought to court to deal with debts and are forced to pay before they are released.[9] In other parts of the country, medical providers garnish the patient's wages.[10] This disruption of regular income can cause the patient to fall behind on other financial responsibilities and can jeopardize their ability to maintain housing or transportation.[11]

To address these issues, some states have instituted requirements that health care providers make financial assistance available.[12] However, although financial assistance policies exist, rates at which assistance is offered have fallen.[13] In Maryland, many financial assistance applications

---

[7] *See, e.g.,* Sarah Whites-Koditscheck, *This Alabama Hospital Sued More Than 1,000 Patients Last Year. Some Owed Just $150*, AL.COM (Feb. 10, 2020 1:48 PM), https://www.al.com/news/2020/02/this-alabama-hospital-sued-more-than-1000-patients-last-year-some-owed-just-150.html; *see also* Meredith Cohn, *As Maryland Hospitals Continue to Sue Patients, Lawmakers Call for 'Guardrails,'* BALT. SUN (Feb. 28, 2020, 5:00 AM), https://www.baltimoresun.com/health/bs-hs-maryland-hospitals-sue-patients-20200228-apppmviai5ehxdlcxo4aecyzia-story.html (describing the average amount claimed by hospitals in medical debt collection suits in Maryland as less than $1,000).

[8] *See* Alec MacGillis, *One Thing the Pandemic Hasn't Stopped: Aggressive Medical-Debt Collection*, PROPUBLICA (Apr. 28, 2020, 2:05 PM), https://www.propublica.org/article/one-thing-the-pandemic-hasnt-stopped-aggressive-medical-debt-collection (explaining hospitals' collection on unpaid bills "makes up just a tiny sliver" of revenue); *see also* Selena Simmons-Duffin, *When Hospitals Sue for Unpaid Bills, It Can Be 'Ruinous' For Patients*, NPR, (June 25, 2019, 2:37 PM), https://www.npr.org/sections/health-shots/2019/06/25/735385283/hospitals-earn-little-from-suing-for-unpaid-bills-for-patients-it-can-be-ruinous.

[9] Jack Karp, *From Hospital to Jail: Debtors Face Growing Arrest Threat*, LAW 360 (Feb. 9, 2020, 8:02 PM), https://www.law360.com/articles/1241734/from-hospital-to-jail-debtors-face-growing-arrest-threat.

[10] Maya Miller & Beena Raghavendran, *Thousands of Poor Patients Face Lawsuits From Nonprofit Hospitals That Trap Them in Debt*, PROPUBLICA (Sept. 13, 2019, 5:00 AM), https://www.propublica.org/article/thousands-of-poor-patients-face-lawsuits-from-nonprofit-hospitals-that-trap-them-in-debt.

[11] David A. Super, *Acute Poverty: The Fatal Flaw in U.S. Anti-Poverty Law*, 10 U.C. IRVINE L. REV. 1273, 1295 (2020) ("Family financial crises can start a self-reinforcing downward spiral. When the sudden need to repair a home, or to pay a medical debt, strains the family's resources, it may be unable to pay timely for childcare or routine car repair, causing a sudden inability to attend work.").

[12] Jack Hoadley, Kevin Lucia, & Maanasa Kona, *States Are Taking New Steps to Protect Consumers from Balance Billing, But Federal Action Is Necessary to Fill Gaps*, THE COMM. FUND, https://www.commonwealthfund.org/blog/2019/states-are-taking-new-steps-protect-consumers-balance-billing-federal-action-necessary (last updated July 31, 2019).

[13] Tara Bannow, *Charity Care Spending Flat Among Top Hospitals*, MOD. HEALTHCARE (Jan. 6, 2018, 12:00 AM), https://www.modernhealthcare.com/article/20180106/NEWS/180109941/charity-care-

are denied.[14] While states struggle to formulate a solution to this crisis, low-income patients continue to struggle with collections from their health care providers.[15]

This comment will examine the current laws governing collection of uncompensated care, gaps in the protections offered, and propose solutions to seal those gaps. Section II will discuss the relevant laws that govern the collection of unpaid medical debt in Maryland, including the Affordable Care Act, the Consumer Credit Protection Act, and Maryland Health-Gen. 19-214 statutes.[16] Section III will discuss the shortcomings these statutes leave in protecting Maryland's residents and in overseeing hospitals.[17] Section IV will propose a three-part solution to close these gaps.[18] Section IV suggests amending the Maryland Health-Gen. statutes to raise the income qualification limit for free uncompensated care.[19] It also suggests increasing transparency and oversight for hospitals' administration of payment plans.[20] Finally, it suggests requiring prerequisites before hospitals may pursue patients for judgments.[21]

II. BACKGROUND

Medical debt in the United States is a national problem.[22] While some regulations guide medical debt and its collection at the federal level, many of these restrictions are not enforceable by patients, and states are left to implement and enforce baseline protections.[23]

---

spending-flat-among-top-hospitals; *see also* NAT'L NURSES UNITED, PREYING ON PATIENTS: MARYLAND'S NOT-FOR-PROFIT HOSPITALS AND MEDICAL DEBT LAWSUITS 31 (2020), https://act.nationalnursesunited.org/page/-/files/graphics/0220_JHH_PreyingOnPatients_Report-opt.pdf (noting charity care rates in Maryland have fallen over 35% since 2014).

[14] *See* NAT'L NURSES UNITED, *supra* note 13 at 59-61 (summarizing by hospital the percentage of charity care applications are denied. Many hospitals denied charity care applications at rates higher than 20% of the time, resulting in thousands of denials).

[15] *See* Sarah Kliff, *With Medical Bills Skyrocketing, More Hospitals Are Suing for Payment*, N.Y. TIMES (July 20, 2021), https://www.nytimes.com/2019/11/08/us/hospitals-lawsuits-medical-debt.html.

[16] *See infra* Section II.

[17] *See infra* Section III.

[18] *See infra* Section IV.

[19] *See infra* Section IV.A.

[20] *See infra* Section IV.B.

[21] *See infra* Section IV.C.

[22] *See generally* Hamel et al., *supra* note 5, at 1-2 (describing national background statistics on medical debt and its impact particularly on persons with lower income levels).

[23] *See* Erin Fuse Brown, *Consumer Financial Protection in Health Care*, 95 WASH. U. L. REV. 127, 134-35 (2017) (discussing state-led innovation to regulate medical debt collection practices due in part to gaps in federal polices).

A. Federal Restriction of Unpaid Medical Debt Collection

i. The Affordable Care Act – Congressional Guidelines on Charity Care

In response to skyrocketing insurance premiums, increasing medical costs, and denial of insurance coverage to persons with pre-existing conditions, Congress enacted the Affordable Care Act ("ACA").[24] In addition to encouraging individuals to obtain health insurance, the ACA also required non-profit hospitals to offer charity care as a condition for maintaining their tax exempt status.[25] The ACA further recognized that collecting outstanding medical debt through remedies such as referral to a collection agency or through litigation were "extraordinary collection actions" and should only be used after reasonable alternatives had been made.[26]

Some terms in the ACA left room for interpretation.[27] First, the financial assistance policy requirements at the federal level only apply to non-profit hospitals and do not apply to for-profit hospitals.[28] The ACA also requires that hospitals create their own financial assistance policies but does not provide specific guidelines dictating who should qualify for assistance.[29] The only concrete limitation requires that non-profit hospitals do not charge uninsured patients who qualify for charity care more than they would charge insured patients.[30] Finally, this portion of the ACA is within the tax code, and there is no private right of action for consumers or medical debtors to enforce the charity care requirements.[31] While a non-profit hospital could

---

[24] Nat'l Conf. of State Legis., THE AFFORDABLE CARE ACT (2011) https://www.ncsl.org/portals/1/documents/health/HRACA.pdf.
[25] 26 U.S.C. § 501(r)(4) (2021); *see also* Gluck & Scott-Railton, *supra* note 1.
[26] 26 U.S.C. § 501(r)(6) (2021).
[27] *See* Andrea Bopp Stark, *An Ounce of Prevention: A Review of Hospital Financial Assistance Policies in the States*, NAT'L CONSUMER L. CTR. 7 (Jan. 2020), https://www.nclc.org/images/pdf/medical-debt/report-ounce-of-prevention-jan2020.pdf (generally discussing the lack of enforcement power available under the ACA patients due to hospitals being responsible to create their own financial assistance polices).
[28] 26 U.S.C. §501(r)(1) (2021).
[29] *See* STARK, *supra* note 27; *see also* Erin C. Fuse Brown, *Fair Hospital Prices Are Not Charity: Decoupling Hospital Pricing and Collection Rules From Tax Status*, 53 UNIV. LOUISVILLE L. REV. 509, 530 (2016) (explaining that the ACA's ambiguity allowed hospitals to implement "stingy" financial assistance plans or to make the application process too difficult for patients to qualify).
[30] 26 U.S.C. § 501(r)(5) (2021).
[31] *Id.* § 7801(a)(1).

lose its tax-exempt status if it failed to have a financial assistance policy, the penalty is rarely enforced.[32]

ii. The Federal Poverty Level and Income Based Healthcare Eligibility

The Federal Poverty Level ("FPL") was developed in the 1960's by the Social Security Administration to measure the number of people in poverty; this measure was based primarily on the average cost of food multiplied by three to account for other family expenses.[33] The basic construction of the measure remains the same and forms the basis to determine eligibility for many federal and state programs.[34] Under the ACA, people with income under 138% of the FPL may be eligible for Medicaid, while people with income between 100% - 400% of the FPL may be eligible for lowered health insurance premiums.[35]

Prior to the ACA, there were government programs devoted to covering individuals in vulnerable circumstances.[36] These included Medicaid, which covered people with low household income, and Medicare, which covered seniors.[37] The ACA offered an optional expansion of Medicaid, which raised the income eligibility limits to 138% of the Federal Poverty Level.[38] The ACA also provided means for people who did not qualify for Medicaid to purchase health insurance at a lower cost subsidized by the government, which people could later repay from their tax refunds.[39]

---

[32] *See* Brandon Huber, *Implementing 501(r): Has 501(r) Lived Up to its Intended Purpose? And what the IRS' 2017 Revocation Action Means For The Tax-Exempt Hospital Community*, 2 BELMONT HEALTH L. J. 1, 14-15 (2018) (describing the IRS' rare enforcement of non-profit hospitals' compliance with the community benefit and charity care standards in the statute).

[33] Off. of the Assistant Sec'y for Plan. & Evaluation, *Frequently Asked Questions related to the Poverty Guidelines and Poverty: How was the Poverty Line Developed?* (Dec. 27, 2020) https://aspe.hhs.gov/frequently-asked-questions-related-poverty-guidelines-and-poverty#developed.

[34] *Id.*

[35] *Federal Poverty Level (FPL)*, U.S. CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.healthcare.gov/glossary/federal-poverty-level-FPL/ (last visited Jan. 30, 2022).

[36] *What's Medicare? What's Medicaid?,* U.S. CTRS. FOR MEDICARE & MEDICAID SERVS. (2020), https://www.medicare.gov/Pubs/pdf/11306-Medicare-Medicaid.pdf.

[37] *Id.*

[38] STARK, *supra* note 27, at 6 (summarizing the ACA's expansion of health insurance plans both for Medicaid eligibility and for subsidized marketplace plans).

[39] *See id.*

Nearly all states have adopted the Medicaid expansion.[40] However, states that adopted higher Medicaid eligibility thresholds have a "coverage gap," where their poorest citizens, in some cases earning as low as forty-one percent of the FPL, do not qualify for Medicaid but cannot afford even subsidized insurance premiums.[41]

Although the percentage of individuals covered by insurance increased once the ACA was passed, charity care rates declined.[42] Thousands of low-income patients were not offered, or did not qualify for, financial assistance but still could not afford care.[43] Hospitals are responsible for implementing their own financial assistance policies and are the sole arbiter of whether patients qualify for assistance at all.[44] Patients who cannot pay for medical treatment are subjected to enhanced methods of collection, including referral to collection agencies, lawsuits, and wage garnishments.[45]

iii. Federal Limits on Wage Garnishment

In part as a response to unrestricted garnishments that consumed the wages of the working class, Congress enacted the Consumer Credit Protection Act.[46] In enacting the statute, Congress limited the amount of wages that could be withheld from a debtor to repay a debt.[47] Congress sought to remedy this imbalance by implementing the Consumer Credit Protection Act to protect debtors by limiting the sums that could be withheld from their wages to the lesser of (i) the amount by which the debtor's disposable wages exceed thirty times the federal minimum wage; or (ii)

---

[40] *See* Rachel Garfield, Kendal Ortega & Anthony Damico, *The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid*, KAISER FAM. FOUND., (Jan. 21, 2021) https://www.kff.org/medicaid/issue-brief/the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicaid/.

[41] *See id.*

[42] Dan Diamond, *How Hospitals Got Richer Off Obamacare*, POLITICO (July 17, 2017, 5:00 AM), https://www.politico.com/interactives/2017/obamacare-non-profit-hospital-taxes/.

[43] *See* NAT'L NURSES UNITED, *supra* note 13, at 9 (describing generally the prevalence, process, and impact of hospitals' debt collection from patients).

[44] Jordan Rau, *Patients Eligible For Charity Care Instead Get Big Bills*, KAISER HEALTH NEWS (Oct. 14, 2019) https://khn.org/news/patients-eligible-for-charity-care-instead-get-big-bills/.

[45] Wendi Thomas, *Profiting From the Poor: The Nonprofit Hospital That Makes Millions, Owns a Collection Agency, and Relentlessly Sues the Poor*, PROPUBLICA (Jun. 27, 2019, 6:00 AM), https://www.propublica.org/article/methodist-le-bonheur-healthcare-sues-poor-medical-debt.

[46] 15 U.S.C. § 1671 (2021); *see also* Faith Mullen, *Fifty Years After the Consumer Credit Protection Act: The High Price of Wage Garnishments*, 45 MITCHELL HAMLINE L. REV. 191, 200 (2019) (describing the status of wage garnishments before the Consumer Credit Protection Act and summarizing the wage garnishment protections the Act instituted).

[47] 15 U.S.C. § 1673 (2021).

twenty-five percent of the debtor's disposable wages.[48] This rule sets the minimum level of protection for debtors; states are free to enact higher levels of protection.[49] Because medical debt is often collected through the same types of wage garnishment as other debts subject to section 1673, state regulation that recognizes additional protections for medical debt can add nuance to interpretation of the statutes.[50]

B. State Trends in Regulating Unpaid Medical Debt

Individual states have taken a variety of approaches to address medical debt protections for low-income patients.[51] For example, California has one of the strictest income protection guidelines; it requires all hospitals provide discounted or charity care for patients with household incomes lower than 350% of the FPL.[52] California also limits the types of patient assets hospitals may consider when evaluating patient eligibility for financial assistance.[53] Several other states require that hospitals provide free medical care to patients with household incomes below a designated threshold, usually between 100-200% of the FPL.[54] States vary on whether the requirements apply to all hospitals and how patients demonstrate qualification for charity care.[55] A few states have implemented their own financial assistance programs for low-income residents instead of requiring hospitals to do so.[56] Some states have also considered increasing their protections for residents subjected to medical debt collection.[57]

---

[48] *Id.* § 1673(a).
[49] *See* Mullen, *supra* note 46, at 202-03 ("Although many states adopted the federal formula for calculating the amount of a wage garnishment, some states excluded higher amounts...Federal law controls unless state law is more generous.").
[50] *Id.*
[51] *See* Fuse Brown, *supra* note 23, at 171-72 (describing the broad range of states' restrictions on hospital debt collection practices, including limits on amounts that can be charged, financial assistance policies, and debt collection strategies).
[52] CAL. HEALTH & SAFETY CODE § 127405 (2021).
[53] *See id.* § 127405(c).
[54] *See* STARK, *supra* note 27, at 19-21 (summarizing financial assistance policy requirements mandated by ten individual states for all hospitals, whether nonprofit or for-profit hospitals).
[55] *See id.* at 11, 22 (summarizing financial assistance policy requirements mandated by three individual states for nonprofit and state-owned hospitals).
[56] *See id.* at 12, 23 (summarizing financial assistance policies directed and funded by Colorado, Massachusetts, and South Carolina individually rather than hospitals in those states).
[57] *See e.g.*, H.B. 1089, 72nd Leg., 1st Sess. (Colo. 2019) (proposing a ban on medical wage garnishment for patients with incomes below 400% of the FPL); H.D. 2346, 111th Leg., 2d Sess. (Tenn. 2020) (proposing the same as Colorado); *see also* H.D. 959, 2020 Leg., 122d

C. Maryland's Restrictions Governing Unpaid Medical Debt

i. Statutes Regulating Collection of Medical Debt Through the Judicial System

In Maryland, if a hospital or healthcare provider is unable to collect an unpaid medical debt within a satisfactory time, it will use the court system to collect the debt.[58] Since most of the debts are under $1,000, claims to collect them are filed in Maryland's district courts.[59] Parties are not permitted to exchange discovery in small claim district court actions.[60] Although this limitation would not impact a hospital, it prevents defendants from accessing information needed to prove a defense, such as their qualification for charity care.[61] Jury trials are not permitted for small claims.[62] The Maryland Rules of Evidence do not apply, making a defendant's evidentiary objections inapplicable.[63]

Most district court cases involving debt collection claims result in a judgment in favor of the creditor, after which a hospital may garnish the patient's assets.[64] If the debt is not completely paid within twelve years, the

---

Sess. (Fl. 2020) (suggesting health providers evaluate patients for payment plans as a prerequisite to filing collection suits).

