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LETTER FROM THE EDITOR-IN-CHIEF

Dear Reader:

The Editorial Board and Staff Members of the University of Baltimore Law Forum, Volume 54, are excited to share the first of two issues for the 2023-2024 school year. Since its inception in 1970, Law Forum has devoted itself to apprising the legal community in Maryland, and the larger community, about developments in the law affecting Maryland. Today, Law Forum publishes scholarly articles, student comments, and recent developments in print, while simultaneously publishing these and other pieces online at ublawforum.com. Volume 54 continues this commitment by providing readers with legal scholarship highlighting developments around the state and selecting diverse pieces geared for intellectual curiosity.

Volume 54.1 commences with an article by the Honorable Byron E. Macfarlane detailing recent changes in Maryland's intestacy laws, the inner workings behind these changes, and the decades-long public efforts leading to these changes. Then, Domonique Flowers, Esq., pens an article discussing the rise of Maryland's earliest generations of Black lawyers and their tribulations in utilizing the legal system to advance minority interests in several factions of the public sphere.

Next, Volume 54.1 welcomes two student comments. Victoria Garner writes about Maryland's juvenile justice system, discussing the harm created when children face charges in adult criminal court and suggestions for repealing Maryland's automatic waiver system. Yakira Price authors a comment regarding gaps in Maryland's privacy laws, stemming from facial recognition technology and the rise of smart home security camera systems. Finally, Volume 54.1 concludes with seven recent development pieces illuminating paramount decisions made by the Supreme Court of Maryland and the U.S. District Court for the District of Maryland, describing their impact on Maryland's legal community.

As Editor-in-Chief, I am honored to facilitate Law Forum's Staff Editors, Associate Editors, and Executive Board's hard work and tenacity in providing this publication for you. Producing a storied legal journal is an impossible feat without the dedication and creativity of each staff member. Thank you to the Volume 54 staff for your dedication throughout the editorial process and thank you to the many faculty members who encouraged and guided the staff members throughout this issue.

On behalf of the University of Baltimore Law Forum, we thank you, our subscribers and readers, for your continued support and interest in our publication.

Sincerely,
Ali Mahdi
Editor-in-Chief
University of Baltimore Law Forum, Volume 54, Issue 1

Member, National Conference of Law Reviews

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VOLUME 54 FALL 2023 NUMBER 1

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ARTICLE

MAJOR REFORMS TO PROBATE IN MARYLAND: MODERNIZING LAWS OF INTESTACY AND ESTABLISHING REGISTERED DOMESTIC PARTNERSHIPS

By: Byron E. Macfarlane*

I. OVERVIEW

When an individual dies without a Last Will and Testament, their estate passes under the laws of "intestacy."[1] Intestate succession controls the disposition of the intestate's probate property.[2] In the absence of an executed testamentary writing, the Maryland General Assembly, like its counterparts in every other jurisdiction in the United States, has enacted legislation to determine who has the privilege of inheriting.[3] As some say, if you do not write a will, the State has written one for you.[4]

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* The Honorable Byron E. Macfarlane is the Register of Wills for Howard County, a graduate of the University of Baltimore School of Law, and a member of the Maryland State Bar Association. Acknowledgements: I am deeply appreciative of the individuals and institutions that have allowed me to be in the position to hopefully contribute to the legal community's scholarly discourse regarding estates and trusts law in Maryland. I am grateful for the mentorship and counsel of Professor Angela M. Vallario, and for the support and contributions of members of my staff, including Gary Smith, Chief Deputy, and Greg Staub, Information Technology Manager. I thank my friend and colleague, Alexis Burrell-Rohde, Register of Wills for Baltimore County, for her partnership in ushering through the legislation discussed in this article. This legislation represented the most comprehensive and culturally inclusive reform to intestacy and estate law in over half a century and I could not have asked for a more steadfast, insightful, and dedicated companion on this journey. I also thank the tremendous staff at the University of Baltimore Law Forum for their consistent, thorough, and prompt assistance with the drafting and publication of this article. Finally, I must thank my family, friends, and the voters of Howard County for their support and for electing me to an office where I have the privilege to serve them and work for positive change not just for our county but for our entire state.

[1] MD. CODE ANN., EST. & TRUSTS § 3-101 (West 2019).

[2] *Id.* § 1-301(a).

[3] Hall v. Vallandingham, 75 Md. App. 187, 192, 540 A.2d 1162 (1988) ("The right to receive property by devise or descent is not an actual right but a privilege granted by the state.").

[4] *Id.* at 192 ("Every State possesses the power to regulate the manner or terms by which property within its dominion may be transmitted by will or inheritance and to prescribe who shall or shall not be capable of receiving that property. A State may deny the privilege altogether or may impose whatever restrictions or conditions upon the grant it deems appropriate.").

II. INTESTATE ESTATES IN MARYLAND

Intestacy is considered the state of dying without a will, and the law considers those who died without a will as having "died intestate." [5] Intestacy laws are essential because of the sheer number of people who do not prepare a Last Will and Testament prior to death and whose heirs do not have the benefit of a testamentary writing to guide the administration of an estate.[6]

Between July 1, 2022, and June 30, 2023 – colloquially referred to in Maryland state government as Fiscal Year 2023 or FY2023 – the registers of wills across Maryland opened 28,556 probate estates in the state's 24 jurisdictions, of which 13,954, or 48.9% of estates, were intestate.[7] Therefore, close to half of Maryland estates rely exclusively on the provisions of Maryland's intestacy laws, as these estates do not have the benefit of an executed Last Will and Testament to determine who will inherit from the probate estate.[8] Additionally, 10,376 of the 13,954 intestate estates, or 74.4% of all intestate estates, were called "small estates," which are estates valued at up to $50,000.[9] While 74.4% of intestate estates are small estates, small estates comprise just 60.5% of all estates.[10] To summarize, nearly half of all Maryland estates are opened intestate and intestate estates are disproportionately smaller estates, often indicating that the decedents were less likely to have the financial means to hire an attorney and create an estate plan.[11] This reality means that nearly half of Maryland estates rely on intestacy law, and estates for families of lesser means rely on intestacy laws more than others.[12]

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[5] *Intestacy*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/intestacy (last updated Feb. 2023); *see generally* Kroll v. Nehmer, 348 Md. 616, 705 A.2d 716 (1998).
[6] Angela Vallario, *Don't Let Death Be Your Deadline: Get A Will Before It's Too Late: Expand Holographic-Wills Law to Incentivize Will-Making*, 30 ELDER L. J. 349, 350-51 (2023).
[7] Byron E. MacFarlane & Greg Staub, Analysis of Estates Opened in Fiscal Year 2023 by Estate Type and Will Type (July 19, 2023) (on file with Author).
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] MacFarlane & Staub, *supra* note 7. Note, however, that this could also be due to the bulk of an individual's gross estate being comprised of assets that are titled jointly, titled with named beneficiaries, or otherwise arranged to pass outside of probate, such as revocable trusts. However, given the nature of small estates, they're usually opened for individuals of modest means rather than for individuals who are wealthy and have left only a small probate estate.
[12] Reid K. Weisbord, *The Connection Between Unintentional Intestacy and Urban Poverty*, RUTGERS L. REV. (Feb. 26, 2014), https://ssrn.com/abstract=2401014.

III. HISTORICAL CONTEXT

In 1974, the Maryland General Assembly reorganized and compiled myriad provisions related to decedents' estates into the Estates & Trusts Article of the Annotated Code of Maryland.[13] Maryland law previously situated the bulk of probate law within Article 93 of the Code, and lawmakers, verbatim, copied much of intestacy law into the new scheme.[14] Since that time, there have been many legislative efforts to alter Maryland intestacy law, with limited success and without any comprehensive review of the intestacy laws' provisions until quite recently.[15] This lack of progress has meant that in the limited instances when intestacy laws have changed, the changes have not been a component of any broad review, but rather a one-off remedy to a real or perceived shortcoming.[16]

Consider, for example, the spousal share in an intestate estate. Lawmakers have only been successfully amended the portion of intestacy law pertaining to spousal share four times in the last forty-nine years.[17] In 1974, the aforementioned Estates & Trusts Article entitled the surviving spouse to the decedent's entire estate only if the decedent did not have issue (i.e., children, grandchildren, adopted children), parents, siblings, or issue of a sibling.[18] The spouse was entitled to one-third of the estate if there were surviving issue, one-half of the estate if there was a surviving parent, and $4,000 plus one-half of the estate if there was a surviving sibling or issue of sibling.[19]

In 1978, Maryland legislators amended the spousal share statute to entitle the surviving spouse to (1) one-half of the estate rather than one-third if there were surviving issue, or (2) the entire estate if the decedent had no surviving issue or parents.[20] This change established a more generous share for the surviving spouse even when there were surviving issue, and stopped the line of intestate succession at parents, thereby revoking the right of

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[13] James G. McCabe, Recent Legislation, *Decedents' Estate – Laws Enacted at the 1974 Session of the Genera; Assembly of Maryland Affecting the Administration of Decedents' Estates*, 4 U. BALT. L. REV. 199, 200-01 (1974).
[14] *Id.*
[15] Act of May 25, 2017, ch. 627, 2017 Md. Laws 3733-35; S. 317, 2019 Gen. Assemb., 440th Sess. (Md. 2019).
[16] *See infra* Part III, Para. 2-5.
[17] S. 317. Revisions include provisions regarding posthumously conceived children, precluding a parent from inheriting from a child they have abandoned, and precluding a parent from inheriting from a child who was born as a result of incest. *Id.*
[18] *Id.; See also* Louis J. Rosenthal, *Recent Developments in Maryland's Intestate Succession Law*, 13 U. BALT. L.F. 28, 28-29 (1982).
[19] Act of Feb. 18, 1974, ch. 11, 1974 Md. Laws 50. ("Revisor's Note: These provisions were not changed, except for language and style, from the aforementioned Article 93.").
[20] Act of Apr. 11, 1978, ch. 111, 1978 Md. Laws 1063-64.

siblings or issue of siblings to inherit.[21] These changes, undoubtedly, would have made more sense to members of the public at that time than they do now.[22]

In 1982, Maryland legislators amended the spousal share statute once again to introduce a distinction between minor and adult children.[23] Accordingly, the surviving spouse would continue to have the right to inherit one-half of the estate, even if the decedent left a surviving minor child.[24] If, however, the decedent left no surviving minor child but a surviving issue, the surviving spouse would receive $15,000 plus one-half of the estate.[25] Similarly, if the decedent left no surviving issue but a surviving parent, the surviving spouse would still receive $15,000 plus one-half of the estate.[26] Like the 1978 measure, this amendment established more generous provisions for the surviving spouse and likely brought the law closer to public expectations.[27]

The next revision to the spousal share statute did not come until 2017.[28] The 2017 measure sought to increase the spousal share from $15,000 to $100,000 in the aforementioned instances – when the decedent left no surviving minor child but left a surviving issue — and when there were no surviving issue but a surviving parent.[29] In its deliberations, the General Assembly felt that a change from $15,000 to $100,000 in spousal share seemed too large, and arbitrarily settled on $40,000.[30] Much like previous revisions to the spousal share, this update entitles surviving spouses to a larger inheritance than under old law.[31]

Prior to 2023, the General Assembly most recent revised the spousal share statute in 2019.[32] The 2019 measure changed the spousal share apportionment when the decedent died without issue but with a surviving parent, from $40,000 plus one half of the estate, to the entire estate if the decedent and spouse had been married for at least five years.[33] The bill, as