[58] *See* NAT'L NURSES UNITED, *supra* note 13, at 10 (detailing Maryland hospitals' long history of suing patients for uncompensated care).

[59] *Id.* at 16 (detailing the median judgment Maryland hospitals obtained by county); *see also* MD. CODE ANN., CTS. & JUD. PROC. § 4-405 (2021) (district courts have exclusive jurisdiction of legal claims under $5,000 and are limited in terms of discovery, evidence, and trial procedure).

[60] *See* Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 205 (2014) (describing procedural and evidentiary hurdles faced by consumers in defending debt collection actions in Maryland District Courts).

[61] *Id.*

[62] *Id.*; *see also* Md. Code Ann., CTS. & JUD. PROC. § 4-402(e) (2022) ("[I]n a civil action in which the amount in controversy does not exceed $25,000 ... a party may not demand a jury trial."); *see also* Fred Schulte and James Drew, *Their Day in Court*, BALT. SUN (Dec. 22, 2008, 3:00 AM), https://www.baltimoresun.com/news/nation-world/bal-te.hospitaldebt22dec22-story.html.

[63] Md. Rule 5-101(b)(4) ("The rules in this Title other than those relating to the competency of witnesses do not apply to...[s]mall claim actions under Rule 3-701...").

[64] *See* Md. Rule 3-646; *see also* MD. CODE ANN., COM. LAW § 15-602 (2021); *see also* Holland, *supra* note 60, at 212-13 (generally describing outcomes in debt collection suits from sample where creditor plaintiffs obtained judgments in 72% of cases); *see also* NAT'L NURSES UNITED, *supra* note 13, at 18 ("For medical debt lawsuits, the imbalance of knowledge and resources between the defendant/ patient and the plaintiff/hospital all but guarantees judgments for the hospital, regardless of the actual details of the case.").

hospital may renew the judgment, resulting in a quasi-permanent attachment of the patient's wages.[65] Not only may hospitals collect the principal balance of the medical debt and costs awarded by the court, but also interest on that judgment.[66] In Maryland, the post-judgment interest rate is ten percent.[67] Patients could end up paying more than the cost of their care.[68]

ii. Statutes Regulating Hospitals' Financial Assistance Policies and Collection of Medical Debt

Prior to the ACA, the Maryland General Assembly enacted its Community Health Care Access and Safety Net Act of 2005 ("CHCA").[69] Similar to the ACA, the purpose of this legislation was to improve low-income Marylander's access to healthcare.[70] The CHCA required hospitals to develop financial assistance policies to be posted in a "conspicuous place."[71] The CHCA also delegated to the Maryland Community Health Resources Commission and Health Services Cost Review Commission ("Commission") responsibility for providing oversight on hospital's financial assistance policies and debt collection practices.[72] Additionally, the Commission was charged with developing a financial assistance application form which each hospital was required to use to determine patient eligibility under its financial assistance policy.[73] Under this version of the act, there was no specific threshold identifying which income levels qualified for financial assistance.[74] The CHCA charged the Commission with enforcement of the act generally,

---

[65] *See* Md. Rule 3-625 ("A money judgment expires 12 years from the date of entry or most recent renewal. At any time before expiration of the judgment, the judgment holder may file a notice of renewal and the clerk shall enter the judgment renewed.").
[66] MD. CODE ANN., CTS. & JUD. PROC. § 11-107 (2021).
[67] *Id.* § 11-107(a).
[68] *Cf.* Mike Bevel, *Idaho Seems Set to Review Legislative Proposal That Would Limit Medical Debt Collection*, INSIDE ARM (Jan. 30, 2020, 10:09 AM), https://www.insidearm.com/news/00045868-idaho-seems-set-review-legislative-propos/. (While the subject of this article occurred in Idaho, the similar problem can be analogized to Maryland – a patient starts off with uncompensated care that quickly balloons into a much greater balance.)
[69] Community Health Care Access and Safety Net Act of 2005, H.D. 627, 2005 Leg., 420th Sess. (Md. 2005) (enacted).
[70] *See* Fiscal and Policy Note to Md. H.B. 627, https://mgaleg.maryland.gov/2005rs/fnotes/bil_0007/hb0627.pdf (identifying the purpose of the proposed legislation was to "increase access to health care for lower-income individuals and provide resources to community health resource centers…around the State.").
[71] MD. CODE ANN., HEALTH-GEN. § 19-214.1 (2005) (amended 2022).
[72] *Id.*
[73] *Id.*
[74] *See id.*

but did not indicate what penalties could befall a hospital for failure to comply with the financial assistance provisions.[75]

From 2009 to 2010, the General Assembly amended the statutes relating to hospitals' financial assistance policies ("the Health-Gen. Statutes").[76] The 2009 statute established baseline income qualification parameters for charity care.[77] It required that hospitals create a means for patients to learn that financial assistance was available.[78] The statute also proscribed the sale of medical debts to collection agencies, and imposed a fine for a hospital's "knowing violation" of any provision of the Health-Gen. statutes.[79] The 2010 version built on the statute by implementing an upper limit for patients to qualify for reduced-cost services and establishing how patients could demonstrate their qualification.[80] The 2010 amendments instituted a refund policy requiring hospitals to voluntarily refund and vacate judgments obtained against patients it later found to be eligible for financial assistance.[81] However, while the language indicated that vacating judgments was required, the relief offered in the statute was subject to self-enforcement by hospitals since they were responsible for evaluating patients for financial assistance.[82]

In the early versions of the statutes, the only oversight enforcing hospitals' compliance with the statutes was through the Commission.[83] Hospitals were responsible for administering their own financial assistance policies, and the Commission's ability to intervene was largely limited to its

---

[75] *Id.* (noting the statute does not indicate penalties).
[76] Act of May 7, 2009, ch. 310, 2009 Md. Laws 1580; Act of May 7, 2009, ch. 311, 2009 Md. Laws 1587 (current version at MD. CODE ANN., HEALTH-GEN. §§ 19-214.1 to 19-214.3 (2022); *see also* Act of Apr. 13, 2010, ch. 60, 2010 Md. Laws 700; Act of Apr. 13, 2010, ch. 61, 2010 Md. Laws 709 (current version at MD. CODE ANN., HEALTH-GEN. §§ 19-214.1 to 19-214.3 (2022), MD. CODE ANN., HEALTH-GEN. § 19-350(b) (2010)).
[77] MD. CODE ANN. HEALTH-GEN. § 19-214.1 (2009) (amended 2022).
[78] *Id.* § 19-214.1(b).
[79] MD. CODE ANN. HEALTH-GEN. § 19-214.2(b) (2009) (amended 2022); *see also* MD. CODE ANN. HEALTH-GEN. § 19-214.3 (2009) (amended 2020).
[80] MD. CODE ANN. HEALTH-GEN. § 19-214.1(b)(4)-(6) (2010) (amended 2022) (patients with income below 500% of the FPL could qualify for reduced-cost service); *see also* MD. CODE ANN. HEALTH-GEN. § 19-214.1(a) (2010) (amended 2022) (identifying what the patient needs to do to demonstrate eligibility for financial assistance).
[81] MD. CODE ANN. HEALTH-GEN. § 19-214.2(b)(7)-(9) (2010) (amended 2022).
[82] *Id.*
[83] *See generally* MD. CODE ANN. HEALTH-GEN. §§ 19-214.1 to 214.3 (2009) (amended 2022); MD. CODE ANN. HEALTH-GEN. §§ 19-214.1 to 214.3 (2010) (amended 2022)(detailing requirements and precautions hospitals should take when evaluating people for financial assistance or when collecting uncollected care costs, but not describing any corrective action the Commission should take when addressing failure to comply with the requirements).

ability to levy fines.[84] Patients did not have a private right to challenge hospitals' policies on financial assistance determinations.[85] Hospitals' rates of filing collection cases did not substantially decline following the 2009 and 2010 amendments.[86] The collection suits continued at the same rates and for the same limited amounts.[87] The General Assembly once again sought to address these concerns in the 2020 session.[88]

To further address medical debt suits, the General Assembly adopted another amendment to the Health-Gen statutes.[89] The amendment increased the income limits on eligibility for free and reduced-cost care.[90] It also clarified that if hospitals were to consider household assets in addition to income when determining eligibility for a payment plan, certain assets and valuables could not be included.[91] The amendment also required that hospitals institute uniform policies in determining patient eligibility for financial assistance.[92]

Finally, the 2020 amendments required hospitals to report annually to the Commission: (i) the number of patients who applied for financial assistance; (ii) the rate and type of financial assistance offered; (iii) the rate of financial assistance denied; and (iv) the cost to the hospital and the amount

---

[84] MD. CODE ANN. HEALTH-GEN. § 19-214.3 (2010) (amended 2020) ("If a hospital knowingly violates any provision of § 19-214.1 or § 19-214.2 of this subtitle...the Commission may impose a fine not to exceed $50,000 per violation...").
[85] *Id.*
[86] *See* NAT'L NURSES UNITED, *supra* note 13, at 12 (summarizing the number of medical debt collection lawsuits filed by Maryland hospitals between 2009 and 2018; the number remained in the range of approximately 14,000 new cases filed per year, with a slight decrease in 2017 and 2018).
[87] *See id.* (describing the median amount of debt sought per lawsuit between 2009 and 2018 as $944).
[88] *See* Hannah Gaskill, *Md. Bills Would Protect Patients Struggling With Medical Debt*, WTOP (Mar. 1, 2020, 8:30 AM), https://wtop.com/maryland/2020/03/md-bills-would-protect-patients-struggling-with-medical-debt/.
[89] *See* Act of May 8, 2020, ch. 470, 2020 Md. Laws 470 (current version at MD. CODE ANN., HEALTH-GEN. §§ 19-214.1 to 19-214.3 (2022)).
[90] See MD. CODE ANN., HEALTH-GEN. § 19-214.1(b)(2) (2020) (amended 2022) (increasing income eligibility for free care to 200% of the FPL and requiring reduced-cost care be offered to those with incomes between 200-500% of the FPL); see also HEALTH-GEN. § 19-214.1(b)(7) (allowing eligibility to be presumed for patients who had already qualified for other forms of income-based government assistance).
[91] HEALTH-GEN. § 19-214.1(b)(8) (excluding from consideration as income assets such as the first $10,000 in monetary funds; $150,000 in equity on a principal residence; certain retirement income; one family car; funds already set aside in a Maryland 529 education account; and any other resources excluded under the Medical Assistance Program under the Social Security Act).
[92] *Id.* § 19-214.1(h)-(i) (describing criteria hospitals may use in evaluating patients under that hospital's financial assistance policy).

of aid offset by government assistance.[93] These amendments also created a process through which patients can file an administrative complaint with the Commission for hospitals' violation of the financial assistance or debt collection policy portions of the Health-Gen. statutes.[94] The amendments also provided patients an alternative means of enforcing the protections enacted in section 19–214.1 and section 19–214.2 by confirming that any violations of those statutes are also violations of the Maryland Consumer Protection Act.[95] This indirect measure of enforcement means that patients may indirectly enforce the protections by bringing an affirmative claim for damages under the Maryland Consumer Protection Act.[96]

iii. Proposed and Newly Enacted Legislation

During the 2020 Legislative Session, Delegate Charkoudian sponsored a bill proposing a comprehensive Medical Debt Protection Act.[97] The 2020 bill was withdrawn by its sponsor;[98] however, Delegate Charkoudian and her co-sponsors in the Senate reintroduced a new bill in the 2021 legislative session suggesting several of the same changes.[99] The bill proposed that the Commission conduct an annual review of the charity care applications and denials, and publish this information in a report available to the public describing the rates of denials along with demographic information.[100] This bill also proposed clearer requirements - to be created by the Commission – for payment plans between hospitals and patients.[101] While the first version of the bill suggested a ban on all medical debt

---

[93] *Id.* § 19-214.1(j).
[94] MD. CODE ANN., HEALTH-GEN. § 19-214.3(a)-(c) (2020).
[95] *Id.* § 19–214.3(d)(3).
[96] *See id.*; *see also* Fuse Brown, *supra* note 23, at 182 (suggesting that allowing patients to obtain relief under consumer protection statutes for medical billing abuses not only provides a remedy for patients but may attract attorneys willing to represent the patients).
[97] *See* Md. H.D. 1081, 2020 Leg., 441st Sess. (Md. 2020) (proposing that patients be evaluated for financial assistance before collection suits could be brought; proposing pre-suit notice be sent to patients; and prohibiting all collection suits under $5,000).
[98] *Health and Government Operations Committee Voting Record*, Md. H.D. 1081, 2020 Leg., 441st Sess. (Mar. 6, 2020).
[99] H.D. 565, 2021 Leg., 442d Sess. (Md. 2021) (enacted) (cross-filed with S.B. 514, 2021 Leg., 442d Sess. (Md. 2021) (enacted)).
[100] *See* Md. H.B. 565 (proposing an amendment to MD. CODE ANN., HEALTH-GEN. § 19-214.2(a) (2021)).
[101] *See id.* (proposing to add to HEALTH-GEN. § 19-214.2(e), which suggests guidelines for payment plans, including restriction of monthly payments to not require more than 5% of patient's monthly income; ensuring that the payments are more than the interest that accrues monthly; and requiring that hospitals demonstrate they have tried to work out a payment plan before filing suit).

collection cases under $1,000, the final enacted legislation requires that hospitals attempt in good faith to arrange payment plans before filing suit.[102] The amended version of the bill was passed by the General Assembly and became effective in January 2022.[103]

III. ISSUE

Maryland's failure to adequately regulate medical debt collection disproportionately harms its low-income residents because: (i) low-income individuals are already at increased risk of slipping into the poverty cycle; (ii) the existing restrictions do not provide enough oversight to adequately protect low-income patients; and (iii) the existing restrictions do not address the damage already done and still ongoing to low-income residents who were not qualified for financial assistance policies at the time they incurred a judgment.[104]

A. The Medical Debt Collection Statutes Setting Income Limits for Free Care Do Not Sufficiently Protect Maryland Residents Who Financially Struggle.

i. Statistics on the FPL, the Cost of Living, and Medical Debt in Maryland

In Maryland, the FPL is used to determine which patients qualify for free care and which patients qualify for reduced cost care or payment plans.[105] In 2020, the FPL for a family of four was $26,200.[106] The people who carry the burden of ineligibility for program assistance are often those who live just above program poverty guidelines – those who are living paycheck to paycheck and whose incomes are not "chronically" in poverty – but merely

---

[102] *See id.* (removing proposal to add a new section to HEALTH-GEN. § 19-214.2 that would prohibit hospitals from filing an action "against a patient to collect a debt owed on a hospital bill in an amount of $1,000.").
[103] *House Voting Record*, Md. H.B. 565 (Mar. 22, 2021); *Senate Voting Record*, Md. S.B. 514 (Apr. 8, 2021); Revised Fiscal and Policy Note to Md. H.B. 565, https://mgaleg.maryland.gov/2021RS/fnotes/bil_0005/hb0565.pdf; *see also* MD. CODE ANN., HEALTH-GEN. §§ 19-214.1 to 19-214.2 (2022).
[104] *See* Super, *supra* note 11, at 1278, 1280; *see also* Bannow, *supra* note 13; *see also* NAT'L NURSES UNITED, *supra* note 13, at 10-12.
[105] MD. CODE ANN., HEALTH-GEN. § 19-214.1(b)(2) (2022).
[106] Off. of the Assistant Sec'y for Plan. & Evaluation, *Poverty Guidelines*, (2020) https://aspe.hhs.gov/poverty-guidelines.

those who have had an unexpected life event that pushed them over the brink.[107]

Studies have shown that over one quarter of adults living in the United States have struggled to pay medical bills.[108] Two of the strongest predictors for whether someone will have trouble paying their medical bill include income level and insurance status (including whether the insurance policy has a high deductible).[109] Unlike predictable expenses such as rent, utilities or groceries, medical debt is not planned for, and many people are pushed into acute poverty because of an unplanned medical expense.[110] However, even relatively low sums can have a devastating impact on a family whose budget is already stretched thin.[111]

Although Maryland is among the wealthiest states, it also has a high cost of living.[112] The living wage in Maryland for a four-person household is $58,366 annually, which exceeds 200% of the FPL for a family of four (or $52,400).[113] Households in this range may be well-off compared to other parts of the country, but they do not make enough money in Maryland to sustain paying off debts that can threaten their ability to pay their other bills.[114]

In response to unpaid medical bills, hospitals have the option to collect from patients involuntarily through judicial proceedings.[115] Mirroring

---

[107] *See* Super, *supra* note 11, at 1280, 1289-90, 1292-93.
[108] *See* Hamel, *supra* note 5, at 1-2 (explaining that individuals reported struggling to pay medical bills over a 12-month period from 2015-16).
[109] *See id.* at 1-2.
[110] *See id.* at 3; *see also* Fuse Brown, *supra* note 23, at 136 ("The purpose of health insurance is to shield the consumer from the financial risks of health care consumption, which tends to be both unpredictable and extremely expensive.").
[111] *See* Hamel, *supra* note 5, at 8; *see also* Super, *supra* note 11, at 1289-90, 1294 (explaining that families living in acute poverty hover slightly above the poverty line but can experience brief periods where they live below the poverty line as a result of unexpected life events, including health-related incidents).
[112] NAT'L LOW INCOME HOUS. COALITION, OUT OF REACH 2020 REPORT – MARYLAND, (July 20, 2020) https://reports.nlihc.org/sites/default/files/oor/files/reports/state/MD-2020-OOR.pdf; *see also* Horus Alas, *The 10 Richest States in America*, U.S. NEWS (Mar. 11, 2021), https://www.usnews.com/news/beset-states/slideshows/10-wealthiest-states-in-america?slide=11.
[113] NAT'L LOW INCOME HOUS. COALITION, *supra* note 112; *see Poverty Guidelines*, *supra* note 106.
[114] *See* NAT'L LOW INCOME HOUS. COALITION, *supra* note 112, at 1; *see also* MARYLANDERS AGAINST POVERTY, MARYLAND POVERTY PROFILES (2020), http://mapadvocacy.org/wp-content/uploads/2020/02/Maryland-Poverty-Profiles_2020-FINAL.pdf.

[115] *See* Md. Rule 3-646; MD. CODE ANN., COM. LAW § 15-602 (2021).

the condition from the national level,[116] the average amount of medical debt in Maryland hospitals generally seek to recover through judgments is also low.[117] Public records indicate that judicial proceedings are not an effective way for hospitals to recover unpaid medical costs; while hospitals have obtained judgments against patients totaling over $268,711,620 between 2009 and 2018, only $59,000,000 has been recovered (through garnishment or other means).[118]

Conversely, the burden of a garnishment on a low-income household is very heavy.[119] When families are living paycheck to paycheck and a garnishment for a medical debt disrupts the amount of the paycheck, the family will have to decide which of their other expenses will have to go unpaid.[120] The same story played out for Darcel Richardson, a Baltimore resident – she had an unexpected medical procedure, and was left with a copay the insurer did not cover.[121] She tried to work out a payment plan with her hospital's collection attorney, but could not afford the plan due to her other costs of living.[122] Because she could not pay the debt, the hospital sued her and garnished her wages.[123] This caused her to miss or fall behind on her other payments.[124] This is a common story which has happened to many other Marylanders only to result in bankruptcy.[125]

ii. Low-income Patients will Avoid Seeking Medical Treatment if they are Concerned About Uncovered Costs.

Rather than face the possibility of ruining their finances over a medical bill they are unable to afford, many people simply avoid seeking

---

[116] *See* Hamel, *supra* note 5, at 8 (explaining that over 20% of persons surveyed indicated a struggle paying a medical debt less than $1,000).
[117] *See* NAT'L NURSES UNITED, *supra* note 13, at 12 (summarizing 145,746 medical debt collection cases filed in Maryland between 2009 and 2018, "the median amount of lawsuits filed was $944….").
[118] *See id.* at 11-12.
[119] *See* Brook E. Gotberg & Michael D. Sousa, *Moving Beyond Medical Debt*, 27 AM. BANKR. INST. L. REV. 93, 126 (2019) (discussing that while many low-income bankruptcy filers have other financial pressures, unexpected medical bills can be the "financial shock" that forces the bankruptcy filing).
[120] *See* Super, *supra* note 11, at 1295.
[121] MacGillis, *supra* note 8.
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *See* NAT'L NURSES UNITED, *supra* note 13, at 6, 10, 11; *see also Medical Debt Collection Fact Sheet*, NAT'L CONSUMER L. CTR. (2020), https://www.nclc.org/images/Medical-Debt-Collection.pdf.

necessary medical treatment.[126] Low-income people will delay obtaining necessary medical care if they are concerned about a bill at the end of the tunnel.[127] This creates a disparate level of care between social levels, and has a disproportionate impact on persons of color.[128] Delays in seeking treatment can also result in patients requiring more costly emergency care – which if patients are not able to afford will ultimately cost hospitals more in uncompensated care.[129]

B. The Existing Medical Debt Collection Statutes do not Provide Enough Oversight to be Adequately Implemented.

The latest amendment to the Maryland Health-Gen. statutes added more requirements for what should be included in a hospital's financial assistance policy than had previously been regulated.[130] However, as with the prior versions of the statute, hospitals are still tasked with implementing the Commission's financial assistance policies.[131] They are responsible for informing patients about financial assistance plans and how to apply.[132] They are still responsible for evaluating whether someone's income level qualifies for financial assistance.[133] Hospitals are permitted to use litigation to collect if the patient fails to complete an application or fails to qualify.[134] If history is any guide, this means that hospitals will continue to deny patients access to charity care and will continue to use litigation to collect bills.[135]

i. Years of Amendments to Medical Debt Statutes Demonstrate that Hospitals Are Not Equipped to

---

[126] NAT'L CONSUMER L. CTR., *supra* note 125.
[127] Saad, *supra* note 2.
[128] *See* Hamel, *supra* note 5, at 2-3 (describing discrepancies in rates of being insured as a predictor of difficulty paying medical bills); *see also* STARK, *supra* note 27, at 4 ("In general, people of color (Black, Latinx, Asian) are at higher risk of being uninsured.").
[129] Emily Gee & Topher Spiro, *Excess Administrative Costs Burden the U.S. Health Care System*, CTR. FOR AM. PROGRESS, (Apr. 8, 2019, 1:00 PM), https://www.americanprogress.org/issues/healthcare/reports/2019/04/08/468302/excess-administrative-costs-burden-u-s-health-care-system/.
[130] MD. CODE ANN., HEALTH-GEN. § 19-214.1 (2021).
[131] *Id.* § 19-214.1(b)(1).
[132] *Id.* § 19-214.1(c).
[133] *Id.* § 19-214.1(h).
[134] *Id.* § 19-214.2(b)(6).

[135] *See* NAT'L NURSES UNITED, *supra* note 13, at 11; *see also* Schulte & Drew, *supra* note 62; *see also* MacGillis, *supra* note 8 (demonstrating that since at least 2009 hospitals have regularly filed thousands of collection suits against patients without slowing their pace).

Consistently Implement Fair Financial Assistance Policies.

Maryland has sought to rectify the medical debt collection industry for years.[136] Since 2005, it has continued to add more requirements that instruct hospitals what should be included in their financial assistance policies.[137] However, in each iteration of the bill, hospitals retained power over crafting the policies, and the effect of those polices had no significant change in how hospitals collected from patients.[138] Hospitals continued filing thousands of small dollar medical claims each year from low-income individuals.[139] Many of these small claim lawsuits were for sums less than $500; and some are also still active due to judgment renewals.[140] Although the funds were available, the amounts of uncompensated care hospitals forgave under financial assistance policies actually decreased.[141] This phenomenon is not unique to Maryland and may be due in part to increased levels of persons being insured under the ACA; however, as the number of uninsured people has risen and as the personal tax mandate expired, there has been no corresponding increase in charity care offered by hospitals.[142]

ii. Hospitals Have No Oversight Ensuring the Payment Plans They Implement are Affordable.

While the Health Services Cost Review Commission is now responsible for creating financial assistance policies, the Commission lacks oversight for ensuring the policies are followed.[143] Once a patient has demonstrated their income and need for financial assistance, the hospital is responsible for arranging a payment plan or cost reduction plan to fit the patient's budget.[144] Although a patient may file an administrative complaint to the Commission if they believe the hospital incorrectly denied them financial assistance, the complaint will ultimately be referred to the Health Education and Advocacy Unit in the Maryland Office of the Attorney General to aid the patient in "filing and mediating a reconsideration

---

[136] *See* Community Health Care Access and Safety Net Act of 2005, H.D. 627, 2005 Leg., 420th Sess. (Md. 2005) (enacted).
[137] *Compare id.* § 2, *with* MD. CODE ANN., HEALTH-GEN. § 19-214.1.
[138] HEALTH-GEN. § 19-214.2; *see also* NAT'L NURSES UNITED, *supra* note 13, at 11-12.
[139] *See* Schulte & Drew, *supra* note 62.
[140] NAT'L NURSES UNITED, *supra* note 13, at 16.
[141] *Id.* at 30-31.
[142] Bannow, *supra* note 13.
[143] *See* HEALTH-GEN. § 19-214.1(b).
[144] *Id.* § 19-214.1(h).

request."[145] Neither the Commission nor the Health Education and Advocacy Unit have the ability to change a hospital's eligibility determination.[146] The only effective way for a patient to challenge an improper assistance evaluation would be to bring a private lawsuit between the patient and the hospital – which is often not a method easily available to low-income families.[147]

C. The Existing Statutes Do Not Address the Ongoing Harm to Maryland Residents Who Were Left Out of the Amendments.

i. The Amended Statutes do not Address Entered Judgments.

While the current Health-Gen statutes require hospitals to ensure patients are aware of the existence of financial assistance programs and how to apply, the statutes still allow hospitals to collect unpaid care by filing suit.[148] They do not require hospitals to offer financial assistance as a prerequisite to filing suit; they also do not require a certification that financial assistance has been evaluated or offered as a prerequisite to filing a suit.[149] While the Health-Gen. statute requires hospitals to vacate judgments obtained against patients who are later found to be eligible for free care as of the date they were served with the lawsuit, it does not require hospitals to review their old judgments or notify patients being garnished of the possibility of vacating the judgment.[150] The result of this deficiency is that hospitals can continue collecting on old judgments they obtained against patients years ago and which have accrued post-judgment interest that hospitals are allowed to retain.[151] Patients who are being garnished may not have been evaluated for financial assistance and do not have the option or leverage to obtain a more

---

[145] *Id.* § 19-214.3(a)(1).
[146] *See id.* § 19-214.3.
[147] *See* Sarah B. Schnorrenberg, *Mandating Justice: Naranjo v. Thompson as a Solution for Unequal Access to Representation*, 50 COLUM. HUM. RTS L. REV. 260, 262-63 (2019) ("Because there is no constitutional guarantee to legal assistance in civil matters, low-income individuals who do not qualify for or cannot otherwise access the limited avenues for legal assistance fall into a justice gap.").
[148] HEALTH-GEN. § 19-214.2(b)(6)-(7), (e)(1).
[149] *Id.* § 19-214.2(e)(5)(i).
[150] *Id.* § 19-214.2(b)(9).
[151] *See* NAT'L NURSES UNITED, *supra* note 13, at 10-12; *see also* Faith Mullen, *Another Day Older and Deeper in Debt: Mitigating the Deleterious Effect of Wage Garnishments on Appalachia's Low-Wage Workers*, 120 W. VA. L. REV. 973, 992-93 (2018) (discussing the issue of post-judgment interest, which, if bearing no relation to market rates only serves to punish the debtor); *see also* MD. CODE ANN., CTS. & JUD. PROC. § 11-107(a) (2021).

affordable payment plan, and for some, the only way out is through bankruptcy.[152]

ii. People Who Incurred Medical Debt Before the Amended Statutes May Have Been Denied Financial Assistance Based on Policies That Did Not Fairly Evaluate Income Level.

Prior to enactment of the new statutes, hospitals evaluated patients who applied for assistance under standards with lower income levels.[153] Many patients who applied for financial assistance based on these standards were denied charity care or other financial assistance.[154] Though hospitals could vacate the judgments they have and re-evaluate patients under today's more favorable standards, they in general have not done so, and in some instances, hospitals have judgments as old as 2005 which they have simply renewed and may continue collecting.[155] Due to the substantial interest rate, the amount of money that can be collected from the patient has in some cases tripled.[156] While this could be seen as a business-savvy return on investment, the person who ultimately must foot the bill is the patient who could not afford the medical bill in the first place.[157] Hospitals that already enjoy tax exempt status should not be gifted yet another way to enlarge their budgets by gaining additional revenue off Maryland's vulnerable residents.[158]

IV. SOLUTION

---

[152] *See* Gotberg & Sousa, *supra* note 119, at 101 (generally describing circumstances of modest medical debt and its presence in the bankruptcy filings of many debtors).

[153] *See generally* HEALTH-GEN. §§ 19-214.1 to 19-214.2 (2010) (amended 2022) (requiring hospitals to develop financial assistance and debt collection policies).

[154] *See* NAT'L NURSES UNITED, *supra* note 13, at 34-35 (summarizing Maryland hospitals' evaluation and denial of charity care applications at rates higher than 20% of the time, resulting in thousands of denials).

[155] *See, e.g.,* Peninsula Reg'l Med. Ctr. v. Taylor, No. 02-02-0001033-2005 (D. Ct. of Md. for Wicomico Cnty. 2006) (Md. Judiciary Case Search) http://casesearch.courts.state.md.us/casesearch/ (explaining that judgment for medical debt and attorney's fees combined was entered in favor of hospital and against patient in the amount of $172.45 on November 29, 2006, judgment was renewed on December 27, 2017, and a request for wage garnishment was filed on July 13, 2021).