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[21] *Id.*
[22] Katharine T. Barlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879, 879 (1984).
[23] Act of May 20, 1982, ch. 264, 1982 Md. Laws 2548.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] Ch. 111, 1978 Md. Laws, at 1063-64.
[28] Act of May 25, 2017, ch. 627, 2017 Md. Laws 3734-35.
[29] *Id.*
[30] S. 73, 2017 Gen. Assemb. (Md. 2017).
[31] *See, e.g.*, ch. 264, 1982 Md. Laws, at 2548; *See also*, ch. 111, 1978 Md. Laws, at 1063-64.
[32] Act of Apr. 30, 2019, ch. 263, 2019 Md. Laws 1567-68.
[33] *Id.*

initially introduced, required a marriage of at least ten years.[34] However, legislators amended this marriage requirement to five years, because the ten-year requirement would disqualify same-sex couples who had only obtained the right to marry in Maryland in 2013.[35] This revision would also effectively remove parents from intestacy in estates when a decedent had been married for a reasonable period of time.[36]

Based on testimony brought before the Maryland General Assembly, a widowed constituent of the sponsoring state senator prompted this spousal share revision, whose husband died in a car accident around the time of the deceased's retirement.[37] The deceased spouse had virtually all of the couple's marital assets titled solely in his own name, did not have a Last Will and Testament, and was survived by his spouse and parents.[38] As the bulk of the marital assets would pass through the decedent's probate estate since the decedent did not have a will, the law previously only entitled a surviving spouse to $40,000 plus one half of the estate, while the other half of the estate passed to the intestate's parents.[39] While the proposed legislation would enable the widow to inherit her husband's entire estate, it also created – for the first time since at least 1974 – a distinction between spousal rights under Maryland probate law based on the duration of the marriage.[40] By creating this distinction, seemingly without reason, individuals who were married for less than five years are precluded from the same protections.[41]

IV. OTHER REFORM EFFORTS

In the quarter century preceding the 2023 session of the Maryland General Assembly, the legislature only considered twelve bills pertaining to

[34] S. 317, 2019 Gen. Assemb. (Md. 2019).
[35] *Id.*; *Hearing on S. 317 Before the S. Comm. on Jud. Proc.,* 2019 Gen. Assemb., 439th Sess. (Md. 2019) [hereinafter "*Hearing on S. 317*"] (statement of Sen. Mary Washington, Member, S. Comm. on Jud. Proc.).
[36] *Hearing on S. 317*, *supra* note 35 (statement of Sen. Mary Washington).
[37] *Id.* (statement of Kathleen D. Colleran Nossick).
[38] *Id.*
[39] Act of May 25, 2017, ch. 627, 2017 Md. Laws 3734-35.
[40] Act of Feb. 18, 1974, ch. 11, 1974 Md. Laws 50; s*ee also*, S. 317.
[41] S. 317.

intestacy.[42] Six of these bills failed,[43] but five bills became law.[44] No session of the General Assembly ever reintroduced the remaining bills any capacity.[45] The five successful measures include the 2017 and 2019 changes to the spousal share, various provisions regarding posthumously conceived children such as those precluding parents who have abandoned their children from inheriting from their children's estates and measures precluding a parent from inheriting from the estate of a child born due to incest.[46] Of all these proposals, only the recent changes to the spousal share could be considered meaningful reforms to intestacy in Maryland because the others, while not without merit, do not fundamentally alter inheritance; rather, the other proposals are narrow provisions for very rare circumstances.[47] It was not until 2022 that legislators undertook the task of thoughtfully considering reform to intestacy in a comprehensive manner.[48]

V. WORKGROUP FORMATION

In early 2022, this author, along with the Honorable Alexis Burrell-Rohde, members of the Estates & Trusts Section Council of the Maryland Bar Association, and other stakeholders, convened an Intestacy Reform Workgroup (the "Workgroup") to study and make recommendations for alterations deemed in the public interest of Maryland's intestacy laws.[49]

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[42] S. 258, 1999 Gen. Assemb., 413th Sess. (Md. 1999); H.D. 1100, 1999 Gen. Assemb., 413th Sess. (Md. 1999); S. 87, 1999 Gen. Assemb., 413th Sess. (Md. 1999); S. 219, 2000 Gen. Assemb., 414th Sess. (Md. 2000); S. 173, 2001 Gen. Assemb., 415th Sess. (Md. 2001); S. 71, 2012 Gen. Assemb., 430th Sess. (Md. 2012); H.D. 857, 2013 Gen. Assemb., 433d Sess. (Md. 2013); S. 73, 2017 Gen. Assemb., 437th Sess. (Md. 2017); H.D. 567, 2018 Gen. Assemb., 438th Sess. (Md. 2018); S. 109, 2018 Gen. Assemb., 438th Sess. (Md. 2018); H.D. 783, 2018 Gen. Assemb., 438th Sess. (Md. 2018); S. 317, 2019 Gen. Assemb., 440th Sess. (Md. 2019).

[43] H.D. 783; S. 219; S. 258; S. 71; H.D. 567; S. 109.

[44] H.D. 1100; S. 73; H.D. 857; S. 173; S. 317.

[45] S. 87.

[46] Act of May 27, 1999, ch. 685, 1999 Md. Laws 3763-66; Act of May 18, 2001, ch. 582, 2001 Md. Laws 3098-3100; Act of May 16, 2013, ch. 644, 2013 Md. Laws 5487-91; ch. 627, 2017 Md. Laws, at 3733-34; Act of Apr. 30, 2019, ch. 262, 2019 Md. Laws 1567-68.

[47] *See* ch. 626, 2017 Md. Laws, at 3733-34; ch. 262 2019 Md. Laws, at 1567-68; Meeting Minutes from the Md. Intestacy Reform Workgroup (Mar. 3, 2022, Mar. 29, 2022, Apr. 23, 2022, May 23, 2022, Jun. 9, 2022, Jul. 7, 2022, Aug. 24, 2022, Oct. 3, 2022, Nov. 2, 2022) (on file with author).

[48] *See generally* Act of May 16, 2023, ch. 647, 2023 Md. Laws (though the Governor signed this bill in 2023, this bill began substantive development in 2022).

[49] Meeting Minutes from the Md. Intestacy Reform Workgroup, *supra* note 47 (Workgroup members include: Hon. Byron Macfarlane, (Register of Wills for Howard County), Hon. Alexis Burrell-Rohde (Register of Wills for Baltimore County), Rachel D. Burke, Esq., Angus Derbyshire, Esq. (Asst. Dir. For Pro Bono, Md. Legal Aid), Christine W. Hubbard, Esq., Shakisha A. Morgan, Esq., Michaela C. Muffoletto, Esq., Micah G. Snitzer, Esq., and

The Workgroup's methodology scrutinized intestacy laws by (1) reviewing materials gathered by the Maryland State Bar Association's Estates & Trusts Section Council during its investigation into Maryland intestacy laws in years prior, (2) comparing Maryland's intestacy laws to that of other jurisdictions in the United States, (including states that follow the Uniform Probate Code ("UPC")), (3) considering the changing nature and composition of modern families, (4) examining practical concerns over how the current law impacts estate administration, and (5) analyzing how current laws may not meet the expectations of the average citizen in terms of who inherits and in what amount.[50] This final consideration was, perhaps, the most important component of the Workgroup's effort. As expressed by the Supreme Court of Maryland, "the purpose of the statutes of descent and distribution is to make such a will for an intestate as he would have been most likely to make for himself."[51] Accordingly, the Workgroup found that many of Maryland's intestacy laws are currently out of sync with what the average citizen "would have been most likely to make for himself," a schism it sought to remedy.[52]

This author chaired the Workgroup, which met nine times over nine months and had numerous internal follow-up conversations regarding presenting the group's recommendations to the public, which included legislators who eventually sponsored the legislation embodying these recommendations in the 2023 Maryland General Assembly.[53] The Workgroup's deliberations were guided by the principles of bringing Maryland intestacy law more in line with other states, considering the contemporary makeup of families, the desire to streamline probate distribution, and the importance of creating laws more in line with public expectations.[54] The Workgroup honed in on the following key areas of concern: (1) providing protection for the growing number of Marylanders living in domestic partnerships, (2) various circumstances implicating spousal share, (3) the rights of great-grandparents and their descendants as

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Laura L. Thomas, Esq. Administrative and strategic support was provided by Joshua Greenfeld, Esq. (Chief of Staff, Reg. of Wills for Balt. Cnty.), judges of the Orphans' Ct. for Prince George's Cnty.; Athena Malloy Groves and Wendy Cartwright, attended the first meeting and a portion of the second meeting of the Workgroup, neither they nor any other Judge of an Orphans' Court participated further.)

[50] *Id*.

[51] Barron v. Janney, 225 Md. 228, 234–35, 170 A.2d 176, 180 (1961).

[52] *Id.* at 234-35, 170 A.2d 176 at 180; *see also* Meeting Minutes from the Md. Intestacy Reform Workgroup, *supra* note 47.

[53] Meeting Minutes from the Md. Intestacy Reform Workgroup, *supra* note 47.

[54] *Id*.

heirs, (4) the inheritance interest thereof, and (5) certain problematic and dated verbiage in Maryland's probate law.[55]

A. *Workgroup Topic 1: Domestic Partnerships*

According to the 2021 Census, 8% of unmarried adults report cohabiting with a partner.[56] In fact, the number of unmarried, cohabitating partners has nearly tripled in the last two decades from six million adults to seventeen million adults.[57] Individuals choose not to legally marry for a myriad of reasons, including religious differences, financial considerations, and personal preference.[58] Individuals in a domestic partnership, often considered an alternative to traditional marriage, tend to form a single financial unit similar to that of a married couple.[59] However, a surviving domestic partner has no legal standing to serve as personal representative and does not have the right to share in the distribution of the intestate's estate, regardless of whether the living partner's contribution was integral to the intestate's accumulation of assets.[60]

Until the passage of legislation in 2023, a limited exemption to the state inheritance tax was the only benefit Maryland gave domestic partner after the death of their partner.[61] The inheritance tax is a tax on the clear value of property passing from a decedent to an individual not exempt from the tax.[62] The individuals exempt from inheritance taxes included spouses, lineal descendants (e.g., children or grandchildren), lineal ancestors (e.g., parents

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[55] *Id.*

[56] *Census Bureau Releases New Estimates on America's Families and Living Arrangements*, U.S. CENSUS BUREAU (Nov. 29, 2021), https://www.census.gov/newsroom/press-releases/2021/families-and-living-arrangements.html.

[57] *Id.*

[58] Erez Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage,* 18 DUKE J. GENDER L. & POL'Y 105, 109 (2010) (discussing the view that marriage is a "patriarchal and discriminatory institution"); *One-in-Five U.S. Adults Were Raised in Interfaith Homes*, PEW RSCH. CTR. (Oct. 26, 2016), https://www.pewresearch.org/religion/2016/10/26/one-in-five-u-s-adults-were-raised-in-interfaith-homes/#:~:text=Roughly%20one%2Din%2Dfive%20U.S.,new%20Pew%20Research%20Center%20study; *see generally* Belinda Luscombe, *Why 25% of Millennials Will Never Get Married*, TIME (Sept. 24, 2014 6:13AM), https://time.com/3422624/report-millennials-marriage/.

[59] Courtney Thomas-Dusing, *The Marriage Alternative: Civil Unions, Domestic Partnerships, or Designated Beneficiary Agreements* 17 J. GENDER, RACE & JUST. 163, 166 (2014).

[60] *Hearing on S. 792 Before the S. Comm. on Jud. Proc.* 2023 Gen. Assemb., 443rd Sess. (Md. 2023) (testimony of Hon. Alexis Burrell-Rohde, Reg. of Wills for Balt. Cnty.)