[156] *See* Mullen, *supra* note 151, at 992 (describing the snowballing effect of interest accruing on judgments).

[157] *See id.* at 992-93 (when the interest rate on a judgment exceeds the market rate, the effect is profit for the judgment creditor).

[158] *See* NAT'L NURSES UNITED, *supra* note 13, at 10.

Maryland's failure to adequately regulate medical debt collection can be remedied by enacting further legislation.[159] Patients who could otherwise not afford care can be protected by a resolution increasing the income limit for free care.[160] The lack of enforceability present in the existing statutes can be addressed through legislation detailing financial assistance requirements and giving the responsibility of enforcement to a different government entity.[161] Hospitals' collection from patients through judgments can be reduced by requiring mitigation as a prerequisite to hospitals filing suit and by eliminating the judgments hospitals have already obtained.[162]

A. Increase Income Eligibility Levels for Free Care Where the Cost of Living Is Higher.

To counteract excessive medical debt collection, Maryland's General Assembly should amend MD. CODE ANN. HEALTH-GEN. § 19-214.1(b) to raise the income eligibility threshold for those who can qualify for free care.[163] While many states have similar income threshold requirements for charity care as Maryland, some states are beginning to enact legislation with higher upper thresholds for their charity care requirements.[164] For example,

---

[159] *See* Marceline White, *If Hospitals Want to be Better Members of Society They Should be More Lenient on Low-Income People With Medical Debt*, BALT. SUN, (Aug. 26, 2020, 11:04 AM), https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0827-medical-debt-20200826-tce4kfpsurb2nhf5yu7x5iges4-story.html.

[160] *Id.*

[161] *See* Fuse Brown, *supra* note 23, at 181 (suggesting a model debt collection practices policy in part because of hospitals' sole discretion to oversee their own financial assistance policies); *see also* Audrey Udashen, *Using Consumer Protection Laws to Ensure Consumers' Access to Affordable Healthcare*, NAT'L ASS'N OF ATT'YS GEN. (Aug. 2020), http://www.naagms.informz.net/naagms/data/images/2020.09.01%20AOM%20Formatted.pdf (describing positive results in charity care rates after Washington Attorney General brought enforcement action against hospitals).

[162] *Cf.* Ariel Speser, *Applying Lessons from Foreclosure Prevention to Medical and Student Loan Debt Among Low-Income Clients: A Practitioner's Note*, 15 SEATTLE J. SOC. JUST. 439, 454-56, 463 (2016) (suggesting foreclosure mediation could be an effective and analogous model to use in the context of medical debt given hospitals' inconsistent administration of charity care).

[163] *See* White, *supra* note 159.

[164] *See* Margarita Kustin, *A Prescription for Charity Care: How National Medical Debt Ills Can Be Alleviated by Integrating State Financial Assistance Policies into the Nonprofit Tax Exemption*, 42 SEATTLE U. L. REV. 965, 990 (2019) (suggesting states enact charity care requirements that mirror the 350% FPL threshold mandated by California); *see also* STARK, *supra* note 27, at 10-12 (identifying California and Connecticut's financial assistance requirements at 350% and 250% of the FPL respectively and Colorado's financial assistance policy for its state run program up to 250% of the FPL).

California's charity care statute requires hospitals to provide free care to residents with incomes of less than 350% of the FPL.[165] However, the statute allows rural hospitals to participate in financial assistance plans where free uncompensated care is offered to people at a lower income threshold.[166] Other states have also considered higher income eligibilities for free uncompensated care.[167]

Maryland should amend MD. CODE ANN. HEALTH-GEN. § 19-214.1(b) in a similar fashion. The current income guidelines for providing free care may provide enough relief in rural regions of the state where the cost of living is lower.[168] However, in the central regions of the state the current charity care guidelines do not reflect the higher cost of living.[169] The amended statute should increase the income guidelines for those qualifying for free uncompensated care to 350% of the FPL in the central regions of the state.[170] In Maryland, the cost of uncompensated care sought through lawsuits is slightly less than the excess funds hospitals have budgeted for uncompensated care.[171] Increasing the income level of people eligible for free care would increase low-income families' access to healthcare and decrease the likelihood that an unexpected life event forces them into a bankruptcy.[172]

Aspects of this solution may need further study. One potential area to examine is Maryland's all-payer rate-setting model.[173] The all-payer model

---

[165] CAL. HEALTH & SAFETY CODE § 127405.
[166] *Id.*
[167] *See* H.D. 1089, 72nd Gen. Assemb., 1st Sess. (Colo. 2019); H.D. 2346, 111th Gen. Assemb., 2d Sess. (Tenn. 2020); *see also* H.D. 959, 2020 Leg., 122d Sess. (Fl. 2020) (proposing to raise eligibility thresholds to allow more patients to qualify for charity care in part because the existing thresholds excluded working class families from relief).
[168] *See* NAT'L LOW INCOME HOUS. COAL., *supra* note 112; *see also* OFF. OF THE ASSISTANT SEC'Y FOR PLAN. AND EVALUATION, *Poverty Guidelines*, *supra* note 106.
[169] *See* NAT'L LOW INCOME HOUS. COAL., *supra* note 112; *see also Poverty Guidelines*, *supra* note 106.
[170] *See id.*
[171] *See* NAT'L NURSES UNITED, *supra* note 13, at 31 ("[T]he charity care rate support provided to hospitals over the last five years has exceeded the actual cost of charity care to the hospitals by more than $119 million ... This amount, coincidentally, is nearly the exact amount of medical debt the hospitals sought to recover through lawsuits over the same period.").

[172] *See* NAT'L CONSUMER L. CTR., *supra* note 125; *see also* Gotberg, *supra* note 119, at 100-01 (suggesting that Americans living paycheck to paycheck combined with higher deductibles and other medical costs works contributes to inability to afford care).
[173] *See* Fiscal and Policy Note to Md. H.B. 1081, 2020 Leg., 441st Sess. (Md. 2020), https://mgaleg.maryland.gov/2020RS/fnotes/bil_0001/hb1081.pdf; *see also* NAT'L NURSES UNITED, *supra* note 13, at 31-32 (describing relationship between all-payer model, costs and rate setting in general, and charity care); *see generally Health Facilities – Hospitals –*

is Maryland's system of controlling rates of health care by ensuring that all payers, including Medicaid and other insurers, pay the same rate for the same services to ensure that the total cost of care is compensated and budgeting remains predictable.[174] This system is only used in Maryland, and the current version has only been in place for a few years.[175] When the Commission considers Maryland hospitals' budgets and sets the rates for the total cost of care for all overhead, it also includes estimates projections for uncompensated care.[176] While the amount currently set aside would be sufficient to cover those who have been denied and collected upon, if more people are being qualified for free uncompensated care, hospital costs will rise.[177] This in turn will spread this cost among its expenses, where rates for the total cost of care could increase.[178]

B. Establish Oversight on Hospitals' Collection of Unpaid Costs.

In addition to increasing the income threshold for charity care, many states and organizations have suggested that greater transparency into hospitals' financial assistance policies is needed to ensure low income communities are being adequately protected.[179] Some solutions include

---

Medical Debt Protection: Hearing on H.B. 1081 Before the H. Health and Gov't Operations Committee, 2020 Leg., 441st Session (Md. 2020) (written testimony of the Maryland Department of Health), https://mgaleg.maryland.gov/cmte_testimony/2020/hgo/4184_02282020_105827-121.pdf (suggesting that adopting legislation that could impact the all-payer model without initial study).

[174] *See Maryland All-Payer Model*, CTR. FOR MEDICARE & MEDICAID SERVS., https://innovation.cms.gov/innovation-models/maryland-all-payer-model (last visited Feb. 13, 2021).

[175] *Id.*

[176] NAT'L NURSES UNITED, *supra* note 13, at 4 ("Built into [the formula used to determine the rate at which hospitals should be compensated] are also monies intended to help hospitals cover the costs of providing charity care… In other words, Maryland's not-for-profits hospitals are obligated to provide charity care but actually do not bear these costs").

[177] *See Health Facilities – Hospitals – Medical Debt Protection: Hearing on H.B. 1081 Before the H. Health and Gov't Operations Committee*, 2020 Leg., 441st Session (Md. 2020) (written testimony of the Maryland Department of Health); *see also* Fiscal and Policy Note to Md. H.B. 1081, 2020 Leg., 441st Sess. (Md. 2020), https://mgaleg.maryland.gov/2020RS/fnotes/bil_0001/hb1081.pdf.

[178] *See Health Facilities – Hospitals – Medical Debt Protection: Hearing on H.B. 1081 Before the H. Health and Gov't Operations Committee*, 2020 Leg., 441st Session (Md. 2020) (written testimony of the Maryland Department of Health).

[179] *See* Hayley Penan, *California's Nonprofit Hospital Puzzle: Reworking the Jigsaw to Benefit Underserved Communities*, 9 U.C. IRVINE L. REV. 1131, 1173 (2019) (discussing the suggestion that hospitals should be required to disclose the concrete community benefits they provide to underserved community members).

suggestions for entirely new statutes solely devoted to regulating medical debt collection.[180] For example, the National Consumer Law Center has suggested a model statute ("Model Statute") that advocates for clear and transparent graduated levels of financial assistance that should be offered, and plans for how to implement these policies.[181] One of the Model Statute's suggestions include instituting mandated financial assistance rates for specific income brackets.[182] It suggests a percentage of uncompensated care that should be billed to the patient based on income – specifically, for patients between 201-400% of the FPL, the model statute suggests for the first $1,000 of uncompensated care, the bill be reduced to 50%; for any remaining charge between $1000-$5000, patients be charged no more than ten percent of that amount.[183] It also prohibits healthcare providers from making payment plans that require patients to make monthly payments that exceed five percent of a patient's income.[184] If Maryland adopted this aspect of the Model Statute, it could ensure the payment plans offered are more likely to be affordable for all its residents.[185]

The Model Statute also suggests that enforcement be delegated to each State's Office of the Attorney General (or applicable state agency).[186] Maryland's Health-Gen statutes are currently overseen by the Health Services Cost Review Commission.[187] However, the Commission was originally instituted to oversee and review hospitals' cost of care rates as part of the All-Payer Model.[188] It is generally not equipped to address shortcomings in hospitals' financial assistance policies, although it efficiently gathers data about some of the hospitals' practices.[189] Patients' primary method of challenging a hospital's violations of the Health-Gen statutes is through separate litigation.[190] Separate litigation may not be logistically

---

[180] H.D. 1089, 72nd Gen. Assemb., 1st Sess. (Colo. 2019); H.D. 959, 2020 Leg., 122d Sess. (Fl. 2020); H.D. 2346, 111th Gen. Assemb., 2d Sess. (Tenn. 2020).
[181] CHI CHI WU ET AL., NAT'L CONSUMER L. CTR., MODEL MEDICAL DEBT PROTECTION ACT (2019) (generally, a model statute constructed for states to borrow from in resolving medical debt collection).
[182] *Id.* § 4.
[183] *Id.* § 4(b).
[184] *Id.* § 4(g).

[185] *See* Fuse Brown, *supra* note 23, at 181 (suggesting a model debt collection practices policy in part because of hospitals' sole discretion to oversee their own financial assistance policies).
[186] MODEL MEDICAL DEBT PROTECTION ACT § 19; *see also* Udashen, *supra* note 161.
[187] MD. CODE ANN., HEALTH-GEN. § 19-214.1(b).
[188] *Id.* § 19-207.
[189] *See* NAT'L NURSES UNITED, *supra* note 13, at 62; *see also* White, *supra* note 159.
[190] HEALTH-GEN. § 19-214.3(b).

available to families who already are facing challenges paying their medical bills; additionally, low-income individuals whose income is above certain thresholds are not likely to qualify for free legal services.[191]

Maryland should adopt a requirement that the Attorney General be responsible for implementing and enforcing income-based repayment plans under the Health-Gen Statutes.[192] While other proposed resolutions of this problem suggest the Commission oversee enforcement of payment plans, diverting enforcement to the Attorney General ensures that the at-risk patients who are the intended beneficiaries of the legislation are sufficiently protected.[193] The Commission's purpose is to set the rates hospitals may use to charge for the cost of care, and it is not equipped to handle minute detail of enforcing income based repayment plans.[194] In contrast, the Attorney General's Office regularly enforces statutes for which it is responsible, and some states that enforce hospital financial assistance requirements through their attorney general's office have been met with success.[195]

C. Maryland Needs to Address Existing Judgments and Institute Prerequisites on Hospitals' Ability to Bring New Lawsuits.

---

[191] *See e.g.*, *2020 LSC Income Guidelines*, MD. LEGAL AID BUREAU (Feb. 2020), https://www.mdlab.org/get-help-services/income-guidelines/ (identifying income limit to qualify for services at 125% of the FPL); *see also* Schnorrenberg, *supra* note 147.

[192] *See* CHI CHI WU ET AL., NAT'L CONSUMER L. CTR., MODEL MEDICAL DEBT PROTECTION ACT § 19, cmt. (2019) ("This section designates the Office of the Attorney General or other state agency, such as a state health care regulator, to enforce the Act. Such enforcement activities would include promulgating regulations, receiving, and resolving complaints, public reporting of complaints, litigation, and other enforcement actions.").

[193] The 2021 legislation passed by the Maryland General Assembly suggests requiring income-based repayment plans similar to this proposed solution. *See supra* Section II.C.iii (explaining Md. H.D. 565, 2020 Leg., 442d Sess. (Md. 2021)). However, this comment suggests that the Attorney General's Office rather than using the Commission be used to implement income-based repayment plans.

[194] *See supra* Section III.B.ii (describing the Commission's historic lack of enforcement power over the Health-Gen statutes); *see also Health Facilities – Hospitals – Medical Debt Protection: Hearing on H.B. 565 Before the H. Health and Gov't Operations Committee*, 2021 Leg., 442d Sess. (Md. 2021) (written informational testimony of the Maryland Health Services Cost Review Commission detailing the Commission's concern that it was not the right entity to oversee payment plans).

[195] *See* MD. STATE ARCHIVES, *Attorney General: Origin & Functions, Division of Consumer Protection*, https://msa.maryland.gov/msa/mdmanual/08conoff/attorney/html/06agf.html (last visited Feb. 17, 2022). The Maryland Office of the Attorney General already has the Health Education and Advocacy Unit which can act as a mediator for patients involved in disputes with hospitals. The Health Education and Advocacy Unit is a part of the Consumer Protection Division, which also files enforcement actions when necessary against companies within the Attorney General's jurisdiction. *See* Udashen, *supra* note 161.

In order to address medical debt collection, some states have proposed legislation limiting medical providers' ability to bring lawsuits for medical debt under certain thresholds.[196] Others have proposed instituting the parties to work out the debts out of court.[197] Maryland could prevent future harm caused through excessive medical debt collection and remediate some of the harm already done by requiring hospitals to engage in attempts to resolve the debt before suing patients; and by offering an incentive such as a grant for hospitals to dismiss cases and judgments entered before patients were offered an opportunity for financial assistance.[198]

i. Hospitals Should Be Required to Offer an Assistance Plan Prior to Suing Patients.

In response to other financial crises, some states have instituted practices to reduce the number of cases that proceed to judgment.[199] Florida state courts have programs requiring parties involved with civil small claims to engage in mediation, which judges in those districts have considered to be efficient.[200] Several states have allowed litigants to participate in foreclosure mediation to determine if a mutually agreeable alternative to foreclosure was reachable.[201] Maryland facilitates a foreclosure mediation program allowing homeowners the opportunity to participate in a conference with an evaluator and the creditor.[202] It also requires that before a mortgage creditor can proceed to foreclosure, it must file an affidavit with the court identifying

---

[196] H.D. 1089, 72nd Gen. Assemb., 1st Sess. (Colo. 2019); H.D. 959, 2020 Leg., 122d Sess. (Fl. 2020); H.D. 2346, 111th Gen. Assemb., 2d Sess. (Tenn. 2020).
[197] *See* Speser, *supra* note 162, at 462-63.
[198] *Id.*; *see also* Fl. H.D. 959 (suggesting a requirement that reasonable efforts to provide financial assistance be made by healthcare providers before proceeding to file collection suits).

[199] *See* Nancy A. Welsh, *Bringing Transparency and Accountability (With a Dash of Competition) to Court-Connected Dispute Resolution*, 88 FORDHAM L. REV. 2449, 2455-56 (2020) (describing five states, including Maryland, which are recognized as "leaders" in their use of Alternative Dispute Resolution).
[200] *See id.* at 2494 ("Florida has had visionary leadership and a commitment to developing and sustaining a framework to assure mediation quality--for example, ethics provisions, disciplinary structures, and advisory services."); *see also* Ariel Cook & James Millard, *Targeting the Poor – How Debt Collectors Help Perpetuate the Poverty Cycle*, 17 FL. COASTAL L. REV. 449, 469 (2016) (describing a survey performed by the Florida Committee on the Judiciary concerning the effectiveness of the mediation programs).
[201] *Foreclosure Mediation Programs by State*, NAT'L CONSUMER L. CTR. (Jan. 1, 2021), https://www.nclc.org/issues/foreclosure-mediation-programs-by-state.html.
[202] MD. CODE ANN., REAL PROP. § 7-105.1(l) (2021).

which loss mitigation programs the borrower was considered for and why they were denied.[203]

While foreclosures are more complicated than small claims debt collection actions, the same concepts can still be applied.[204] Maryland should institute a program allowing patients to participate in mediation before any judgment is entered.[205] If Maryland elected to enact this legislation, there are pitfalls that should be avoided if possible.[206] Some patients may have income that is not subject to garnishment, such as certain types of social security or pension income.[207] Patients may be worse off financially if they enter a mediated agreement than if the hospital had obtained an judgment it cannot collect.[208] However, mediation may allow patients additional time to decide next steps on their own terms rather than waiting on a garnishment they would have to fight.[209] Maryland could create a mediation program enlisting a neutral evaluator like the Office of Administrative Hearings or the existing District Court ADR programs.[210] It could appoint pro bono counsel to represent patients at the mediation, who could prescreen patient's income sources and provide appropriate advice.[211]

ii. Maryland Should Prevent Collection of Judgments Against Patients Not Evaluated for Financial Assistance.

Maryland should also prevent hospitals from collecting on judgments they have already obtained against people who cannot afford them.[212] To require this legislatively, the General Assembly would need to create a statute

---

[203] *Id.* § 7-105.1(a)(3), (n)(2).
[204] *See generally* Speser, *supra* note 162 *passim*.
[205] *See* Cook & Millard, *supra* note 200, at 469-70.
[206] *Id.* at 469-470 (recognizing the potential benefits to mediating in a small claims context but cautioning that pressure to pro se consumer defendants into entering unwise agreements must be prevented).
[207] *See* Cook & Millard, *supra* note 200, at 471-72.

[208] *Cf.* Gotberg, *supra* note 119, at 125 (suggesting that some individuals in low-income brackets choose not to file for bankruptcy because their income is protected from the reach of creditors); *see also* Cook & Millard, *supra* note 200, at 469-70.
[209] *See* Cook & Millard, *supra* note 200, at 469.
[210] *See generally* Welsh, *supra* note 199, at 2460 (describing Maryland's use of its Alternative Dispute Resolution system in District Courts to resolve small claims).
[211] *See id.* at 2454-55 (describing circumstances where mediation programs in federal district courts conduct pro bono mediations); *see also Court Programs,* AM. BAR ASS'N, https://www.americanbar.org/groups/probono_public_service/policy/judicial-participation/court-programs/ (last visited Feb. 13, 2021) ("judicial officer[s] may consider the appointment of pro bono counsel for all purposes," including for mediation).
[212] *See* NAT'L NURSES UNITED, *supra* note 13, at 2; *see also* Cohn, *supra* note 7, at 31.

which clearly states that it is taking away a right retroactively, and the right it is taking must not be a vested right or Constitutional right.[213] However, in Maryland a judgment is a vested right and there is no way to legislatively dismiss it.[214]

Maryland should provide relief from ongoing collection against patients who were sued because they could not afford medical care.[215] Maryland cannot legislate away the entered judgments; however, it could prevent hospitals from collecting some of the judgments from low-income patients by limiting the wages that can be garnished.[216] It should enact additional protections limiting wage garnishment of medical debt judgments to a maximum of 5% of the debtor's monthly income.[217] By protecting greater amounts of patients' income from involuntary collection, Maryland can provide relief not only for future patients, but also for patients who may not have been evaluated or who were denied financial assistance under the prior policies.[218]

There are some potential drawbacks to this plan. It seems unfair for hospitals to be allowed to keep rewards for targeting low-income individuals who could not afford to pay for medical care in the first place, particularly since the cost of charity care is already built into the rates they are permitted to charge.[219] It is also possible that some people whose garnishments are limited may not have needed assistance.[220] Despite these drawbacks, the legislation is necessary because the patients affected are not likely to obtain

---

[213] Est. of Zimmerman v. Blatter, 458 Md. 698, 728, 183 A.3d 223, 241 (2018) (describing when legislation may be made retrospectively).

[214] LVNV Funding LLC v. Finch, 463 Md. 586, 611, 207 A.3d 202, 216 (2019) (explaining that validly entered judgments are vested rights).

[215] *See* NAT'L NURSES UNITED, *supra* note 13, at 34-35 (summarizing Maryland hospitals' evaluation and denial charity care applications at rates higher than 20% of the time, resulting in thousands of denials).

[216] *See* Mullen, *supra* note 46, at 231 (describing states' ability states to implement garnishment regulations more favorable to debtors than the Consumer Credit Protection Act).

[217] *See* CHI CHI WU ET AL., NAT'L CONSUMER L. CTR., MODEL MEDICAL DEBT PROTECTION ACT § 4(g) (2019) (suggesting voluntary payment plans for patients not to exceed 5% of patients' monthly income); *see also* Mullen, *supra* note 46, at 233 (suggesting a limit that protects 90% of a debtor's income from garnishment).

[218] *See* NAT'L NURSES UNITED, *supra* note 13, at 34-35.

[219] *See id.* at 31 (explaining that because Maryland's all-payer system sets the prices hospitals can charge, the cost for charity care is built into the rates hospitals can charge, essentially passing the cost of charity care onto all those paying for health care in Maryland.").

[220] *See Health Facilities – Hospitals – Medical Debt Protection: Hearing on H.B. 1081 Before the H. Health and Gov't Operations Committee*, 2020 Leg., 441st Sess. (Md. 2020) (written testimony of the Maryland Department of Health); *see also* Cohn, *supra* note 7.

relief in any other way, and hospitals will keep renewing the judgments over and over.[221]

V. CONCLUSION

Enacting legislation that increases income eligibility for patients' access to free uncompensated care, that provides more oversight to health care providers' financial assistance policies, and that limits health care providers' ability to sue low-income patients will better protect Maryland's vulnerable population.[222] Medical bills for uncompensated care are widespread.[223] If Maryland does not take action, its low-income residents will continue to suffer the consequences either through forfeiting money needed for living expenses or by avoiding necessary medical treatment.[224]

---

[221] *See* Est. of Zimmerman v. Blatter, 458 Md. 698, 728, 183 A.3d 223, 241 (2018); *see also* LVNV Funding LLV v. Finch, 463 Md. 586, 611, 207 A.3d 184, 216 (2019).

[222] *Cf.* CAL. HEALTH & SAFETY CODE § 127405; *see also* H.D. 959, 2020 Leg., 122d Sess. (Fl. 2020); *See* CHI CHI WU ET AL., NAT'L CONSUMER L. CTR., MODEL MEDICAL DEBT PROTECTION ACT § 19 (2019); Fuse Brown, *supra* note 23, at 181; *see also* Speser, *supra* note 162, at 463-64.

[223] *See* Hamel, *supra* note 5, at 1-2; *see also* Gotberg, *supra* note 119, at 100-101.

[224] *See* White, *supra* note 159; Saad, *supra* note 2; Leonhardt, *supra* note 3.

RECENT DEVELOPMENT

E.N. V. T.R: TO ESTABLISH DE FACTO PARENTHOOD WHERE THERE ARE TWO LEGAL PARENTS, A PROSPECTIVE DE FACTO PARENT MUST DEMONSTRATE THAT BOTH LEGAL PARENTS CONSENTED TO AND FOSTERED THE PARENT-LIKE RELATIONSHIP THAT A NON-CONSENTING LEGAL PARENT WAS UNFIT, OR EXCEPTIONAL CIRCUMSTANCES EXIST.

By: Oluwatosin Adedeji-Fajobi

The Court of Appeals of Maryland using a four-part test for establishment of *de facto* parenthood held as a matter of first impression that under the first factor of the test, where there are two legal parents, a prospective *de facto* parent must demonstrate both legal parents consented to and nurtured a parent-like relationship with the child; the non-consenting legal parent is unfit; or there were exceptional circumstances. *E.N. v. T.R.*, 474 Md. 346, 355-56, 255 A.3d 1, 10. The court held where a child has two legal parents, permitting a single parent to consent to a *de facto* parent relationship could result in a second existing parent having no knowledge that a *de facto* parent relationship was established. *Id.* at 346, 353, 255 A.3d 6.

E.N. and D.D. are the biological mother and father of minor children G.D. and B.D. From 2005 to October 2009, E.N. and D.D. lived together with their children. In October 2009, D.D. was incarcerated. After D.D. was released from prison in 2013, he began a relationship with T.R. and periodically visited with his children. In 2015, D.D. and T.R. moved in together, and in June of that year the children joined them. When D.D. was again incarcerated in 2017, he wrote a letter giving T.R. full custody of the children.

Between June 2015 to 2017, E.N. saw her children once. E.N. attempted to find her children and have them live with her but was unsuccessful. In November 2017, while T.R. and the children were visiting the children's paternal grandparents, E.N. came and asked for her children. E.N. did not see her children again until September 2018.

In February 2018, T.R. filed a complaint against E.N. and D.D. for sole legal and physical custody of the children in the Circuit Court for Prince George County. The court held T.R. was a *de facto* parent and awarded T.R. and E.N. joint legal custody of the children with T.R. having tiebreaker authority over disputed decisions about the children's care and upbringing. In addition, T.R. received sole physical custody. E.N. had visitation rights. E.N. appealed and the Court of Special Appeals affirmed the circuit court's judgment. In 2020, E.N. petitioned for a writ of *certiorari* to the Court of

Appeals of Maryland, which the court granted. The issue before the court was if a *de facto* parentship is formed due to the actions of one legal parent without the knowledge or consent of the other legal parent, or does the non-consenting parent retain a superior custody claim, thereby requiring the potential *de facto* parent prove that the non-consenting parent is unfit or that exceptional circumstances exist to receive custody? *Id. at* 368, 255 A.3d at 13-14.

The Court of Appeals began its analysis by reiterating a parent's right to raise their child is fundamental and cannot be unjustly taken away. *E.N.*, 474 Md. at 371, 255 A.3d at 15 (citing *Conover v. Conover,* 450 Md. 51, 60, 141 A.3d 31, 438). The court elaborated, stating that parental rights to custody of biological children are usually superior to anyone else's. *Id.* at 371, 255 A.3d at 16 (citing *Conover v. Conover,* 450 Md. 51, 60, 141 A.3d 31, 438). The Court of Appeals reiterated the current law for establishing *de facto* parenthood is a four-part test : (1) the biological or adoptive parent consented to, and encouraged, the requester's establishment of a parent-like relationship with the child; 2) the non-biological parent and the child lived together; (3) the non-biological parent assumed the responsibilities of a parent including child's care, education and development, without the expectation of reimbursement; and (4) the requester has been in a parental role for enough time to have established a parental relationship with the child. *E.N. v. T.R.*, 474 Md. 346, 376, 255 A.3d 1, 18 (2021) (citing *Conover v. Conover,* 450 Md. 51, 60, 141 A.3d 31, 438). Additionally, in cases where there are no *de facto* parents and a third party seeks custody or visitation, to receive custody or visitation the third party must show that the parents are unfit or that exceptional circumstances exist. *Id.* at 396, 255 A.3d at 30 *(*citing *Conover*, 450 Md. at 61, 141 A.3d at 38). A trial court will then apply the best interests of the child standard. *Id.* at 396, 255 A.3d at 30.

In the instant case, the court held that T.R. failed to meet the first factor of the four-part test. *Id.* at 395, 255 A.3d at 30. Although D.D. consented to T.R.'s formation of a parent-like relationship with his children, E.N. did not expressly or impliedly consent to T.R.'s formation of a parent-like relationship with her children. *Id.* In addition, T.R. did not prove that E.N. was an unfit parent or that exceptional circumstances existed that would have given T.R. standing to seek custody of the children. *Id.* As such, the court determined that declaring the existence of a d*e facto* parentship based on the consent of only one parent while ignoring the second legal parent's fitness as a parent undermined and negated the second parent's constitutional right to parent their child. *Id.* at 396-97, 255 A.3d at 31.

In its analysis, the court distinguished this case from prior decisions where the child had only one legal parent. *E.R.*, 474 Md. at 395, 255 A.3d at 30 (distinguishing *Conover,* 450 Md. at 55, 141 A.3d at 35.) The court held

that the Court of Special Appeals erred in analyzing precedent in regarding the silence as to the requirement that two legal parents' consent to the *de facto* parentage as the acquiescence of single-parent consent. *E.N.*, 474 Md. at 400, 255 A.3d at 33. Here, the court stated a majority opinion's silence as to the views or concerns in a concurring opinion should not be interpreted as how the Court would later rule on the issue. *E.N. v. T.R., 474 Md. 400, 255 A.3d 1, 33* (citing *Conover at 246, 236 A.3d at 677* (The court here noted that the majority opinion in *Conover* did not comment on the issue of two legal parents consenting.)).

Here, the court established the consent requirement in the first prong of the *de facto* parent test may be given either explicitly or implicitly. *Id.* 474 Md. at 401, 255 A.3d at 34. The court reasoned under the first factor, implied consent requires a legal parent have sufficient information about the formation of a parent-like relationship between a third party and a child, and the parent knowingly and voluntarily not resist or object to it. *Id.* 474 Md. at 402-3, 255 A.3d at 34.

The court found E.N. neither expressly nor implicitly consented to the *de facto* parent relationship. *Id.* T.R. thus failed to satisfy the first prong of the four-part test. *Id.* 474 Md. at 404, 255 A.3d at 35 (citing *Conover*, 450 Md. At 74, 141 A. 3d at 46-47 (quoting *H.S.H.-K.*, 533 N.W.2d at 435-36). E.N. tried to locate her children in 2017 and was unsuccessful. *Id.* 474 Md. at 357, 255 A.3d at 7. She never gave up her parental rights, nor did she abandon her children. *Id.* 474 Md. at 407, 255 A.3d at 37. Her consent was required due to an absence of any exceptional circumstance. *Id.* 474 Md. at 405, 255 A.3d at 36.

The dissent, in this case, held that there was no basis to require the consent of both legal parents. *Id.* 474 Md. at 414, 255 A.3d at 41. The dissent further explained that the majority's holding prevented the court from fully considering the best interest of the child. *Id.* 474 Md. at 417, 255 A.3d at 44. The dissent held that the majority failed to consider a child's right to maintain relationships with parent-like caregivers. *Id.* 474 Md. at 418, 255 A.3d at 44.