[61] MD. CODE ANN., TAX-GEN. § 7-203(l) (West 2018).

[62] TAX-GEN. § 7-202.

or grandparents), siblings and stepchildren.[63] Since domestic partners were not exempt from inheritance taxes, domestic partners used to be obligated to pay a 10% tax on all property inherited from their deceased partner.[64]

In 2009, the Maryland General Assembly enacted legislation that exempts a surviving domestic partner from paying this tax on the interest they inherit in their primary residence.[65] To claim the exemption, the property must be jointly titled with the right of survivorship, and the surviving partner must provide their county's Register of Wills with either an Affidavit of Domestic Partnership, or two or more documented proofs of partnerships, like a shared bank account or shared home utility bill.[66] While this legislation allowed many partners to avoid paying the inheritance tax on the interest a partner inherits on their home, the surviving partner would still owe tax on all other inheritance, including probate and non-probate assets. Furthermore, a domestic partner would still have no priority to serve as the decedent's personal representative or inherit under the laws of intestacy.[67]

The Workgroup, therefore, considered whether domestic partners should have the same rights in intestacy as surviving spouses, in light of the financial partnership undertaken between domestic partners and the intestate, and the growing number of cohabitating adults in domestic partnerships.[68] The group also contrasted Maryland with many other states, including California, Maine, Nevada, New Jersey, Oregon, Washington, and Wisconsin, along with the District of Columbia — all that have domestic partnership registries which provide for identical treatment of registered domestic partners and spouses in intestacy.[69] The Workgroup engaged in extensive deliberations on this issue, and gave consideration to recommending intestacy protections for domestic partners who could prove a partnership existed upon death – as is the case with the narrow inheritance tax exemption – or establishing a registration process that would need to be completed prior to death.[70]

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[63] TAX-GEN. § 7-203(l).
[64] TAX-GEN. § 7-204(b).
[65] Act of May 19, 2009, ch. 602, 2009 Md. Laws 3405-06.
[66] MD. CODE ANN., HEALTH-GEN. § 6-101(b) (West 2008).
[67] TAX-GEN § 7-202; MD. CODE ANN., EST & TRUSTS § 5-104 (West 1974).
[68] *See Census Bureau Releases New Estimates on America's Families and Living Arrangements*, U.S. CENSUS BUREAU (Nov. 29, 2021), https://www.census.gov/newsroom/press-releases/2021/families-and-living-arrangements.html.
[69] *Domestic Partner Registries*, UNMARRIED EQUALITY (Last Updated Mar. 2013), https://www.unmarried.org/domestic-partnership/registries/.
[70] Minutes for Intestacy Workgroup Meetings, Maryland Intestacy Reform Workgroup at 6, 8 (May 23, 2022 & Aug. 24, 2022) (on file with Author).

Ultimately, the Workgroup was not comfortable with surviving domestic partners *automatically* receiving an intestate share from the deceased partner, as it could adversely impact the intestate's wishes as expressed in their estate planning documents and potentially generate litigation over whether a partnership existed.[71] To avoid disturbing the estate plans of unmarried persons and to prevent the potential chaos of one-sided post-death assertions of a partnership, the Workgroup suggested that Maryland follow the example of other jurisdictions by establishing an "opt-in domestic partnership registry" that requires couples to affirmatively seek recognition of their domestic partnership by submitting an application and other required proof related to the existence of the partnership.[72] By registering as a domestic partner, the surviving domestic partner would be exempt from the inheritance tax on the receipt of all assets and would be treated the same as a surviving spouse in intestate succession, and would also receive the same priority for appointment as personal representative for a statutory family allowance.[73] This recommendation stops short of treating a registered domestic partner the same as a surviving spouse — by implicitly enumerating the benefits of registration and, conversely, explicitly stating that the right to an elective share of the decedent's estate would not automatically exist.[74]The elective share is a statutory right of a surviving spouse to receive a certain fractional share of a deceased spouse's estate in the event they are disinherited, not provided for, or are not sufficiently provided for in the decedent's Last Will and Testament.[75]

The proposed domestic partnership registry would be maintained by the Registers of Wills in each of Maryland's twenty-four jurisdictions.[76] Modeled largely after the District of Columbia's longstanding domestic partnership registry, interested couples would be required to sign an application stating that they are both eighteen years or older, not in a partnership with anyone else, unmarried, and are in a committed relationship.[77] The Register would then provide a certificate memorializing

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[71] Minutes for Intestacy Workgroup Meeting, Maryland Intestacy Reform Workgroup at 5 (May 23, 2022) (on file with Author).
[72] *See id.*
[73] *Id.*
[74] *Id.*
[75] Claire S. Calomeris, *What Are You Entitled to When Your Spouse Dies – The Elective Share,* PEOPLE'S L. LIBR. OF MD (Jan. 17, 2022, 7:07 AM), https://www.peoples-law.org/what-are-you-entitled-when-your-spouse-dies-elective-share.
[76] Intestacy Workgroup Recommendations from Alexis Burrell-Rohde, et al., to Md. Gen. Assemb., at 3 (on file with Author).
[77] *Registered Domestic Partnerships in Maryland*, MD. OFF. OF REG.'S WILLS (2023) https://registers.maryland.gov/main/publications/Domestic%20Partnership%20Registration

the registration, similar in form to Letters of Administration,.[78] The Registers would collectively maintain a database of registered domestic partnerships, accessible to all the Register of Wills offices across the State.[79] To ensure that domestic partners understand the ramifications of registering, the Register of Wills would provide a standard form notice detailing what rights are being conferred and what rights are being curtailed for all couples registering their domestic partnership.[80]

Also modeled after the District of Columbia's registry, the Workgroup suggested several methods for terminating a registered domestic partnership.[81] These methods include the mutual agreement of the parties, or the declaration by one party with notice given of the termination to the other, both of which would take effect six months after filing.[82] Another method of termination is the filing of a declaration of termination by one partner after six months without contact with the other partner, termed by the Workgroup as "abandonment[,]" which would take effect immediately upon filing.[83] Finally, the death of one partner or the marriage of either or both partners would terminate a partnership immediately.[84]

The Workgroup's recommendation to establish a domestic partner registry represented a significant policy shift from treating domestic partners as legal strangers after the death of one partner, to treating them like married couples.[85] This registry would also recognize the growing number of adults living in various degrees of committed relationships, provide them with appropriate protections in intestacy, and – like spouses – exempt them from Maryland's inheritance tax.[86]

.pdf; *see also* H.D.755, 2023 Gen. Assemb., 445th Sess. (Md. 2023). S. 792, 2023 Gen. Assemb., 445th Sess. (Md. 2023).

[78] Timonthy Canney, *Estate Administration Overview*, PEOPLE'S L. LIBR. OF MD, https://www.peoples-law.org/estate-administration-overview (July 21, 2021, 3:39 PM). Letters of Administration are issued to personal representatives when estates are opened, *Id.*

[79] *Intestacy Reform & Domestic Partnership Registry: Summary of Current Law and New Law*, MD. OFF. OF REG. WILLS (2023), https://registers.maryland.gov/main/publications/Intestacy%20Summary%20Grid.pdf.

[80] *Registered Domestic Partnerships in Maryland*, *supra* note 77.

[81] D.C. CODE ANN. § 32-702 (West 2016); Act of May 16, 2023, ch. 647, 2023 Md. Laws.

[82] Ch. 647, 2023 Md. Laws.

[83] *Id.*

[84] *Id.*

[85] Brenda Wintrode, *Bill Will Grant Probate Protections for Domestic Partners, Eliminate Inheritance Taxes*, BALT. BANNER (May 11, 2023, 5:30 AM), https://www.thebaltimorebanner.com/politics-power/state-government/domestic-partnership-rights-maryland-TSZXXJXT2JGGJNCTNWAHSWLFXY/.

[86] *Id.*

B. *Workgroup Topic 2: Surviving Spouse*

One of the most misunderstood provisions in Maryland's intestacy laws among the public is that a surviving spouse does not always receive one-hundred percent of their deceased partner's estate.[87] Particularly surprising is that a decedent's parents are entitled to a share of the decedent's estate even though the decedent has a surviving spouse.[88] Maryland is also the only state where the surviving spouse's intestate share is dependent on the age of surviving children and the length of the marriage.[89]

Until the 2023 intestacy reform measure, Maryland spousal shares were structured in one of four ways: (1) If the decedent died, leaving a surviving spouse and any minor children, the surviving spouse received one half of the estate and the other half was distributed to issue (children and grandchildren) in equal shares, *per stirpes.*[90] (2) If the decedent died with a surviving spouse and any number of adult children, the spouse received $40,000 plus one half of the remainder estate, and the law distributed the other half to issue in equal shares, *per stirpes.*[91] (3) If the decedent died with a surviving spouse and no issue, but one or more surviving parents, the spouse received $40,000 plus one half of the remainder and the law distributed the other half to the decedent's parents in equal shares.[92] If the decedent and the surviving spouse were married at least five years, the spouse received the whole estate.[93] (4) If the decedent died with a surviving spouse, no issue, and no surviving parents, only then would the spouse receive the whole estate.[94]

Given that Maryland is the only state that distinguishes between minor and adult children, the Workgroup was inclined to eliminate this distinction as a matter of uniformity.[95] However, in broader discussions with members of the Maryland State Bar Association's Estates & Trusts Section Council, Registers of Wills throughout Maryland, judges, and state

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[87] *See Md. Intestacy Law*, PEOPLE'S L. LIBR. OF MD., https://www.peoples-law.org/maryland-intestacy-law. Maryland is the only jurisdiction in the United States that distinguishes between minor and adult children in intestacy. *Id.*
[88] *See id.*
[89] *Id.*
[90] MD. CODE ANN., EST. & TRUSTS § 3-102(b) (West 2019) (prior to 2023 amendment).
[91] *Id.* § 3-102(c) (prior to 2023 amendment).
[92] *Id.* § 3-102(d), (e) (prior to 2023 amendment).
[93] *Id.* § 3-102 (e) (prior to 2023 amendment).
[94] *Id.* § 3-102(f) (prior to 2023 amendment).
[95] Minutes for Intestacy Workgroup Meeting, Maryland Intestacy Reform Workgroup at 7 (Jul. 12, 2022) (on file with Author); Intestacy Leg. Recommendations from Alexis Burrell-Rohde, et al., *supra* note 76, at 3.

legislators, there were concerns over the ramifications of this proposal.[96] For example, if a decedent died with a surviving minor child and a surviving spouse who is not the parent of the minor child, the surviving spouse would receive an inheritance and have no obligation to support the minor child.[97] This Workgroup proposal, after scrutiny, came to light as inequitable, and so the first of the above-listed spousal share provisions was left alone.[98]

The Workgroup greatly scrutinized the second and third provisions listed above because legislators poorly aligned these provisions with assumptions made by members of the general public, and because the spousal benefit was relatively minuscule when compared to other states.[99] In addition, these provisions did not reflect the growing number and variety of blended families, a growing trend which the law should adequately address.[100] For instance, many states, including those that have adopted the UPC, provide a different spousal share if the decedent died with issue.[101] Specifically, if the issue of the decedent is an issue of the surviving spouse, then the surviving spouse receives the whole estate.[102] However, if the decedent died leaving issue, and at least one of the issue is *not* also issue of the surviving spouse, then the surviving spouse receives $100,000 plus half the remainder.[103] In the latter scenario, some states like North Dakota are even more generous, providing that the surviving spouse receive $225,000 plus half of the remainder.[104]

An example better explains these differences. In this situation, A and Z were married, until Z passed away in a UPC state. If Z shared a child with

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[96] *See* Minutes of the Joint Meeting of Rep.'s of the Md. Orphans' Ct. Judges, Md. Reg.'s Wills, Md. Atty. Gen. Off., Md. Comptroller's Off., & Md. State Bar Est. and Tr. L. Section Council, at 2-3 (Oct. 13, 2022) (on file with Author).

[97] EST. & TRUSTS § 3-102 (prior to 2023 amendment).

[98] Intestacy Workgroup Recommendations , *supra* note 76, at 3; *cf.* H.D. 755, 2023 Gen. Assemb., 445th Sess. (Md. 2023); S. 792, 2023 Gen. Assemb., 445th Sess. (Md. 2023).

[99] Intestacy Workgroup Recommendations, *supra* note 76, at 3.

[100] Minutes for Intestacy Workgroup Meeting at 7 (Jul. 12, 2022) (on file with Author). Minutes for Intestacy Workgroup Meeting at 8 (Aug. 24, 2022) (on file with Author). Blended families are families in which the heads of household may not both be parents of all the children in the household. *See* Jennifer Siedman, *Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession*, 75 U. COLO. L. R. 211, 216, 226 (2004); *see also* Terin Barbas Cremer, *Reforming Intestate Inheritance for Stepchildren and Stepparents*, 18 CARDOZO J.L. & GENDER 89, 89 (2011).

[101] *See* ALEX S. TANOUYE & ELISA SHEVLIN RIZZO, SURVIVING SPOUSE'S RIGHTS TO SHARE IN DECEASED SPOUSE'S ESTATE 50 (2nd ed. 2021) https://www.actec.org/assets/1/6/Surviving_Spouse%E2%80%99s_Rights_to_Share_in_Deceased_Spouse%E2%80%99s_Estate.pdf?hssc=1.

[102] *Id.*

[103] *Id.*

[104] *Id.*

another person (Y), B, then A only receives $100,000 and half of the rest of Z's estate. However, if B's parents were A and Z, then A receives the entire estate. Of course, states may amend this UPC language, such as in North Dakota where A receives $225,000 instead of $100,000, if the child is not A's issue.

Efforts to reform the spousal share since 1974 show that there has been an ongoing theme to provide a greater share of a decedent's estate to their surviving spouse, due to prevailing assumptions based on the societal value bestowed with marriage.[105] While states have developed diverse approaches to these different family dynamics, the Workgroup recommended adopting the UPC approach.[106] Adopting this approach would protect minor children; ensure that the surviving spouse in a "traditional nuclear family "inherits the entire estate of the deceased spouse; and entitle issue of a decedent who has no legal or blood relationship with the surviving spouse to inherit subject to an increase of the spousal share.[107]

The fourth provision listed above is the final piece of the spousal share the Workgroup debated.[108] Just as the spousal share is more generous under the UPC and in most other states, Maryland has a unique approach to the spousal share when there is no surviving issue, but one or more surviving parents of the decedent exist.[109] Under the UPC, the surviving spouse receives $300,000 plus one half of the remainder of the estate, and the other half is distributed to the surviving parents in equal shares; however, many states like North Dakota and Colorado provide for an even greater share, where the surviving spouse receives $300,000 plus three-quarters of the remainder of the estate.[110] Notably, Oregon allows the surviving spouse to receive the entire estate.[111]

While generous bestowments to surviving spouses is the minority approach, the Workgroup finds the intestacy laws in many states are so favorable to a surviving spouse that the upfront monetary share is large

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[105] Act of Apr. 11, 1978, ch. 111, 1978 Md. Laws; Act of May 20, 1982, ch. 264, 1982 Md. Laws; Act of May 25, 2017, ch. 627, 3733-35; Act of Apr. 30, 2019, ch. 262, 2019 Md. Laws.

[106] Intestacy Workgroup Recommendations, *supra* note 76, at 3.

[107] *Id.*

[108] *Id.*

[109] Act of Apr. 30, 2019, ch. 262, 2019 Md. Laws (stipulating that the surviving spouse's intestate share is based on the length of their marriage to the decedent, yet no other state has such a provision); *see* TANOUYE & RIZZO, *supra* note 101, at 30-31.

[110] UNIF. PROB. CODE § 2-102A(2) (amended 2019). TANOUYE & RIZZO, *supra* note 101, at 32, 38, 43, 68 (indicating the following intestate shares: Massachusetts ($200,000 plus ¾ of the remainder), Montana ($300,000 plus ¾ of the remainder), NH ($250,000 plus ¾ of the remainder), and WA (¾ of the estate)).

[111] TANOUYE & RIZZO, *supra* note 101, at 53.

enough to constitute the entire estate or close to it.[112] Therefore, in order to make the spousal share in these cases simple and straightforward, and to align Maryland law with public expectations, the Workgroup recommended the Oregon approach, which provides that when a decedent dies with a surviving spouse and no issue, the surviving spouse receives the entire estate – regardless of the length of their marriage and the existence of the decedent's living parents.[113]

C. *Workgroup Topic 3: Great-Grandparents and Descendants*

Until recently, Maryland was in the minority of states which provide for intestate estate distribution to great-grandparents and their descendants.[114] Few people have living great-grandparents at the time of their death who would stand to inherit, and few people have a close relationship, if any, with the descendants of their great-grandparents.[115] Because of the remote and tenuous relationship most people have with the descendants of their great-grandparents, these very distant relatives can be difficult and expensive to locate; these inheritors are sometimes referred to as "laughing heirs" due to their ability to inherit from those they may have never even met.[116] As a practical matter, the Maryland intestate estate distribution to laughing heirs provision is only applied in very rare circumstances in Maryland.[117] Considering Maryland's minority status, the policy concern over providing inheritance rights to individuals who are commonly strangers, the potential costs to an estate in locating these heirs, and how infrequently these provisions are applied, the Workgroup recommended that the General Assembly strike references to these distant relatives in Maryland intestacy

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[112] Minutes for Intestacy Workgroup Meeting at 7 (Jul. 12, 2022) (on file with Author).
[113] *See id; see* Intestacy Workgroup Recommendations, *supra* note 76, at 3.
[114] *Hearing on S.B. 797 Before the Maryland Senate Budget and Taxation Committee*, 2023 Gen. Assemb., 445th Sess. 7 (Md. 1999) (statement in support by the Honorable Byron E. Macfarlane, Reg. of Wills for Howard Cnty., Md.).
[115] Stephanie Rosenbloom, *Here Comes the Great-Grandparents,* N. Y. TIMES (Nov. 2, 2006), https://www.nytimes.com/2006/11/02/fashion/02parents.html.
[116] John V. Orth, *The "Laughing Heir": What's so Funny?,* 48 REAL PROP., TR. & EST. L.J. 321, 322-24 (2013).
[117] Byron E. Macfarlane, et al., *Analysis of Heirs in Intestate Estates Opened in Howard County in Fiscal Year 2021*, (on file with Off. Howard Cty. Reg. of Wills). This analysis of the 413 intestate estates opened in Howard County in FY2021 showed that 77.75 of estates' heirs were limited to a surviving spouse or issue, 20.57% were parents or descendants of parents, 1.2% were grandparents or descendants of grandparents, and 0% were great-grandparents or descendants of great-grandparents. *Id.* Maryland, unlike other jurisdictions, has laws which curb such inheritance to the fifth degree. KENNETH G.C. REID, ET AL., INTESTATE SUCCESSION, at 416 (2015).

laws.[118] This solution adds the benefit of elevating stepchildren in the line of intestate succession.

D. *Workgroup Topic 4: Stepchildren*

Under prior laws, stepchildren would only be entitled to inherit if the decedent had no blood relatives, as distant as great-grandparents and their descendants.[119] Historically, stepchildren were the last in line to inherit before the decedent's estate would escheat, or revert back, to the local Board of Education.[120] The Workgroup found that it would be very difficult to craft a one size fits all intestacy provision for stepchildren, given the complexities of blended families which take into account the length of marriage, age of children at marriage, wealth, and personal preference.[121] The Workgroup concluded that, like intestate distribution for descendants of great-grandparents, these provisions are rarely applied in probate estates.[122] Thus, the Workgroup elected to support changing the intestate provisions dealing with stepchildren.[123] However, the removal of great-grandparents and their descendants from the line of intestate succession elevates stepchildren, who presumably share a closer relationship with a decedent than very distant blood relatives.[124]

E. *Workgroup Topic 5: Dated Terminology*

Lastly, Maryland Estates and Trusts Law has, for as long as traceable, differentiated between children conceived within and outside of a marriage.[125] Historic terms used to describe such children have ranged from as offensive as "bastard" children to the more common "illegitimate" children.[126] While this terminology does not have a practical impact on intestacy, or probate generally, the Workgroup found this kind of terminology outdated and stigmatizing.[127] The Workgroup recommended removing those terms and revising how "child" is defined in the Estates & Trusts Article.[128]

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[118] Intestacy Workgroup Recommendations, *supra* note 76; Minutes for Intestacy Workgroup Meetings, Maryland Intestacy Reform Workgroup at 6, 8, (Apr. 25, 2022) (on file with Author).
[119] MD. CODE ANN., EST. & TRUSTS § 3-104(e) (West 2019) (prior to 2023 amendment).
[120] *See id.* § 3-105(a)(2)(ii).
[121] Minutes for Intestacy Workgroup Meetings, Maryland Intestacy Reform Workgroup (Apr. 24, 2022) (on file with Author).
[122] Intestacy Workgroup Recommendations, *supra* note 76.
[123] *Id*.
[124] *Id*.
[125] EST. & TRUSTS §§ 1-205, 1-206, 1-208 (prior to October 1, 2023).
[126] *Id.*
[127] Intestacy Workgroup Recommendations, *supra* note 76.
[128] *Id*. (recommending the use of "marital" vs. "non-marital" children).

Similarly, intestate succession references to grandparents and great-grandparents were classified in terms of "maternal" and "paternal" sets of relatives.[129] Of course, these terms ignore that a decedent may not have parents of the opposite sex, and so these needlessly gendered terms are both dated and insufficiently inclusive of how families are constituted in the modern world. The Workgroup recommended replacing gendered terms with gender-neutral references to each set of grandparents.[130]

VI. LEGISLATIVE CONSIDERATION AND THEIR IMPACT ON PROBATE

Many of these reforms were introduced in both chambers of the Maryland General Assembly in the 2023 session, as Senate Bill 792 and House Bill 755.[131] Both measures were supported by this author, the Register of Wills for Baltimore County, and the Estates & Trusts Section Council of the Maryland State Bar Association.[132] The Senate bill received no opposition in the Judicial Proceedings Committee and was passed by the State Senate on March 10, 2023, by a vote of 46 to 0.[133] While the House bill received some skepticism from the House Judiciary Committee, House Bill 755 was ultimately approved by the House of Delegates on March 17, 2023, by a vote of 131 to 1.[134] Governor Wes Moore signed these bills into law on May 16, 2023.[135]

The intestacy reform package will ensure that in nearly half of the probate estates opened in Maryland, the decedents' estates will pass more in line with what the average citizen would expect.[136] This law builds on the prior revisions to the spousal share adopted in 1978, 1982, 2017, and 2019 by more appropriately providing for a surviving spouse or registered domestic partner.[137] When a decedent dies and is survived by a spouse and