In *E.N.*, the Court of Appeals of Maryland held that T.R. failed to satisfy the first factor of the *de facto* parenthood test. T.R. failed to prove that E.N. was an unfit parent or that exceptional circumstances existed that would have given T.R. standing to seek custody. The circuit court erred in concluding that T.R. was a *de facto* parent to the children and in granting her joint legal custody and sole physical custody. This case further bolsters a parent's constitutional right to parent but simultaneously limits the rights and ability of a third party to establish parental rights. It further establishes the notion that a family can only include two legitimate parents and everyone else is

secondary. This law may disadvantage people who have nontraditional children and family units.

RECENT DEVELOPMENT

ESTEPPE V. BALT. CITY POLICE DEP'T: THE LOCAL GOVERNMENT TORT CLAIMS ACT DOES NOT IMPOSE LIABILITY ON GOVERNMENT EMPLOYERS WHOSE EMPLOYEES COMMIT TORTS OUTSIDE THE SCOPE OF THEIR EMPLOYMENT.

By: Jeneen Burrell

The Court of Appeals of Maryland held that the Baltimore City Police Department ("BCPD") would not be liable for the actions of their police officers if those actions were not in furtherance of or authorized by the police department. *Esteppe v. Balt. City Police Dep't*, 476 Md. 3, 14, 258 A.3d 210, 216 (2021). Specifically, the court unequivocally affirmed the holding of the Court of Special Appeals of Maryland and held that BCPD was not responsible for a judgment against a former officer who perjured himself to obtain a fraudulent search warrant. *Id* at 13-14, 258 A.3d at 216.

In 2012, former BCPD detective Adam Lewellen ("Lewellen") committed perjury to obtain a search warrant for David Esteppe's ("Esteppe") home. Additionally, Lewellen initiated a fraudulent prosecution of Esteppe. An investigation into Lewellen's conduct by BCPD led to criminal charges against Lewellen and the dropping of charges against Esteppe. In 2014, Lewellen resigned from the police department and pled guilty to perjury and misconduct in office.

That same year, Esteppe brought a civil suit against Lewellen for various torts, including negligence, violations of the Maryland Declaration of Rights, and civil conspiracy. During trial, Esteppe argued Lewellen's actions had no legitimate law enforcement purpose, but that his conduct was personally motivated. The Circuit Court for Baltimore City found in favor of Esteppe and awarded him $167,007.67 in damages. The circuit court made no mention concerning the Local Government Tort Claims Act ("LGTCA"), a Maryland statute whereby local governments may be responsible for torts committed by their employees. Accordingly, the circuit court made no findings as to whether Lewellen acted within the scope of his employment.

After the proceedings concluded, Esteppe sought enforcement of the judgment in the circuit court against the City and BCPD, both of whom were not parties to the action at the time of the judgment. Relying on the LGTCA, Esteppe argued Baltimore City ("the City") should pay the damages awarded as a result of Lewellen's tortious conduct. The City argued it was not responsible for damages because Lewellen's wrongdoings were outside the scope of his employment. Finding the City responsible for covering the judgment's cost against Lewellen, the circuit court ruled in favor of Esteppe.

BCPD appealed the circuit court's ruling, following which the Court of Special Appeals reversed the circuit court, holding that the City was not liable for damages under the LGTCA. Esteppe and BCPD filed petitions for writ of certiorari, which the Court of Appeals of Maryland granted. Subsequently, the Court of Appeals of Maryland affirmed the Court of Special Appeals and remanded the case to the circuit court.

On appeal, the Court of Appeals of Maryland considered whether, for the purposes of the LGTCA, Lewellen acted within the scope of his employment, thereby making BCPD and the City responsible for the judgment against Lewellen. *Esteppe*, 476 Md. at 11, 258 A.3d at 214 (citing Md. Code Ann., Cts. & Jud. Proc. § 5-301 (2021). The Court of Appeals of Maryland unequivocally adopted the analysis and holding of the Court of Special Appeals, finding no benefit in restating the well-researched opinion. *Id.* at 14, 258 A.3d at 216.

The main issue addressed by the Court of Special Appeals was whether the circuit court was correct in holding BCPD liable for Esteppe's judgment against Lewellen. *Esteppe*, 476 Md. at 11, 258 A.3d at 214. Resolving this issue turned on whether Lewellen acted within the scope of his employment. *Id.* The Court of Special Appeals adopted a two-prong test articulated in precedential opinions establishing when a local government employee's actions are within the scope of their employment. *Esteppe,* 476 Md. at 11, 258 A.3d at 214-15 (citing *Sawyer v. Humphries*, 322 Md. 247, 255, 587 A.2d 467, 470 (1991); *Balt. City Police Dep't v. Potts*, 468 Md. 265, 271, 227 A.3d 186, 190 (2020)).

Under the two-prong test, a plaintiff must first prove that the employee's actions were in furtherance of the employer's business. *Esteppe*, 476 Md. at 11, 258 A.3d at 215 (citing *Sawyer*, 322 Md. at 255; *Potts*, 468 Md. at 271). A plaintiff must then prove that the employer authorized the employee's actions. *Esteppe,* 476 Md. At 11, 258 A.3d at 215 (citing *Sawyer,* 322 Md. At 255; *Potts,* 468 Md. At 271). An employee's actions will be outside the scope of employment when the actions are either personally motivated, protecting an employee's own interest, or when an employee's actions deviate from a purpose in furtherance of the employer's business. *Id.* at 11, 258 A.3d at 214-15 (citing *Sawyer*, 322 Md. 256-57; *Potts*, 468 Md. at 290).

The Court of Appeals of Maryland affirmed the Court of Special Appeals' finding that Esteppe did not satisfy the two-prong test. *Esteppe*, 476 Md. at 12, 258 A.3d at 215 (citing *Sawyer*, 322 Md. at 255; *Potts*, 468 Md. at 271). The court reasoned that the undisputed evidence of the record supported the conclusion that Lewellen's actions were personally motivated, and not in support of the interests of his employer, BCPD. *Id.* Thus, under the two-prong test, the first prong was not satisfied. *Id.* The court found

Lewellen's actions were not even partially in furtherance of BCPD's interest. *Id.* (citing *Balt. City Police Dep't v. Esteppe*, 247 Md. App. 476, 527-28, 236 A.3d 808, 838 (2020); *Sawyer*, 322 Md. at 255; *Potts*, 468 Md. at 271). Esteppe's failure to satisfy the first prong of the two-prong test meant he was not entitled to summary judgment on the scope of the employment issue. *Id.*

The Court of Appeals of Maryland held that the Court of Special Appeals' independent review of the record was an "unassailable" application of the law regarding the scope of employment issue for LGTCA liability purposes. *Esteppe*, 476 Md. at 14, 258 A.3d at 216; citing Cts. & Jud. Proc. § 5-301). Adopting the analysis and conclusion as its own, the Court of Appeals of Maryland endorsed the Court of Special Appeals' opinion and removed doubt as to the standing of its decision as Maryland law. *Id.* (citing *Sturdivant v. Md. Dep't of Health & Mental Hygiene,* 436 Md. 584, 590, 84 A.3d 83, 87 (2014)).

The Court of Appeals of Maryland's decision in *Esteppe* laid out a bright-line rule for when a local government — in this instance, a police department — can be held liable for an employee's misconduct. So long as an employee's actions are not in furtherance of the employer's interests and the employer did not authorize the action, local governments may disassociate themselves from their employees' misconduct. Lower courts now have a practical standard to resolve scope of employment issues for local governments. The decision could, however, leave Maryland citizens with little to no means of collecting compensation when they fall victim to police misconduct. From the police department's perspective, a rule requiring a nexus between misconduct and a police officer's official duties to further the police department's interests is an appropriate rule that avoids determining liability in a way that is too broad. From the perspective of a victim of police misconduct, however, police officers may freely abuse their authority if that abuse is so far removed from their official duty that it cannot be said to be in furtherance of the police department's interest.

In the context of police departments, the two-prong test ignores the fact that regardless of whether the misconduct was in furtherance of the police department's interest, the official authority of a police officer is, more often than not, also abused during their misconduct. A rule that also accounts for a police officer's use of their authority may better bridge the gap between local governments' interests and Maryland citizens who fall victim to police misconduct.

RECENT DEVELOPMENT

MADRID V. STATE: A JUVENILE'S CONFESSION IS ADMISSIBLE WHEN HE CONFESSED AFTER KNOWINGLY AND VOLUNTARILY WAIVING MIRANDA RIGHTS AND IS PRECLUDED FROM A DURESS DEFENSE IF HE VOLUNTARILY PLACED HIMSELF IN A POSITION WHERE COERCION TO COMMIT A CRIME WAS REASONABLY FORESEEABLE.

By: Erin Carrington Smith

The Court of Appeals of Maryland held that when *Miranda* rights are clearly presented to a juvenile, the juvenile is generally able to understand his rights as presented, and an interrogation is not expressly coercive, then a juvenile may knowingly and voluntarily waive *Miranda* rights and voluntarily confess to a crime. *See Madrid v. State*, 474 Md. 273, 288-89, 254 A.3d 468, 476 (2021). Further, the court held a duress defense requires a "present, imminent, and impending threat," and is unavailable as a matter of law when a defendant voluntarily or recklessly placed himself in a situation that made coercion to commit a crime reasonably foreseeable. *Id*. at 289, 254 A.3d at 476.

Darwin Naum Monroy Madrid's ("Madrid") association with MS-13 began in 2015. In 2016, at the age of sixteen, Madrid was ordered to kill Carlos Tenorio-Aguirre, a rival gang member. Madrid traveled on foot to Tenorio-Aguirre's apartment, where he wounded Tenorio-Aguirre and fatally shot another man.

Later that evening, police arrested Madrid. During interrogation, Detective Cruz ("Cruz") told Madrid he knew Madrid was an undocumented immigrant, but that he still had rights. Cruz then read Madrid his *Miranda* rights in Spanish, both his and Madrid's first language. When asked, Madrid confirmed he understood his rights. During the interrogation, Cruz mention that Madrid was likely in danger of being killed by both MS-13 and the rival gang. Twenty minutes into the interrogation, Madrid confessed.

At trial, Madrid moved to suppress his confession, claiming he did not knowingly and voluntarily waive his *Miranda* rights and his confession was involuntary under Maryland common law, the Fourteenth Amendment Due Process Clause, and Article 22 of the Maryland Declaration of Rights. The circuit court denied the motion. Madrid then sought a duress defense, claiming he only complied with the "hit" to avoid gang punishment he expected to occur "as soon as possible." The circuit court declined Madrid's request for a jury instruction on duress and the jury convicted him of first-degree murder and attempted murder. The Court of Special Appeals affirmed

the lower court's decisions and the Court of Appeals granted *certiorari* to consider whether Madrid properly waived his *Miranda* rights; whether his confession was voluntary under Maryland common law, the Due Process Clause, and Article 22; and whether he was entitled to a duress defense.

The Court of Appeals began with a comprehensive analysis of a juvenile suspect's rights during interrogation. *See Madrid*, 474 Md. at 309-321, 254 A.3d at 488-495. To admit a confession, the state must first prove that a juvenile was properly advised of his *Miranda* rights and knowingly, intelligently, and voluntarily waived his rights before confessing. *Id.* at 310, 254 A.3d at 488(citing *Gonzalez v. State*, 429 Md. 632, 637, 57 A.3d 484, 486-7 (2012)). Rights may be administered orally or in writing. *Id.* at 324, 254 A.3d at 497. Under Maryland common law, the Due Process Clause, and Article 22, a confession must not be "the product of an improper threat, promise, or inducement by the police," or result from "police conduct that overbears the will of the suspect and induces the suspect to confess." *Madrid,* 474 Md. at 317, 320, 254 A.3d at 492, 494 (citing *Lee v. State*, 418 Md. 136, 159, 12 A.3d 1238, 1252 (2011); citing U.S. Const. amend. XIV, § 1; citing Md. Decl. of Rts. art. 22.). Applying a totality of circumstances approach, the court considered factors such as the length of the interrogation and the age, background, education, experience, character, and intelligence of the suspect. *Madrid*, 474 Md. at 320-21, 254 A.3d at 495 (quoting *Hof v. State*, 337 Md. 581, 596-97, 655 A.2d 370, 377-78 (1995)).

Here, the Court of Appeals found Madrid knowingly and voluntarily waived his *Miranda* rights and voluntarily confessed. *Madrid*, 474 Md. at 328, 254 A.3d at 499. Madrid had lived and attended school in the United States for two years, his *Miranda* rights were administered in Spanish, and he was a "self-sufficient young man" who worked, earned money, and financially supported himself and his mother. *Id.* at 322-23, 330, 254 A.3d at 496, 500. The court did not find Cruz's statements about Madrid's immigration status or gang threats intimidating or coercive because they were statements of fact, not promises of protection or inducements to confess. *Id.* at 327, 254 A.3d at 498-99. Finally, Madrid was not subjected to a lengthy, overbearing, or inappropriate interrogation. *Id.* at 330, 254 A.3d at 500.

The Court then considered the duress defense by establishing the essential elements required to warrant a jury instruction. *See Madrid*, 474 Md. at 331-338, 254 A.3d at 501-5. A duress defense is possible when a defendant reasonably believed he was in imminent danger of death or serious harm, he could not reasonably escape, and he killed because of this duress. *Id.* at 332, 254 A.3d at 502 (quoting Md. Crim. Pattern Crim. Jury Instructions, § 4:17.5C (Md. State Bar Assoc. 2021)). This defense cannot be raised if the compulsion to act stems from the defendant's "own fault, negligence or misconduct." *Madrid*, 474 Md. at 333, 254 A.3d at 502 (quoting *Howell v.*

State, 465 Md. 548, 551, 214 A.3d 1128, 1130 (2019)). A mere fear of harm at some unspecified time in the future is not sufficient for a duress defense. *Madrid*, 464 Md. at 338, 254 A.3d at 505 (citing *Howell*, 465 Md. at 565-66, 214 A.3d at 1138-39).

Here, the Court of Appeals held that Madrid's fear of retribution "as soon as possible," was more akin to a generalized fear of future harm than an imminent threat." *Madrid*, 464 Md. at 338-39, 254 A.3d at 505. Madrid was outside with an unarmed companion when the "hit" order arrived, indicating a clear opportunity to escape. *Id.* at 339, 254 A.3d at 505. The court also emphasized that fear of gang retribution cannot justify a duress defense without expanding it to shield nearly every gang member ordered to commit a crime. *Id.* at 340, 254 A.3d at 506.

Finally, the Court of Appeals addressed the question of whether the duress defense is unavailable when a defendant placed himself in a position to be coerced. *Madrid*, 464 Md. at 341, 254 A.3d at 507. Previously, the Court of Special Appeals did not permit a duress defense where an adult defendant was voluntarily or recklessly involved in the situation that created the alleged duress. *Id.* at 341-42, 254 A.3d at 507 (citing *Williams v. State*, 101 Md. App. 408, 425 646 A.2d 1101, 1110 (1994)).

Here, the Court of Appeals established that, as a matter of law, a duress defense is unavailable to a defendant—including a juvenile—who voluntarily or recklessly placed himself in a situation where coercion is the foreseeable result. *Madrid*, 474 Md. at 342, 254 A.3d at 507. By voluntarily associating with MS-13, Madrid did just that. *Id.* Because criminal activity, including murder, is a known requirement of MS-13 membership, such coercion was not only foreseeable, but inevitable. *Id.* at 342-43, 254 A.3d at 507-8. Thus, Madrid was barred from a duress defense as a matter of law. *Id.* at 343, 254 A.3d at 508.

In *Madrid*, the Court of Appeals explored a juvenile's ability to act voluntarily, both during an interrogation and as part of a criminal gang. Clarifying what makes a juvenile's confession voluntary is an important step towards protecting the rights of young suspects. However, the totality of circumstances approach permits a court to exercise discretion in weighing the importance of factors such as age, intelligence, and experience when determining voluntariness.