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[129] EST. & TRUSTS § 3-104(c)(1) (prior to October 1, 2023).
[130] Intestacy Workgroup Recommendations, *supra* note 76.
[131] S. 792, 2023 Gen. Assemb., 445th Sess., Reg. Sess. (Md. 2023); H.D. 755, 2023 Gen. Assemb., 445th Sess., Reg. Sess. (Md. 2023).
[132] S. 792; *see* Committee Testimony and Witness Signup, S. 792, 2023 Gen. Assemb., 445th Sess. (Md. 2023); *see* Committee Testimony and Witness Signup, H.D. 755, 2023 Gen. Assemb., 445th Sess, (Md. 2023).
[133] *See* S. 792; *see* Committee Testimony and Witness Signup, S. 792; *see* Voting Report, S. 792, 2023 Gen. Assemb., 445th Sess. (Md. 2023).
[134] *See* H.D. 755; *see* Committee Testimony and Witness Signup, H.D. 755; *see* Voting Report, H.D. 755, 2023 Gen. Assemb., 445th Sess. (Md. 2023).
[135] S. 792.
[136] Macfarlane & Staub, *supra* note 7.
[137] Act of Apr. 11, 1978, ch.111, 1978 Md. Laws 1063-64; Act of May 20, 1982, ch. 264, 1982 Md. Laws 2548; Act of May 25, 2017, ch. 626, 2017 Md. Laws 3733-35; Act of Apr. 30, 2019, ch. 262, 2019 Md. Laws 1567-68.

issue — all of whom are also issue of the surviving spouse or registered domestic partner — or when a decedent dies with no issue but leaves a surviving parent, the surviving spouse or registered domestic partner now inherits the entire probate estate.[138]

This change also means that estate administration will become less burdensome, as there will be fewer interested persons in some intestate estates and unanimous consent by all parties at various stages of the probate process becomes unnecessary.[139] For example, attorney's fees and commissions for the personal representative may be paid without a petition to the Orphans' Court, but only if all interested persons consent.[140] Instead of obtaining consents signed by the surviving spouse and potentially adversarial in-laws, the surviving spouse will be able to manage such intestate succession situations on their own.[141] Similarly, a surviving spouse will not need consent from children or parents to proceed under a process known as "Modified Administration," a streamlined form of probate with less rigorous accounting requirements and little to no interaction with the Orphans' Court.[142]

Removing a decedent's parents from the line of intestate succession also resolves concerns over the 2019 amendment to Maryland's intestacy law.[143] The requirement that a surviving spouse have been married at least five years in order to inherit the whole estate was, as a matter of record, arbitrary.[144] Also, because it created two categories of surviving spouses based on an arbitrary time period, the five-year requirement is constitutionally dubious.[145] While some express concern over "death-bed marriages" and elder abuse, this bifurcation excludes anyone under the age of 23 who could not have been married for five years because of their age, generally anyone who marries and has a spouse who dies by accident or unexpected illness within five years of their marriage, or anyone who is of perfect sound mind and chooses to marry shortly before the end of their

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[138] Act of May 16, 2023, ch. 627, 2023 Md. Laws 10-11.
[139] MD. CODE ANN., EST. & TRUSTS § 7-604(a)(1) (West 2022).
[140] *Id.*
[141] *Id.* § 5-702(5).
[142] *Id.* § 5-707; Byron E. Macfarlane, *Administering Estates in Maryland: A Basic Instructional Guide*, HOWARD CNTY. REG. OF WILLS, (Apr. 2023), https://registers.maryland.gov/main/region/howard/Administering%20Estates%20in%20Maryland%20Guide.pdf.
[143] Ch. 262, 2019 Md. Laws, at 1567-68.
[144] *See generally Hearing on S. 317*, *supra* note 35.
[145] Michael J. Higdon, *(In)Formal Marriage Equality*, 89 FORDHAM L. REV. 1351, 1370 (2021), https://ir.law.utk.edu/cgi/viewcontent.cgi?article=1008&context=utklaw_facpubs. *See* U.S. CONST. amend. XIV, § 1 ("Equal Protection Clause").

life.[146] There are ample legal options available to heirs who wish to challenge the validity of a death-bed marriage without unfairly prejudicing legitimate marriages with the random and rigid requirement imposed by the 2019 statute.[147] Additionally, the elimination of great-grandparents and their descendants from the line of intestate succession, alleviates personal representatives of the cost and time to hire professionals to search for distantly related heirs who the decedent, in all likelihood, did not know existed.[148]

VII. SUMMATIVE CONCLUSION

Intestacy laws are an essential protection for individuals who die without a Last Will and Testament because they ensure a sensible method for determining heirs and provide consistent guidance for interested persons in estates, for attorneys, and for the judiciary. As vital as they are, Maryland intestacy laws have been subject to minimal reform efforts and, until 2022, had never been studied and scrutinized in a comprehensive manner.[149] After months of research, discussion, and debate, a Workgroup of stakeholders produced a series of recommendations to the Maryland General Assembly.[150] This package restedon the principles of bringing Maryland intestacy law in line with other states, incorporating the evolution of family structures, streamlining estate administration, and creating law that is more in line with public expectations.[151] Ultimately, this package took effect on October 1, 2023.[152]

Crucially, this package also paved the way to grant rightful protections for domestic partners, a rapidly growing segment of society.[153]

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[146] JEFFREY E. NUSINOV & PAUL D. RASCHKE, MARYLAND WILL CONTESTS: CAREGIVERS, GOLD DIGGERS, AND DEATH-BED MARRIAGES (2019), https://www.msba.org/product/maryland-will-contests/.

[147] *Annulment*, PEOPLE'S L. LIBR. OF MD., https://www.peoples-law.org/annulment (June 28, 2023, 3:33 PM).

[148] Orth, *supra* note 116.

[149] Vallario, *supra* note 6, at 355; *see also* S. 426, 2022 Gen. Assemb., 444th Sess. (Md. 2022).

[150] Intestacy Workgroup Recommendations, *supra* note 76.

[151] *See* Meeting Minutes from the Md. Intestacy Reform Workgroup, *supra* note 47 ("Statement of Purpose" for Workgroup: "Intestacy laws Workgroup were written a long time ago and amended in a way that is not holistic. Goal is to modernize these statutes to better reflect how familiar are organized in 2022 as compared to the 1950s when the statutes were written. The laws should reflect what the average person on the street expects and understands."

[152] S. 792, *supra* note 131.

[153] Press Release, U.S. Census Bureau, Census Bureau Releases New Estimates on America's Families and Living Arrangements, *supra* note 56.

Effective October 1, 2023, domestic partners in Maryland are able to visit their local Register of Wills and submit a Declaration of Domestic Partnership, which must be signed and notarized.[154] The Register will issue the partners a Certification of Domestic Partnership that will entitle a surviving partner to inherit under Maryland's intestacy law in the same way as a surviving spouse.[155] The Certificate will also exempt the surviving partner from our state's inheritance tax.[156]

It was the perspective of the 2022 Workgroup, shared by the Maryland State Legislature, that this overhaul to Maryland's intestacy law was long overdue.[157] The motto of Maryland's Judiciary is "Fair, Efficient, Effective Justice for All."[158] This long-overdue reform keeps with this vision for Maryland's courts and the people of Maryland; in this case, people who are experiencing the hardest part of their lives – the death of a loved one.

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[154] S. 792, *supra* note 131.
[155] *Id.*
[156] *Id.*
[157] Intestacy Workgroup Recommendations, *supra* note 76.
[158] *Mission and Vision*, MD. CTS. (last visited Sep. 22, 2023), https://www.courts.state.md.us/about/mission.

ARTICLE

PASSING THE MANTLE: THE TRANSFORMATIVE INITIATIVES OF HARRY CUMMINGS, ASHBIE HAWKINS, AND THE NEXT GENERATION OF AFRICAN AMERICAN LAWYERS IN MARYLAND, TO UTILIZE THE LEGAL SYSTEM AND ADVANCE THE RACIAL PROGRESS OF AFRICAN AMERICAN CITIZENS

By: Domonique Flowers [*]

I. INTRODUCTION

The testimonial dinner held at Madison Street Presbyterian Church was unlike any other that come before it. A large assortment of Black Baltimore citizens gathered in the summer of 1889 to celebrate the triumph of Harry Cummings and Charles Johnson, who had recently completed their law program in only two years.[1] What made their extraordinary accomplishment even more remarkable was that they were the only Black graduates of the University of Maryland Law School.[2] Everett Waring and Joseph Davis, legends in their own right, both presented the newly minted lawyers with law books as well as candid advice concerning the new legacy that they would soon establish as Black lawyers.[3] Everett Waring, a graduate of Howard Law School, was the first Black attorney to be admitted to the bar of the Supreme Bench of Baltimore on October 10, 1885.[4] The two prominent attorneys had already made headlines in the years since and had argued many

[*] Domonique Flowers, Esq. I am extremely grateful to the individuals who gave me the inspiration to write this article including Justice John Browning, Professor Jose Anderson, and Dean Claudia Diamond. I would also like to extend my gratitude to the Staff Editors for the 2023-2024 University of Baltimore Law Forum for your guidance and diligence in this endeavor. I could not have accomplished my research objectives without the organizations that allowed me to present my initial research findings including the Historical Committee for the Bar Association of Baltimore City and the Maryland Center for History and Culture. Special thanks to my family for supporting me throughout this process including my wife Ciara Flowers. I want to dedicate this article to my late aunt Gail Flowers who tragically passed away this year during the writing process. It is my hope that this article encourages people from underrepresented backgrounds to consider joining the legal profession and to use it to counter any injustices that are still prevalent in today's society.

[1] *See City News in Brief: Miscellaneous Items Gathered Here and There by Reporters of the Sun*, BALT. SUN, June 7, 1889, at 4 [hereinafter, "*City News"*] (though a monumental event, this event was barely mentioned and was combined with other random stories of the day).

[2] David S. Bogen, *The First Integration of the University of Maryland School of Law*, 84 MD. HIST. MAG. 39, 39 (1989) [hereinafter *The First Integration*].

[3] *City News*, *supra* note 1, at 4.

[4] *The First Integration*, *supra* note 2, at 39.

high-profile cases. Yet as Davis and Waring presided over this monumental event, they did not realize that this occasion would mark the start of a second generation of Black lawyers who would continue in their footsteps and utilize the legal system as a buttress against the specter of racial discrimination that had plagued Black citizens in Maryland.[5]

This article addresses the legal achievements of the second generation of Black lawyers, including Harry Cummings, Joseph Davis and Ashbie Hawkins, by analyzing their progress in combating racial segregation policies using legal challenges and public policy reform in Maryland during the late 19th and early 20th centuries. This article will demonstrate that this second generation not only continued the initial groundwork created by the first African American lawyers in Maryland but also transformed the legal system into a mechanism used to advance the legal rights of African American citizens in the areas of equal rights, educational policy, suffrage reform, and housing discrimination.

This article is divided into four sections. Section One provides a brief recap concerning the first generation of African American lawyers in Maryland and discusses the initial legacy that they established. It starts with the first attempts by Black individuals in Maryland to become lawyers leading up to the *In re Wilson* decision of 1885 which struck down the racial restriction statute that prevented African Americans from practicing law at the state level. Section Two introduces the second generation of lawyers and focuses on some of their earlier attempts to use courts to redress the grievances of African Americans resulting from discrimination from private citizens and institutions. Section Three will look at legal challenges against discriminatory practices in state and local statutes and ordinances which sought to disenfranchise and segregate Black citizens at the turn of the 20th century. Finally, Section Four analyzes the efforts of Cummings, the first Black councilmember in Baltimore City, to use political policy reform to advance the educational interests of African American students and teachers.

II. THE FIRST GENERATION OF LAWYERS

During the first half of the 19th century, the thought of a Black lawyer in Maryland, and indeed in any part of the country was, in many ways, unthinkable. In fact, Maryland held the onerous distinction of being one of the first states to enact a statute in 1832 limiting bar admission to white males who had studied law in any part of the United States for at least two years.[6] Until that time, the various courts of Maryland essentially set their own

[5] *City News*, *supra* note 1, at 4.
[6] Act of Mar. 10, 1832, ch. 268, § 2, 1831 Md. Laws.

standards that dictated bar admission in Maryland.[7] Just a year prior to the law's creation, Nat Turner led his ill-fated rebellion — prompting states like Maryland and Virginia to buckle down and pass a series of laws aimed at controlling both free and enslaved Blacks, as well as codifying racial discrimination.[8]

Courts at this time did not admit African Americans to the practice of law and would not entertain the notion that Black men were capable of becoming lawyers.[9] Macon Bolling Allen would soon have the honor of becoming the first Black American to practice law after being admitted in 1844 to practice before the courts of Maine.[10] Other states began admitting Black men to the practice of law, including Massachusetts with the admission of Robert Morris in 1847, New York with the admission of George Vashon in 1848, and Ohio with the admission of John Mercer Langston in 1854.[11] It was not until 1857 that Edward Draper became one of the first Black men in Maryland to take the next step in becoming a lawyer.[12] Due to a lack of formal requirements, reading the law under the tutelage of a seasoned practitioner was the only practical method to become a lawyer.[13] After studying under the mentorship of Charles Gilman, a well-respected lawyer in Baltimore, Draper underwent an examination by Baltimore Superior Court Judge Zacheus Collins Lee who approved a certificate attesting to his qualifications for admission to the Maryland Bar provided he was a free white citizen of the state.[14] This double-edged distinction was a far cry from actual admittance to any of the state courts of Maryland. His situation, in many ways, was reflective of the precedent established by the *Dred Scott* case decided that same year.[15] In his opinion to the Court, Chief Justice Roger B. Taney declared that African Americans, both enslaved and free, were not citizens of the United States and were not entitled to the rights and privileges that came with citizenship.[16] Despite the circumstances that prevented him from

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[7] *The First Integration*, *supra* note 2, at 39.
[8] *Id.*
[9] *See generally* J. CLAY SMITH, EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944, at 93 (1993).
[10] *Id.*
[11] John G. Browning, *To Fight the Battle, First You Need Warriors: Edward Garrison Draper, Everett Waring, and the Quest for Maryland's First Black Lawyer*, 53 U. BALT. L.F. 1, 3 (2022).
[12] *Id.* at 11.
[13] David B. Kopel, *Lyman Trumbull: Author of the Thirteenth Amendment, Author of the Civil Rights Act, and the First Second Amendment Lawyer*, 47 LOY. U. CHI. L.J. 1117, 1179 (2016).
[14] *Id.* at 10-12.
[15] STEVE LUXENBERG, SEPARATE: THE STORY OF PLESSY V. FERGUSON AND AMERICA'S JOURNEY FROM SLAVERY TO SEGREGATION 62 (2019).
[16] *Id.* at 64.

becoming a lawyer in Maryland, Draper served as the forerunner for the first generation of individuals who would continue the long struggle that led to the first Black lawyers who could practice law in Maryland.

Following the Civil War, African Americans were repeatedly banned from admission to the state bar of Maryland.[17] In contrast to the refusal of the Maryland courts to openly admit Black lawyers, the federal court system was more welcoming.[18] In fact, some of the first Black lawyers admitted to practice in the Maryland federal court system had already been admitted as lawyers in other state courts.[19] James Harris Wolff was admitted to the Supreme Judicial Council of Massachusetts in 1875.[20] Prior to that, Wolff had attended Harvard Law School for a year after studying the law under a former Massachusetts Congressman.[21] Shortly after his Massachusetts bar admission, Wolff moved to Maryland to become the first Black attorney admitted to the United States Circuit Court of Maryland.[22] Despite this achievement, he did not stay in Maryland for long, most likely due to Maryland's statute banning Black attorneys from practicing law at the state level.[23] The first significant challenge to this law came from Charles Taylor, a Black lawyer from Massachusetts who also moved to Maryland.[24] Though Taylor was able to gain admission to the federal bar in Maryland, the state bar denied his application.[25] Undeterred, he then petitioned the Court of Appeals of Maryland.[26] In support of his petition to the Court of Appeals, Taylor claimed that under the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution, admission to the bar was a privilege of state citizenship that the General Assembly could not abridge on account of his race.[27] In attacking the 1832 Maryland statute that limited the practice of law to only white male citizens of the state, Taylor argued that it was a violation of the Equal Protection Clause of the Fourteenth Amendment.[28] While Taylor cited to the *Slaughterhouse Cases* to support his argument, at the time of the case, the Court had not fully defined the scope of the Privileges and Immunity Clause nor had it expanded the definition of equal protection to include the

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[17] *See generally infra* note 20.
[18] Browning, *supra* note 11, at 3.
[19] *See, e.g., infra* note 20-24.
[20] SMITH, *supra* note 9, at 103.
[21] *Id.*
[22] *Id.* at 103-04.
[23] *Id.* at 104.
[24] DENNIS P. HALPIN, A BROTHERHOOD OF LIBERTY: BLACK RECONSTRUCTION AND ITS LEGACIES IN BALTIMORE, 1865-1920, at 54-55 (2019) [hereinafter A BROTHERHOOD OF LIBERTY].
[25] *Id.* at 55.
[26] *See In re Taylor*, 48 Md. 28 (1877).
[27] *Id.* at 29-30.
[28] *Id.* at 29.

"privileges" under state law.[29] In fact, under its own interpretation of the *Slaughterhouse Cases*, the Court found that the power of the federal government to protect "privileges" only belonged to U.S. citizens and that the practice of law was not such a privilege but rather governed by the legislature of each state to set boundaries and qualifications.[30] In rejecting his rationale and denying his petition to practice law, the Maryland Court of Appeals in *In re Taylor* upheld the state law, arguing that the Fourteenth Amendment did not apply to admission to the bar.[31]

Between 1877 and 1885, there were numerous failed challenges to this prohibition, including the Maryland legislature's multiple attempts to stunt several measures to strike the racial bar admission restriction.[32] One of these included an attempt by a Black lawyer named Richard King who petitioned unsuccessfully to the Maryland House of Delegates and, ultimately asked the U.S. Senate to override the statute.[33] The next attempt to overturn the state law was in 1885, and it was spearheaded by the Mutual United Brotherhood of Liberty, a civil rights organization formed by Reverend Harvey Johnson.[34] Johnson convinced Charles Wilson, a Black lawyer from Massachusetts who moved to Maryland to teach, to act as a plaintiff in a test case, *In re Wilson,* to overturn the law.[35] Wilson, who was represented by a white attorney named Alexander Hobbs, argued that racial discrimination violated the Equal Protection Clause, citing to several cases involving racial exclusion in the selection of jury members.[36] On March 19, 1885, the Supreme Bench of Baltimore unanimously agreed that "if blacks could not be discriminated against in jury selection, they also could not be discriminated against in the opportunity to become judges" and lawyers.[37] In overturning the Maryland Court of Appeals decision in *In re Taylor*, the judges of the Supreme Bench in *In re Wilson* held that the racial exclusion provision of the 1832 state law was in fact a denial of equal protection under the Fourteenth Amendment.[38] It is important to note that this triumph did not

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[29] David S. Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Lawyer*, 44 MD. L. REV. 939, 1033 (1985) [hereinafter *The Transformation*].

[30] Elaine K. Freeman, Harvey Johnson and Everett Waring: A Study of Leadership in the Baltimore Negro Community, 1880-1900, at 23 (Sept. 1968) (M.A. thesis, George Washington University).

[31] *The Transformation*, *supra* note 29, at 1033.

[32] *The First Integration*, *supra* note 2, at 39.

[33] A BROTHERHOOD OF LIBERTY, *supra* note 24, at 55.

[34] *Id.* at 47, 54.

[35] SMITH, *supra* note 9, at 144.

[36] *The Transformation*, *supra* note 29, at 1039.

[37] *Id.* at 1039-40. *See Strauder v. West Virginia*, 100 U.S. 303, 311-12 (1880) (declaring that excluding persons from a jury on the basis of race violates the Fourteenth Amendment).

[38] *Admitted to the Bar,* BALT. SUN, Mar. 20, 1885, at 1.

necessarily overturn the state law itself.[39] Instead, the judges indicated that despite the existence of the term "white" in the statute, Blacks must now be allowed to practice law.[40] Furthermore, because the statute still existed, the ruling of *In re Wilson* only applied in Baltimore City, effectively meaning that Black lawyers were still barred from practicing law in other parts of the state.[41]

While this hurdle was over, the struggle continued as the state bar still found reasons other than race to deny Wilson's application.[42] While Wilson was never admitted to the bar, Johnson and the United Brotherhood of Liberty convinced Everett Waring, a recent graduate of Howard Law School, to come to Maryland.[43] Waring became the first Black attorney to be admitted to the bar of the Supreme Bench of Baltimore on October 10, 1885.[44] He also became one of many of the first generation of Black lawyers in Maryland. This generation, conceived from Draper's early attempt in 1857, also included James Harris Wolff, the first Black attorney admitted to the federal court in Maryland; Charles Taylor, the first Black lawyer to initiate a case attempting to overturn the statute; Richard King, the Black lawyer who appealed to the Maryland House of Delegates to strike down the statute; Charles Wilson, the lawyer who succeeded in overturning the statute; and Everett Waring, the first Black lawyer to be admitted to practice law at the state level.[45] Thereafter, Waring was joined by Joseph Davis become the second Black attorney to practice law in Maryland in March 1886.[46]

Both Waring and Davis continued the legacy of this first generation by joining with the Brotherhood of Liberty as co-counsel in tackling some of the most egregious affronts to Black civil rights during that time.[47] Their first legal challenges were against the Bastardy Acts, which essentially allowed judges to issue warrants for the apprehension of women accused of giving birth to illegitimate children unless they provided the name of the father of the child who would then be arrested.[48] The purpose of the law was to prevent the child from becoming a ward of the state by compelling the father to provide funds for the mother or the state.[49] While the law was originally

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[39] A BROTHERHOOD OF LIBERTY, *supra* note 24, at 56.
[40] Freeman *supra*, note 30, at 23-24.
[41] A BROTHERHOOD OF LIBERTY, *supra* note 24, at 56.
[42] SMITH, *supra* note 9, at 144.
[43] David S. Bogen, *The Forgotten Era,* 19 MD. BAR J. 10, 10 (1986) [hereinafter *The Forgotten Era*].
[44] *Id.*
[45] Browning, *supra* note 11, at 16-19.
[46] *Bar Association Hold Its Banquet,* BALT. AFRO-AM., Sept. 29, 1922, at 12.
[47] *See* A BROTHERHOOD OF LIBERTY, *supra* note 24, at 71.
[48] Freeman, *supra* note 30, at 28.
[49] *Id.* at 28-29.

created in 1781 to protect women in general, it was changed twice, first in 1785 to include all free women, and finally in 1860 to apply to only white women.[50] Waring challenged the constitutionality of the Bastardy Act in his representation of a Black woman named Lucinda Moxley and argued that the Act unfairly discriminated against Black women who did not possess the same rights as white women.[51] While the Baltimore Supreme Bench ruled against Waring and his client in finding that the Act did not violate the Fourteenth Amendment, this case was groundbreaking in that it was the first time that an African American appeared to argue in front of the Supreme Bench.[52] This first generation made history again when Waring and Davis represented a group of Navassa laborers between 1889 and 1890 who had been accused of killing white officers in an uprising on Navassa Island that opposed the inhumane and cruel treatment the laborers faced from rapacious managers.[53] After several defeats in the lower courts, the Brotherhood of Liberty appealed the case to the United States Supreme Court.[54] October 29, 1890, marked the first time that Black lawyers from Maryland argued in front of the U.S. Supreme Court and, though their argument was ultimately unsuccessful, they later convinced President Benjamin Harrison to commute the death sentences of their clients to life in prison.[55]