The court's holding that a juvenile defendant is precluded from a duress defense when he voluntarily placed himself in a situation that makes coercion foreseeable will limit young defendants' access to this defense. Despite its expansive discussion of voluntariness in the first half of its opinion, the court did not consider whether Madrid was capable of voluntarily consenting to join MS-13 as a child. Although the court aimed to prevent abuse of the

duress defense, this omission invites future questions about the nature of consent in gang-related crimes involving minors and, in fact, all crimes committed by minors at the behest of adults.

RECENT DEVELOPMENT

NATIONSTAR MORTG. LLC v. KEMP: MARYLAND USURY LAWS APPLY TO ASSIGNEES OF A MORTGAGE LOAN, NOT JUST THE LOAN ORIGINATOR, AND IT IS ILLEGAL FOR MORTGAGE SERVICERS TO CHARGE INSPECTION FEES DURING THE LIFE OF A LOAN.

By: Fateh Tarar

The Court of Appeals of Maryland held that assignees of a mortgage are considered "lenders" and are prohibited from charging a mortgagee inspection fees during the life of a loan. *Nationstar Mortg. LLC v. Kemp*, 476 Md. 149, 193, 258 A.3d 296, 332 (2021). The court's holding resolved a matter in which a mortgagee contested the assessment of an inspection fee pursuant to Maryland Usury Laws, to which the assignee of the loan argued the laws did not apply to it because it did not fit the statute's definition of a "lender". *Id*. at 153-54, 258 A.3d at 299. The court also decided a matter between the parties concerning a violation of the Maryland Consumer Debt Collection Act ("MCDCA"). *Id*. at 161, 258 A.3d at 303-04 (citing Com. Law §§ 14-201-03).

Donna Kemp ("Kemp") obtained a mortgage loan secured by a deed of trust on her home. The loan was later assigned by the originator to the Federal National Mortgage Association ("Fannie Mae") who contracted with Nationstar Mortgage LLC ("Nationstar") to service the loan. Kemp later fell behind on her loan payments and Nationstar declared she was in default of the loan agreement. Nationstar conducted drive-by inspections of the property and charged Kemp inspection fees.

Kemp, Nationstar, and Fannie Mae entered into a loan modification agreement to resolve the default, but Kemp argued that she was improperly charged inspection fees pursuant to Maryland Usury Laws, section 12-121 of the Maryland Commercial Law. (citing Com. Law § 12-121). Nationstar and Fannie Mae argued that they did not fit within the definition of a "lender" that had been added to the Maryland Usury Law as part of code revision. Therefore, Nationstar and Fannie Mae asserted that they were exempt from the prohibition outlined in Maryland Usury Law section 12-121. (citing Com. Law § 12-121).

In December 2017, Kemp filed a complaint concerning the assessment of inspection fees in the Circuit Court for Montgomery County against Nationstar and Fannie Mae. Kemp asserted a federal claim as well as five

counts based on State law. Each count asserted that Fannie Mae and Nationstar improperly charged Kemp the inspection fees. The federal court dismissed the federal claim and remanded the remaining state law claims to the circuit court.

In the circuit court, Nationstar filed a motion to dismiss, and the court granted the motion. The circuit court held that neither Fannie Mae nor Nationstar fit the definition of a "lender" and therefore neither was subject to the service fee prohibition in Maryland Usury Law section 12-121. (citing Com. Law § 12-121). Kemp appealed to the Court of Special Appeals, and the court found that the usury law's prohibition of inspection fees applied to an assignee of a mortgage loan. The Court of Special Appeals also concluded that the dismissal of the MCDCA claim was appropriate because the MCDCA prohibits the use of an illegal method of debt collection, but it does not proscribe a method of addressing the validity of the underlying debt. The Court of Appeals of Maryland granted Nationstar's petition for a writ of *certiorari*.

The Court of Appeals was asked to determine whether Maryland Usury Law section 12-121 is applicable to an inspection fee assessed by an assignee of a loan. *Nationstar*, 476 Md. at 168, 258 A.3d at 308 (citing Com. Law § 12-121). The Court also had to determine whether Kemp's MCDCA claim was adequately asserted against Nationstar. *Id*. at 169, 258 A.3d at 308 (citing Com. Law § 14-203).

In terms of the inspection fee, the Court of Appeals of Maryland looked at the context of the statute, legislative history, and the legislature's intent to interpret the statute's purpose. *Nationstar,* 476 Md. at 169-71, 258 A.3d at 308-09. The Court of Appeals found that the term "lender" used throughout Maryland's Usury Law described the terms of loaning money. *Id*. at 172-73, 258 A.3d at 310-11 (citing Com. Law §§ 12-101(f), 12-121). During the relevant period, a "lender" was defined as "a person who makes a loan under [Maryland Usury Law]". *Id*. at 172-73, 258 A.3d at 310 (citing Com. Law § 12-101(f)). Nationstar argued that this definition did not apply to it because it was the assignee of the mortgage loan. *Id*. at 173, 258 A.3d at 310. The legislative history of the term's use showed that a lender's responsibilities do not diminish once the loan is assigned to another party. *Id*. at 187, 258 A.3d at 318-19. The Court explained that Nationstar's interpretation violated a standard canon of statutory construction that statutes are not construed to repeal the common law by implication. *Id*. at 177-78, 258 A.3d at 313 (citing *United Bank v. Buckingham*, 472 Md. 407, 433, 247 A.3d 336, 352 (2021)). Following this reasoning, the Court of Appeals held that the General Assembly's addition of the definition of "lender" into the Maryland Usury

Law's 1975 code revision did not change the rule that an assignee succeeds to the same rights and obligations under a loan agreement as its assignor. *Nationstar*, 476 Md. at 187, 258 A.3d at 318-19.

Next, the Court of Appeals looked at the record to determine whether Kemp adequately stated a claim under the MCDCA that Nationstar attempted to claim or enforce a right with knowledge that the right does not exist. *Nationstar,* 476 Md. at 189, 258 A.3d at 320 (citing Com. Law § 14-202(8)). In her complaint, Kemp asserted a claim that Nationstar violated the MCDCA, which also constitutes a violation of the Maryland Consumer Protection Act. *Id*. (citing Com. Law § 14-202(8)). The Court of Appeals held that Kemp's claim was not limited to the methods of debt collection because the remedial nature of the MCDCA required broad interpretation "to reach any claim, attempt, or threat to enforce a right that a debt collector knows does not exist". *Id.* at 190, 258 A.3d at 320 (citing Com. Law § 14-202(8)).

For the knowledge element of the MCDCA, the Court of Appeals held that to claim a defendant had adequate knowledge, a plaintiff must allege that the defendant had actual knowledge that it did not have a right that it claimed to have, or that it "recklessly disregarded" the inaccuracy of its claim. *Nationstar*, 476 Md. at 192, 258 A.3d at 321-22 (citing Com. Law § 14-202(8)). The complaint also included a 2014 advisory notice by the Maryland Commissioner of Financial Regulation informing mortgage servicers that it was likely illegal to charge mortgage borrowers inspection fees. *Id*. The court therefore found that the complaint properly alleged that Nationstar knew that it did not have the right to impose an inspection fee on Kemp. *Id*.

Judge Getty, dissenting, stated that the majority failed to properly interpret the relevant statutes in this case. *Nationstar*, 476 Md. at 193, 258 A.3d at 322-23 (Getty, J., dissenting). Judge Getty wrote that the General Assembly did not annul the common law by enacting sections 12-121 and 12-101(f) of Maryland Usury Law, and that the clearly stated intent of the General Assembly was to omit assignees from the term "lender". *Id*. at 194, 258 A.3d at 323 (citing Com. Law §§ 12-121, 12-101(f)). Getty also disagreed with the majority's decision regarding Kemp's MCDCA claim. *Id*. at 194, 258 A.3d at 323. Getty maintains that Maryland Usury Law section 14-202 only provides a cause of action in terms of a method of debt collection and not a challenge to the underlying reason for such debt. *Id*. at 194, 258 A.3d at 324 (citing Com. Law § 14-202).

In *Kemp*, the Court of Appeals of Maryland affirmed in part and reversed in part the lower court's decision and held that the prohibition on charging

inspection fees outlined in Maryland's Usury Laws applies to an assignee of a mortgage loan. The Court of Appeals also held that the MCDA prohibits lenders from attempting to collect inspection fees by asserting a right that it knowingly does not have. This decision clarifies the meaning of the term "lender" for the entire collection of Maryland Usury Laws. This clarification is important for the Maryland legal community because it resolves the ambiguity caused by the term's use. In addition, explaining what constitutes a proper claim under Maryland Usury Law section 12-121 allows borrowers to properly fight for their rights and contest the assessment of illegal fees. These holdings demystify the legality of money borrowing and empower borrowers to advocate against the imposition of illegal fees.

RECENT DEVELOPMENT

STATE V. MILLER: IF QUALIFIED AS A "SECOND AUTHOR", THEN AN ANALYST WHO DID NOT AUTHOR A DNA REPORT MAY TESTIFY REGARDING THE REPORT WITHOUT VIOLATING RIGHTS TO CONFRONTATION.

By: Chelsea Roberts

The Court of Appeals of Maryland held that a criminal defendant's confrontation clause rights were not violated by the admission of conclusions contained in a DNA report, where admitted solely through an analyst who did not create the report but reviewed the report and independently adopted its conclusions. *State v. Miller*, 475 Md. 263, 303, 256 A.3d 920, 944 (2021). The Court of Appeals of Maryland reversed the Court of Special Appeals of Maryland by holding: (1) the forensic analyst who conducted the technical review of a DNA report was allowed to testify as the "functional equivalent of a second author of the report"; and (2) brief references to the primary author's conclusions were harmless error because the testifying analyst's testimony was substantively her own opinion. *Id.*

In 2008, an unidentified person assaulted L.J. in her apartment. Members of the Baltimore Police Department collected DNA from the scene, and forensic analyst Thomas Hebert ("Hebert") identified an "unknown male" as the source of the DNA in his 2008 report. Nine years later, Oliver Miller ("Miller") was arrested for an unrelated offense and his DNA was entered into the FBI's Combined DNA Index System ("CODIS"). When entered, Miller's CODIS profile produced a "hit", matching him to the "unknown male" profile in the 2008 report. In 2017, Hebert authored a second DNA report, which identified Miller as "the source" of the DNA recovered in 2008.

At trial in the Circuit Court for Baltimore City for the 2008 assault, the State neither offered the 2017 DNA report into evidence nor offered Hebert as a witness. Instead, Kimberly Morrow ("Morrow"), an analyst and "technical reviewer" of the 2017 report, testified about the DNA match. Under the FBI's Quality and Assurance Standards ("QAS"), analysts must conduct a "technical review" of each DNA profile input to CODIS. This review requires "a thorough, substantive review of the primary analyst's work", in which the reviewer determines if there is "an appropriate and sufficient basis for the scientific conclusions."

Miller moved to exclude Morrow's testimony, arguing admission of Hebert's analysis through Morrow would violate his constitutional right to

confrontation. In response, Morrow explained that as a technical reviewer, she independently arrived at the same conclusions as Hebert before she signed the report. The court denied Miller's motion and permitted Morrow to testify. Morrow's testimony included "exact language" from the 2017 report, and Morrow affirmed she agreed with Hebert's conclusions. The jury found Miller guilty of several sex offenses in connection with the 2008 assault.

Miller appealed to the Court of Special Appeals of Maryland, contending Morrow's testimony violated his rights under both the Sixth Amendment of the U.S. Constitution ("Sixth Amendment") and Article 21 of the Maryland Declaration of Rights ("Article 21") because Hebert was not present for cross-examination. The Court of Special Appeals of Maryland concluded Hebert's 2017 report was testimonial, and Miller was denied his rights to confrontation when the contents of the report were admitted through Morrow's testimony. The intermediate court found the error was not harmless and ordered a new trial. The Court of Appeals of Maryland granted the State's petition for *certiorari* to decide whether admission of a forensic report's conclusions, through a reviewing analyst of the report and not the author, violated a defendant's constitutional rights to confrontation.

The confrontation clauses of the Sixth Amendment and Article 21 preserve a criminal defendant's right to confront all witnesses presented against him. *Miller*, 475 Md. at 280-81, 256 A.3d at 930 (citing U.S. Const. amend. VI; citing Md. Decl. of Rts. Art. 21). Admission of testimonial hearsay where the declarant is not available for cross-examination violates a defendant's rights to confrontation. *Miller*, 475 Md. at 281, 256 A.3d at 931 (quoting *Crawford v. Washington*, 541 U.S. 36, 59 (2014)). A forensic report is testimonial when prepared with the "primary purpose" of accusing the defendant of committing a crime. *Miller,* 475 Md. at 282, 256 A.3d at 931 (quoting *Williams v. Illinois*, 567 U.S. 50, 82-84 (2012) (plurality op.)). Under Article 21, a forensic report is testimonial where the author would reasonably understand the report's "primary purpose" was to establish facts "potentially relevant to a later criminal prosecution." *Miller*, 475 Md. at 283, 256 A.3d at 931-32 (quoting *Leidig v. State*, 475 Md. 181, 186, 256 A.3d 870, 873 (2021)). The State conceded, and the court agreed, Hebert's 2017 report was testimonial. *Miller*, 475 Md. at 283, 256 A.3d at 932.

The court next determined whether an analyst's testimony concerning a report they did not author (i.e., "surrogate testimony") constitutes hearsay, such that the defendant's rights to confrontation are violated. *Miller*, 475 Md. at 284, 256 A.3d at 932-33. The level of an analyst's first-hand knowledge of the report, at the time the report was made, is significant to whether the analyst's testimony is hearsay or their own expert opinion. *Id.* at 286-87, 289, 256 A.3d at 934, 935 (first citing *Bullcoming v. New Mexico*, 564 U.S. 647,

652 (2011); and then citing *Cooper v. State*, 434 Md. 209, 231, 73 A.3d 1108, 1121 (2013)).

The court concluded, where a second analyst conducted a technical review of a forensic report in compliance with QAS, the second analyst's first-hand knowledge is sufficient for the analyst to testify as the equivalent of a "second author" of the report. *Miller*, 475 Md. at 293-94, 256 A.3d at 938-39. The technical review required by QAS ensures: (1) the second analyst conducted a thorough review of the data at the time the report was made; and (2) the analyst is responsible for the report by signing it and indicating they independently adopted the same conclusions from the data. *Id.* at 294-95, 256 A.3d at 939. Thus, if challenged, the State must lay a foundation that the analyst became responsible for the report by conducting a technical review sufficient to satisfy QAS. *Id.* at 301, 256 A.3d at 942-43.

The court found the evidence in the instant case demonstrated Morrow's technical review complied with QAS and qualified her as a "second author" of the 2017 report. *Miller*, 475 Md. 293, 256 A.3d at 938. Morrow's testimony established she independently reviewed the data, documentation, statistics, and interpretations underlying the report before determining the report's conclusions were correct. *Id.* at 291, 256 A.3d at 936-37. When Morrow signed the report, she not only took part in its creation, but also adopted the report's conclusions as her own. *Id.* Thus, Morrow's testimony was not hearsay, but her own expert opinion. *Id.* at 293, 256 A.3d at 938. Portions of the testimony potentially violative of Miller's right to confrontation were harmless error: Morrow's testimony largely contained her own expert opinion and mere references to Hebert's report were insignificant. *Id.* at 302, 256 A.3d at 943.

The Court of Appeals of Maryland held the primary author of a DNA report is not required to testify if an analyst is the equivalent of a "second author". While this decision defines the degree of involvement required of an analyst who provides "surrogate testimony", it possibly abridges constitutional safeguards for the accused. Critics increasingly question the conclusiveness of forensic evidence; however, DNA may be viewed as irrefutable evidence to a jury. In the present case, neither the primary nor secondary author conducted the testing of Miller's 2017 DNA profile, nor did they make the initial CODIS match. A defendant's ability to confront analysts who create a DNA profile and those who make the match connecting the defendant to the crime was left unsettled by the *Miller* court.