Though some of their efforts were met with setbacks, a few of the attempts by the first generation of Black lawyers would later be met with success. The racial statute was on the books for over half a century was finally changed in 1888 when the racial restriction was removed due to the efforts of Maryland Law School Dean, John Prentiss Poe.[56] Later, the state's other discriminatory laws changed when the term "white," was removed from laws including the Bastardy Act as well as the prohibition of Blacks to serve on juries.[57] More importantly, the first generation's fight for the rights of Black citizens became the standard bearer for the work that the next generation of lawyers would continue. While the actions of Waring, Davis, and others epitomized the Black attorney as a zealous fighter for civil justice in the face

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[50] *Id.* at 29.
[51] Browning, *supra* note 11, at 22-23.
[52] *Id.* at 23-24.
[53] *Id.* at 30-32.
[54] A BROTHERHOOD OF LIBERTY, *supra* note 24, at 86.
[55] *Id.* at 86-88.
[56] Taunya L. Banks, *Setting the Record Straight: Maryland's First Black Women Law Graduates*, 63 MD. L. REV. 752, 753 (2004); *see* Browning, *supra* note 11, at 25; *but cf. The Transformation*, *supra* note 29, at 1043 n.363 (suggesting that Poe's actions in removing the term white were due to pragmaticism versus any *desire* to help the progress of African Americans).
[57] JEFFREY R. BRACKETT, NOTES ON THE PROGRESS OF THE COLORED PEOPLE OF MARYLAND SINCE THE WAR 79 (Herbert B. Adams, ed. 1889).

of racial adversity, the actions of the next generation continued to mold and redefine this image by transforming the legal system into a weapon for social change.

III Litigating against Discrimination in Criminal and Civil Cases

Not before long, the second generation of lawyers, represented by Harry Cumming and Charles Taylor, began the crucial work of championing the rights of African Americans by defending against lawsuits and representing Black citizens falsely accused of wrongdoing. While little is known about the life of Charles Taylor, Harry Cummings came from a prominent Black family and many of his siblings went on to a make name for themselves. His sister, Ida Rebecca Cummings, eventually became Baltimore's first kindergarten teacher.[58] Born in Baltimore, Maryland on May 19, 1866, Cummings was the grandson of slaves but grew up as the son of free Blacks.[59] His father, Harry Sr., worked primarily as a chef while his mother, Eliza Jane Cummings, worked in domestic service and was heavily involved in several different occupations involving church and missionary leadership.[60] Both parents instilled the importance of a quality education in their eight children.[61] Harry Cummings grew up in Baltimore and attended the city's public schools.[62] With high school in Baltimore closed to their son, Cummings' parents sent him to Lincoln University in Oxford, PA, where he attended the university's preparatory school.[63] Later, he attended Lincoln University where he graduated in 1886.[64] During his time at Lincoln University, Cummings moved from the classroom to the law offices of Joseph Seldon Davis where he read law for one year.[65]

Cummings applied to the University of Maryland School of Law in 1886, the same year that he graduated from Lincoln University and a year after the admission of Waring to the Maryland Bar.[66] Harry Cummings and Charles S. Johnson completed the three-year course in only two years,

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[58] *Miss Ida' Dies; Was First City Kindergarten Teacher*, BALT. AFRO-AM., Nov. 11, 1958, at 1.
[59] HAROLD A. MCDOUGALL, BLACK BALTIMORE**:** A NEW THEORY OF COMMUNITY 37 (1993).
[60] *Mrs. Eliza J. Cummings: Mother of City Councilman Dead. Her Work for Her People*, BALT. AFRO-AM., May 29, 1913.
[61] Quincey Johnson, *With Color Flying**:** The First Black Law Graduate Integrates Education and Politics*, 4 MD. IN BALT., 22, 22 (1990).
[62] *Id.*
[63] *Id.*
[64] Suzanne E. Greene, *Black Republicans on the Baltimore City Council, 1890-1931*, 74 MD. HIST. MAG. 203, 205 (1979).
[65] Johnson, *supra* note 61, at 22.
[66] *Id.*

graduating in 1889.[67] Before enrolling in the University of Maryland Law School, Johnson attended and graduated from Lincoln University.[68] When asked about how he was treated during his time at the University of Maryland Law School, he replied, "'we are as cordially received and as finely treated' here as when we were in a northern college."[69] The New York Times reported on the graduation of Cummings and Johnson stating that "[t]he graduating students themselves, by the good judgement and tact of the two colored ones, and the kindly feeling of a majority of the white ones, in return, prevented any color discrimination in seating the guests at the graduation exercises."[70]

Shortly after their admission to the Maryland bar, Cummings and Johnson helped prepare correspondence in equity jurisprudence for Judge Charles E. Phelps, who sat on the city bench and taught at the law school.[71], Both Cummings and Johnson went on to embark on what was a prosperous legal career spent vindicating the rights of African Americans against an oppressive and unjust legal system.

Following Reconstruction, African Americans' position nationwide eroded so seriously that it was described as "the nadir of the Negro's status in American society."[72] While Maryland never seceded from the Union, it did not have the same protections as states that benefited from federal Reconstruction.[73] As a result, Black Maryland citizens still experienced racism because many white residents still had strong allegiances to the South after the war. Yet, this level of discrimination never reached the levels faced by Blacks in deep southern states.[74]

By 1889, Baltimore had made some progress towards stripping away pockets of racial injustice. By this time, Maryland had abolished the discriminatory state polices known as the Black laws.[75] These restrictions, among others, encroached on Black people's ability to vote, a right recently

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[67] SMITH, *supra* note 9, at 145.
[68] *The First Integration*, *supra* note 2, at 40.
[69] BRACKETT, *supra* note 57, at 77.
[70] *See* Johnson, *supra* note 61, at 22; *see also* BRACKETT, *supra* note 57, at 77).
[71] BRACKETT, *supra* note 57, at 77; *see also The First Integration*, *supra* note 2, at 40 (a previous Union fighter and one of the only full-time faculty members who was in support of the rights of African Americans, Judge Phelps encouraged admission of black students at the University of Maryland Law School).
[72] RAYFORD LOGAN, THE BETRAYAL OF THE NEGRO FROM RUTHERFORD B. HAYES TO WOODROW WILSON 62 (First Da Capo Press ed. 1997).
[73] Dennis P. Halpin, Reforming Charm City: Grassroots Activism, Politics, and the Making of Modern Baltimore, 1877-1920, at 75 (Oct. 2012) (Ph.D. dissertation, Rutgers University) (on file with the Rutgers University Library) [hereinafter, "Reforming Charm City"].
[74] *Id*. at 76.
[75] *Given a Chance in Life: A Liberal Tendency in Maryland*, N.Y. AGE, Aug. 31, 1889, at 1 [hereinafter *Given a Chance in Life*].

acquired through the passage of the Fifteenth Amendment.[76] That same year, Baltimore also set a milestone by hiring the City's first African American educators to teach Black children.[77] However, these small gains towards equality resulted in the creation of a carceral system in Baltimore linking race to crime.[78] This system involved the systematic incarceration of African Americans, typically at the beckoning of segregationists who used the fabricated concern of protecting white women as a platform to undermine the rights of African Americans by inflicting harsh punishments.[79] One of the victims of this repressive system was a young clerk named Joseph Sampson.[80] Described as a good looking and well-connected young man, Sampson worked in a wholesale coal dealer shop owned by Irving Hall.[81] On August 6, 1889, Mary Wren, a young white woman, accused him of rape which allegedly took place at his house on Warner Street in Baltimore.[82] Following his arraignment, he pleaded not guilty and hired Charles W. Johnson to represent him.[83] At the time, Johnson had only practiced as a lawyer for two months but had already tried and won an astonishing fifteen cases.[84]

On the day of Sampson's trial, Judge Edward Duffy presided over a crowded court room packed with spectators of all races.[85] Most came with the specific intent of witnessing Charles Johnson in action, especially since this would be the first time that a Black lawyer pleaded a criminal case in Maryland where the defendant was facing the death penalty.[86] After the prosecutor's opening statement, Johnson arose as the crowd waited with bated breath.[87] As Johnson began his opening statement to the jury, the silence in the courtroom was striking.[88] In what was described as a "masterly" display of the English language, Johnson eloquently portrayed the facts of the case and indicated to the jury what he intended to prove.[89] His presentation was so impressive that it forced even "the venerable and laconic Judge Duffy" to put down his pen and glasses and lean forward to hear every word Johnson

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[76] Reforming Charm City, *supra* note 73, at 11, 83-84.
[77] HOWELL S. BAUM, BROWN IN BALTIMORE: SCHOOL DESEGREGATION AND THE LIMITS OF LIBERALISM 27 (2010).
[78] A BROTHERHOOD OF LIBERTY, *supra* note 24, at 93.
[79] *Id*.
[80] *Given a Chance in Life, supra* note 75, at 1.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Given a Chance in Life*, *supra* note 75, at 1.
[87] *Id.*
[88] *Id.*
[89] *Id*.

uttered.[90] After completing his argument and taking his seat, Mary Wren stood to give her account of what took place at Sampson's home.[91] Without hesitation, Johnson subjected her to a two-hour cross examination despite the repeated objections raised by the State which were promptly overruled in Sampson's favor.[92] Under such an assault, Ms. Wrens recollection of what took place crumbled.[93] Following this testimony came the examination of other witnesses prior to the deliberation by an all-white jury.[94] In what could only be described as a miracle, they all rendered a verdict of not guilty without ever setting foot outside of the jury box.[95] For his win, Johnson's friends hailed him as a hero and whisked him away from the courtroom.[96]

Notwithstanding his solo success in winning Sampson's case, Johnson typically worked with other lawyers in most of the cases he litigated. In fact, two weeks following the Sampson victory, he found himself assisting the state in prosecuting four white men for the rape of a Black woman.[97] He worked very closely with Cummings during these years, and one of their first cases together occurred a few months following the Sampson case in November 1889 when Cummings and Johnson represented a Black man charged with assaulting a white girl.[98] Their client's arrest took place many months before the court scheduled his trial for assault in the Baltimore County Courthouse.[99] This case had the distinction of being the first time that Black lawyers argued in a court room in Baltimore County.[100] Despite finding themselves at the mercy of an all-white jury of men, Cummings and Johnson successfully presented an alibi argument for their client which resulted in him being acquitted of all charges.[101]

In addition to criminal work, both Johnson and Cummings were active in representing clients in civil actions, typically clients challenging segregated practices by private institutions. While portions of Baltimore were integrated, many public sectors were still partially segregated, resulting in Black people being excluded from different services.[102] Prejudice against African Americans increased by 1890 with Blacks being turned away from

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[90] *Id*.
[91] *Id*.
[92] *Given a Chance in Life*, *supra* note 75, at 1.
[93] *Id*.
[94] *Id.*
[95] *Id*.
[96] *Id.*
[97] *Id.*
[98] *See* BRACKETT, *supra* note 71, at 77.
[99] *Id.*
[100] *Id.*
[101] *Id.* at 77; *Id.* at 77 n.1.
[102] *The First Integration*, *supra* note 2, at 41.