Concern for constitutional safeguards in admission of DNA evidence is possibly even greater where confirmation bias may be at play. When an analyst knows a match exists, and their job is to ensure the already processed data can support the conclusion, the question must be raised as to whether their review can truly be independent.

RECENT DEVELOPMENT

TOWN OF RIVERDALE PARK v. ASHKAR: AN EMPLOYEE MUST PRESENT SUFFICIENT EVIDENCE OF DISCRIMINATION TO WITHSTAND A MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AGAINST AN ADVERSE EMPLOYMENT DECISION.

By: Leah Rowell

The Court of Appeals of Maryland held that to overcome a motion for judgment notwithstanding the verdict ("JNOV") in an employment discrimination case, a plaintiff must present sufficient evidence upon which a jury could find, by the preponderance of the evidence, that the employer's decision was rooted in intentional discrimination. *Town of Riverdale Park v. Ashkar*, 474 Md. 581, 615, 255 A.3d 140, 159-160 (2021). The court thus held that Mamoun Ashkar ("Ashkar") presented sufficient evidence for a jury to reasonably conclude that the Town of Riverdale Park, Maryland ("the Town") discriminated against Ashkar based on Ashkar's national origin in its employment decision. *Id.* at 613, 255 A.3d at 158. In addition, the court held that a remand to reinstate a verdict, when additional rulings on questions of law remain, does not require a new trial. *Id.* at 625, 255 A.3d at 165.

For thirty years, Greg's Towing ("Greg's") possessed an exclusive towing contract with the Riverdale Park Police Department ("RPPD") and remained the only towing company with a storage lot within municipal limits. Ashkar purchased Greg's in March 2014, however, Greg's previous owner allowed Greg's membership on the police department's "Tow List" to lapse. Ashkar visited RPPD to discuss the continuation of Greg's as the Town's exclusive towing provider, yet RPPD rejected his request. On a subsequent visit, Ashkar overheard RPPD officers making disparaging comments regarding his national origin. Ashkar reported the racial slurs to an officer with the Maryland Fraternal Order of Police ("FOP"). A RPPD officer later told the FOP officer that Ashkar was a "foreigner" who was unable to pass a background check. Ashkar submitted a proposal for a towing contract in September 2014. However, the Town awarded the contract to AlleyCat Towing and Recovery ("AlleyCat") based on the Chief of RPPD's recommendation.

Alleging claims of discrimination based on national origin, Ashkar sued the Town and members of the RPPD in the Circuit Court for Prince George's County. Following a jury trial and at the close of evidence, the Town moved for judgment on the discrimination count. The jury found in Ashkar's favor

on the discrimination claim. The court granted the Town's motion for JNOV after finding Ashkar failed to provide any "direct evidence of discrimination" that could be "imputed to the Town." On appeal, the Court of Special Appeals of Maryland reversed the grant of the motion for JNOV. The majority held Ashkar met his burden of proof because a jury could reasonably conclude that the Town offered a "pretextual reason" for refusing Ashkar's towing contract based on discriminatory biases. The Town appealed, and the Court of Appeals of Maryland granted *certiorari*.

For a plaintiff to establish employment discrimination through circumstantial evidence, the plaintiff must adhere to a three-part burden-shifting test articulated by the United States Supreme Court. *Ashkar,* 474 Md. at 615-16, 255 A.3d at 160 (first citing *Molesworth v. Brandon*, 341 Md. 621, 638, 672 A.2d 608, 616 (1996); and then citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). The first step requires an employee to establish a *prima facie* case of discrimination. *Ashkar*, 474 Md. at 616, 255 A.3d at 160 (citing *Molesworth*, 341 Md. at 638, 672 A.2d at 617). A *prima facie* case of discrimination requires the plaintiff to show that: (1) he belonged to a protected class; (2) that he applied for an open position and was qualified; (3) that he was rejected; and (4) that after his rejection, the employer continued to seek applicants having qualifications comparable to those of the complainant. *Ashkar,* 474 Md. at 616, 255 A.3d at 160 (quoting *McDonnell Douglas Corp.*, 411 U.S. at 802).

The Court of Appeals of Maryland found that Ashkar established a *prima facie* case of discrimination. *Ashkar*, 474 Md. at 617, 255 A.3d at 161. As a Palestinian-American, Ashkar's national origin qualified him as a member of a protected class. *Id.* at 618, 255 A.3d at 161. Ashkar was qualified because of his towing experience and ownership of Greg's. *Id.* Despite Ashkar's qualifications, his application for the towing contract was rejected, and the Town continued to keep the contract open until February 2015 when it awarded the contract to AlleyCat. *Id.* at 619, 255 A.3d at 162.

After establishing a *prima facie* case of discrimination, the burden then shifts to the employer, who must demonstrate a "legitimate, nondiscriminatory reason" for the employment decision. *Ashkar*, 474 Md. at 620, 255 A.3d at 162 (*citing Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 254 (1981)). The Town satisfied its burden by citing AlleyCat's inclusion on the Tow List and Greg's omission from the list during the 2014-2015 Tow List cycle as a sufficient and nondiscriminatory reason for Ashkar's rejection. *Ashkar*, 474 Md. at 620, 255 A.3d at 162-63.

The third step of the framework shifts the burden back to the plaintiff who must prove by a preponderance of the evidence that the proffered

business reason was not the true motive behind the adverse employment decision, but rather a pretext for discrimination. *Ashkar*, 474 Md. at 616-17, 255 A.3d at 160 (quoting *Molesworth*, 341 Md. at 638-39, 672 A.2d at 617). Ashkar met this burden because he presented sufficient evidence for a jury to infer that RPPD's discrimination against his national origin was the decisive factor behind the Town's employment decision. *Ashkar*, 474 Md. at 623, 255 A.3d at 164. Ashkar testified that a RPPD officer called him racial slurs on two separate occasions. *Id.* at 621, 255 A.3d at 163. In addition, a RPPD officer told a FOP officer to not use Ashkar's company because Ashkar was a "foreigner" who was unable to pass a background check. *Id.* The court noted that these instances of discrimination were "reasonably imputed" on the Town because RPPD officers, as employees of the Town, influenced the Chief of RPPD's recommendation in awarding the towing contract. *Id.* at 622-23, 255 A.3d at 163-64.

Ashkar also presented sufficient evidence for a jury to find that the Town's use of the Tow List was not "worthy of credence." *Ashkar*, 474 Md. at 623, 255 A.3d at 164. The Town did not provide evidence of a written policy listing the Tow List as a decisive factor in awarding the towing contract. *Id.* Moreover, the Town formalized its preference for giving business to local vendors several months before the towing contract was awarded. *Id.* at 624, 255 A.3d at 165. This resolution should have favored Greg's since it was the only towing service within the Town's limits. *Id.* The court therefore held a jury could reasonably conclude that the Town's denial of Greg's proposal based on the Tow List was either directly a result of discrimination or indirectly as a pretext for discrimination. *Id.* at 624-25, 255 A.3d at 165.

Finally, the court explained when a motion for JNOV is granted, the circuit court must simultaneously decide whether to grant a motion for a new trial. Ashkar, 474 Md. at 628, 255 A.3d at 167. However, the court held that a verdict can be reinstated without a new trial if only outstanding issues of law remain to be decided by the circuit court on remand. *Ashkar*, 474 Md. at 629, 255 A.3d at 167 (citing *Bowden v. Caldor, Inc.*, 350 Md. 4, 47, 710 A.2d 267, 288 (1998)).

Ashkar illustrates the necessary path for an employee to prove employment discrimination. However, as most employment decisions are made behind closed doors, it is unlikely this burden-shifting framework is practical in the 21st century. Potential employers can fall prey to unintentional or intentional bias when researching an applicant online. An applicant's national origin, sexual preferences, gender identity, religious beliefs, and more can be found by viewing social media accounts. One can be relegated to discriminatory practices by one click. Although this ruling protects potential employees from intentional discrimination in employment decisions, industries must do their due diligence to ensure intentional

discrimination does not occur. Companies can achieve this goal by prohibiting employers from looking at applicants' social media accounts and requiring employers to provide legitimate reasons in rejecting applicants.

RECENT DEVELOPMENT

VELICKY V. COPYCAT BLDG. LLC: IN A TENANT HOLDING OVER ACTION, AN UNLICENSED LANDLORD RETAINS STATUTORY RELIEF TO REPOSSESSION, AND THE VALUE OF A LANDLORD'S POSSESSORY INTEREST IN PROPERTY IS INCLUDED WHEN CALCULATING THE AMOUNT IN CONTROVERSY.

By: Jacob Linn

The Court of Appeals of Maryland held that the use of the tenant holding over statute by a landlord to repossess their property from a tenant is appropriate even when the landlord is unlicensed. *Velicky v. Copycat Bldg. LLC*, 476 Md. 435, 264 A.3d 661 (2021). The court balanced a tenant's rights to safe and habitable living conditions with a landlord's rights to repossession after a tenancy is over. *Id.* at 481, 264 A.3d at 688. The court also held that the right to repossession of a property interest had a monetary value, which counts towards the amount in controversy for determining a *de novo* or on the record appeal. *Id.* at 481, 264 A.3d at 688.

Copycat Building, LLC ("Copycat") did not have the requisite rental license, as required to rent residential property in Baltimore City. Copycat owns and rents residential units at 1501 Guilford Avenue in Baltimore City. Christopher Walke ("Walke") and Anna Velicky ("Velicky") were both month-to-month tenants in Copycat's building. Walke and Velicky both received a sixty-day notice to vacate the building and a notice of termination. At the end of the sixty days, neither Walke nor Velicky had vacated Copycat's building.

Copycat filed separate tenant holding over actions against Walke and Velicky in the District Court for Baltimore City. Walke and Velicky filed motions to dismiss based on Copycat's lack of a rental license. Both motions were dismissed, and the district court entered judgment in favor of Walke and Velicky, stating Copycat had not shown expired leases. Copycat appealed both decisions to the Circuit Court for Baltimore City. The circuit court entered a *de novo* judgment in each case for Copycat. Walke and Velicky both petitioned the Court of Appeals of Maryland for a writ of *certiorari* to answer whether an unlicensed landlord can seek repossession of a property interest under the tenant holding over statute and the court granted certiorari. Velicky additionally asked whether the circuit court should have heard the appeal on the record instead of *de novo*.

The Court of Appeals of Maryland first determined whether an unlicensed landlord could utilize the statutory relief of a tenant holding over action to regain possessory interest in real property. *Velicky*, 476 Md. at 466, 264 A.3d at 679. The court found the general rule was that the courts would not enforce an unlicensed professional's monetary claims based on a contractual agreement requiring a license. *Id.* at 466, 264 A.3d at 679-80 (citing *McDaniel v. Baranowski*, 419 Md. 560, 587, 19 A.3d 927, 943 (2010)). The contract was the basis for the relationship between the landlord and the tenant, and therefore the contract governed alongside the statutory provisions provided by the summary ejectment process. *Velicky*, 476 Md. at 471, 264 A.3d at 682 (citing *McDaniel*, 419 Md. at 574, 19 A.3d at 935; citing Md. Code Real Prop. § 8-401 (LexisNexis 2021)). In jurisdictions that require a license, an unlicensed party cannot enforce a contract without showing they were licensed to enter that contract. *Id.* The court determined essential differences in this case compared to their previous ruling. *Id.* at 473, 264 A.3d at 683 (citing *McDaniel*, 419 Md. at 587, 19 A.3d at 943).

First, the summary ejectment process is based on a breach of contract between the parties. *Velicky*, 419 Md. at 473, 264 A.3d at 683-84 (*see* Real Prop. § 8-401(e)). If the landlord was unlicensed to enter any landlord-tenant contract, the statutory remedies of the summary ejectment process that come from the contract were unavailable. *Id.* (*see McDaniel*, 419 Md. at 587, 19 A.3d at 943.) While Copycat was unlicensed, it sought a statutory remedy through the tenant holding over statute, which applies when a tenancy contract is no longer in effect. *Id.* (*see* Real Prop.. § 8-402(b)(2)). The remedy being sought is not contractually based but arises out of the landlord's possessory interest in the property. *Id.* (*see* Real Prop.. §§ 8-401, 8-402).

Second, in contrast to the court's prior ruling on the summary ejectment process, Copycat was not seeking monetary damages stemming from a contract where a license was required. *Velicky*, 419 Md. at 474, 264 A.3d at 684 (*see McDaniel,* 419 Md. At 587, 19 A.3d at 943). Instead, Copycat was seeking a return of its possessory interest in the property. *Id.*

Third, the tenant holding over statute procedures differed from the statutory procedures for summary ejectment. *Velicky*, 419 Md. at 474-75, 264 A.3d at 684 (*compare* Real Prop. § 8-401 *with* § 8-402 (The summary ejectment statute bases recovery on monetary claims, whereas the tenant holding over statute seeks to regain possession of real property.)). In a summary ejectment action, a landlord can repossess a property when tenants fail to pay rent. *Velicky*, 419 Md. at 475, 264 A.3d at 684-85 (citing Real Prop. § 8-401(f)). Whereas, under the tenant holding over statute, the landlord-tenant relationship must be terminated, and the landlord must provide sixty days' notice before filing an action. *Velicky*, 419 Md. at 475, 264 A.3d at 685 (citing Real Prop. § 8-402(c)).

Finally, the court stated that if its prior ruling were to apply in this case, there would be no statutory remedy for an unlicensed landlord to regain possession of their property. *Velicky*, 419 Md. at 475, 264 A.3d at 685. The statutes that regulate the landlord-tenant relationship and modify the common law ejectment action balance a landlord's property rights and establish protections for tenants. *Id.* Therefore, the court in the instant case declined to apply its ruling under the summary ejectment statute to an unlicensed landlord seeking repossession of their property under the tenant holding over statute. *Velicky*, 419 Md. at 478, 264 A.3d at 687.

The Court of Appeals of Maryland then determined whether an appeal of a tenant holding over action was appropriately reviewed *de novo* or on the record. *Velicky*, 419 Md. at 478-79, 264 A.3d at 687. A civil case on appeal is heard on the record when the parties' consent or the amount in controversy is greater than $5,000. *Id.* at 479, 264 A.3d at 687 (*see* Md. Code Ann., Cts. & Jud. Proc. § 12-401(f) (LexisNexis 2021)). Next, a possessory interest in real property has value the same as a monetary claim; the aggregate of the two values represents the amount in controversy. *Velicky*, 419 Md. at 480-81, 264 A.3d at 687-88 (citing *Purvis v. Forrest Street Apartments*, 286 Md. 398, 404-05, 408 A.2d 388, 391-92 (1979)). Accordingly, the court determined that Copycat had a possessory interest equal to the statutory sixty-day notice requirement or two months of rent exceeding the threshold. *Id.* at 481, 264 A.3d at 688.

Judge McDonald and Judge Watts both dissented. *Velicky*, 419 Md. at 482, 264 A.3d at 690. Judge McDonald opined that expedited statutory remedies should be limited to licensed landlords. *Id.* at 488, 264 A.3d at 692 (McDonald, J., dissenting). Judge Watts opined that unlicensed landlords would use the majority opinion to collect unpaid rent from tenants holding over without abiding by licensing requirements meant to create habitable living environments for tenants. *Id.* at 500, 264 A.3d at 700 (Watts, J. dissenting).

In *Velicky v. Copycat Building LLC,* the Court of Appeals of Maryland determined that even an unlicensed landlord has a statutory right to their property. This case worked to balance the public policy rights of a tenant to live in a habitable environment and a landlord's rights to their property, but the dissenting opinions recognize important considerations of which Maryland lawmakers should be mindful. The Baltimore City licensing requirements are meant to promote habitable living conditions for tenants. Maryland's General Assembly and legal practitioners should carefully analyze the cases that follow *Velicky* to determine if public policy goals are being protected and make necessary changes.