hotels, restaurants, lunchrooms, stores, and other public accommodations.[103] The theaters were especially strict and forced Black people to sit upstairs — if they were even sold a ticket at all.[104] While Black citizens complained about such ill-treatment, Black leaders accomplished very little with only some modest accommodations.[105] In December of 1890, two Black residents took the initiative of filing a lawsuit in the Superior Court of Baltimore against separate entities.[106] Mr. H. H. Sutton, represented by Johnson, and Mr. Edward Fields, represented by Cummings, filed suit against Mr. Forepaugh, manager of Forepaugh's Museum, and Mr. Kernan, proprietor of Kernan's Theater, respectively.[107] Their lawsuits alleged that they were refused services at each of these venues and, as such, they requested to be awarded the sum of $5,000.[108] While the outcome of this case is unknown, it was speculated that they reached a settlement in the amount of $25 or $50, which was a normal outcome for these types of cases.[109] Still, even when these cases settled, they represented a change in the manner in which African Americans used lawsuits to challenge private discrimination. Rather than simply demanding the end of segregated practices, these lawsuits were the first attempts by Black people to seek monetary damages against institutions for civil rights violations.[110]

Even the University of Maryland Law School, where Cummings and Johnson both graduated from, was not insulated from the spread of racism which seemed to permeate the culture of the day. In 1889, the school admitted two Black students named John Dozier and Ashbie Hawkins.[111] Unfortunately, the racial climate at the school began to change with many of the students and staff becoming discontent with integration and petitioning that Dozier and Hawkins be kicked out.[112] Bowing to public pressure, the law school subsequently expelled them with Dean John Prentiss Poe, an early opponent of the admission of Black students, commenting that the "school would jeopardize its interest by allowing colored students to attend."[113] Both Dozier and Hawkins continued to pursue their goals with Hawkins attending

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[103] *Suits Begun in Baltimore Against Theatre Proprietors for Discrimination*, N.Y. AGE, Dec. 27, 1890, at 4 [hereinafter *Suits Begun in Baltimore*]; s*ee also* BRACKETT, *supra* note 71, at 60.
[104] BRACKETT, *supra* note 71, at 60.
[105] *Id.*
[106] *Suits Begun in Baltimore*, *supra* note 103, at 4.
[107] *Id.*
[108] *Id.*
[109] Freeman, *supra* note 30, at 63.
[110] SMITH, *supra* note 9, at 146.
[111] *The First Integration, supra* note 2, at 42.
[112] *Id.*
[113] Johnson, *supra* note 61, at 22. *The First Integration*, supra note 2, at 40.

Howard Law School in 1892 before working a few years as a teacher and ultimately being admitted to practice as a lawyer in 1897.[114] Hawkins would went on to start his own law firm and eventually represented a Black student who, much like himself, was kicked out of an institution of higher learning for the "indignity" of being Black.[115]

In February 1896, Dr. J. Marcus Cargill, an African American member of Baltimore's City Council, nominated a student named Robert Clark to enroll in the Maryland Institute of Art and Design (the Institute).[116] However, after years of begrudgingly accepting a handful of Black applicants from three different Republican councilmembers, the Institute declined to admit yet another Black student.[117] The Institution's refusal to admit Mr. Clark was based on a by-law adopted by the management of the Institute back in November of 1895, which limited all admissions to the school to "reputable white pupils."[118] In June of 1896, Cummings became involved and notified Baltimore Mayor Hooper that if Cargill's appointee was not admitted, a case would be brought against the Trustees of the Maryland Institute.[119] Mayor Hooper, however, ensured Cummings that he had already conducted an investigation and concluded that the trustees had not violated their contract.[120]

Ultimately, Robert Clark took matters into his own hands and file a petition in October of 1897 for a writ of mandamus in the Superior Court of Maryland asking that the court issue a writ requiring the Maryland Institute to receive him.[121] W. Ashbie Hawkins and John Phelps, the son of Judge Phelps, represented Clark and alleged in the petition that the Institute only

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[114] *The First Integration,* supra note 2, at 42; *W. Ashbie Hawkins (1861-1941)*, MD. STATE ARCHIVES, (May 15, 2016), https://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/012400/012415/html/12415bio.html.

[115] *See generally W. Ashbie Hawkins*, *supra* note 114.

[116] *Only White Pupils: Councilman Cargill's Colored Appointee Refused Admission to the Maryland Institute,* BALT. SUN, Mar. 14, 1896, at 10.

[117] *Id*.

[118] *No Colored Pupils: Maryland Institute Files an Answer to the Petition of Robert H. Clark, Jr.,* BALT. SUN, Nov. 4, 1897, at 8 [hereinafter *No Colored Pupils: Maryland Institute Files an Answer*].

[119] *Dr. Cargill's Pupil: Legal Action May Be Taken if He Is Not Admitted to the Maryland Institute*, BALT. SUN, June 18, 1896, at 7 [hereinafter *Dr. Cargill's Pupil*]; s*ee A Colored Pupil for Maryland Institute*, BALT. SUN, Sept. 3, 1891, at 6 (describing Cummings' success during his time on the Baltimore City Council in 1891, in nominating a black student named Harry T. Pratt to enroll in the Maryland Institute).

[120] *Dr. Cargill's Pupil*, *supra* note 119, at 7; *A Colored Pupil for Maryland Institute*, *supra* note 119, at 6.

[121] *Dr. Cargill's Appointee: Robert H. Clark, Jr., Colored, Applies for a Writ of Mandamus to Compel the Maryland Institute to Receive Him*, BALT. SUN, Oct. 16, 1897, at 12 [hereinafter *Dr. Cargill's Appointee*].

passed the by-law limiting admission to whites students, only after the execution of the contract that permitted councilmembers to appoint pupils to the school.[122] The petition alleged that the by-law was void against appointees of City Council members and was in fact a violation of the original agreement between the Institute and the City which did not prevent students of color from being accepted.[123] The Hawkins' second argument was that the by-law constituted illegal discrimination in violation of the 14th Amendment of the U.S. Constitution.[124] In its response, the Maryland Institute insisted that the creation of the by-law was necessary due to the negative reaction by the public during the election of October 1895 when the school had announced the admission of colored pupils.[125] This caused a bitter discussion concerning the subject of mixed schools and the mingling of white and colored students prompting the adoption of the by-law the following month.[126] In further support of its decision to prevent Clark's enrollment, the Institute expressed difficulty in inducing white students to attend — in fact arguing that there had been a steady decline of white students in recent years.[127]

The Institute defended itself against the accusation that it had violated the contract, arguing that during the time of the signing of the contract, no mixed schools existed since the Institute's founders originally established the school for white students only.[128] The by-law was therefore neither a violation of the contract nor a violation of any rights possessed by the petitioner under the U.S. Constitution.[129] While Hawkins alleged the exclusion of colored pupils violated the Privileges and Immunities Clause, the Institute argued that the school is a private institution and not a state agency subject to that provision.[130] In December 1897, the Superior Court agreed with the Institute and dismissed the writ of mandamus.[131] In an opinion written by Judge Ritchie, the Court found that as a private corporation, the Institute was not subject to the Equal Protection Clause of the Fourteenth Amendment.[132] The opinion also indicated that the Immunity Clause does not apply, as the right of free education is not a privilege or

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[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *No Colored Pupils: Maryland Institute Files an Answer*, *supra* note 118.
[126] *See id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *No Colored Pupils: Maryland Institute Wins in the Suit to Compel It to Receive Robert H. Clark, Jr.*, BALT. SUN, Dec. 11, 1897, at 7.
[132] *Id.*

immunity incident to citizenship of the United States.[133] The right of public education only exists as a virtue of the law of any particular state.[134]

Hawkins and Phelps soon appealed the decision to the Maryland Court of Appeals.[135] However, the court affirmed the lower court's decision — rejecting the claim by Hawkins that it was unconstitutional to deny Clark's admission and stating that the school did not violate any contractual provisions.[136] Judge Bryan wrote the opinion, stating once more that as a private institution, the school had every right to deny Clark admission based on the disastrous occurrences when the school previously enrolled Black students.[137] Since the original intent of the school was to educate only white pupils and there was nothing in its contract with the city to the contrary, no contractual obligation had been breached.[138] As for the argument concerning Clark's deprivation of rights under the Fourteenth Amendment of the U.S. Constitution, Judge Bryan indicated that the denial of admission had not deprived Clark of any privilege or immunity, nor had it deprived him of any property.[139] Furthermore, in agreeing with the lower court's decision, Judge Bryan once more stated that the Fourteenth Amendment only protects against state action, not action by private individuals or entities.[140] Despite this setback, Hawkins and other lawyers continued to fight discrimination at the turn of the century utilizing not only the court system but also protest movements, which were highly effective in later struggles against the anti-suffrage movement of the early 20th century as well as against Baltimore's residential segregation laws.

IV. CHALLENGES AGAINST ANTI-SUFFRAGE LEGISLATION AND DISCRIMINATORY HOUSING ORDINANCES

In the early 1900s, Black Republican leaders in Baltimore converged to fight Jim Crow legislation concerning public transportation.[141] A small cadre of Black lawyers recently admitted to the bar assisted in these efforts, including Cornelius C. Fitzgerald and William L. Fitzgerald.[142] Many of

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[133] *Id.*
[134] *Id.*
[135] State ex rel. Clark v. Md. Inst. for the Promotion of the Mech. Arts, 87 Md. 643, 654, 41 A. 126, 127 (1898).
[136] *Id*. at 659, 663, 41 A. at 128, 130.
[137] *Id*. at 658, 41 A. at 128.
[138] *Id.*
[139] *See id*. at 659-60, 41 A. at 128-29.
[140] *Id*.
[141] William G. Paul, The Shadow of Equality: The Negro in Baltimore, 1864-1911, at 273 (1972) (Ph.D. dissertation, University of Wisconsin) (ProQuest).
[142] *The Forgotten Era*, *supra* note 43, at 12.

these lawyers like Cummings and Hawkins would also join other Black Republican leaders in the fight against the restrictive racial legislation called the Separate Car Law, passed in 1902, which first mandated segregated railroads and then steam ships in 1902.[143] Members of the Black community organized boycotts as a result, which were backed by Black newspapers such as the *Afro American*.[144]

In March of 1904 the Democrat-controlled General Assembly passed the Poe Amendment.[145] The General Assembly named the amendment after John P. Poe, the Dean of the University of Maryland School of Law who by this time was quite well established not only within the Democratic leadership, but also the upper echelons of the Republican Party, including President Theodore Roosevelt.[146] The first provision of the Poe Amendment, referred to as the grandfather clause, provided that all persons eligible to vote on or prior to January 1, 1869 and male decedents of such persons who would be 21 years of age by 1906 henceforth would be able to vote.[147] The second provision, referred to as the understanding clause, stipulated that persons unable to qualify under the grandfather clause could still vote if they could offer a reasonable explanation under any section of the Maryland Constitution.[148] "Voter registrars would determine the reasonableness of any explanation offered."[149] The Poe Amendment's true purpose was to disqualify thousands of Black voters in Maryland.[150] The insidious nature of the bill gave most of Maryland's white citizens the privilege to vote because they qualified under the grandfather clause.[151] Black voters would immediately be barred, as they had no such right until 1870 with the passage of the Fifteenth Amendment and thus would have to qualify under the Poe

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[143] Gretchen Boger, *The Meaning of Neighborhood in the Modern City: Baltimore's Residential Segregation Ordinances, 1910-1913*, 35 J. URB. HIST. 236, 241 (2009).
[144] *The Forgotten Era*, *supra* note 43, at 12.
[145] *Amendment Passes: Disfranchisement Bill Now Goes to the Governor*, BALT. SUN, Mar. 11, 1904, at 2 [hereinafter *Amendment Passes*].
[146] *See* Letter from Judge John Carter to President Theodore Roosevelt (Mar. 14, 1905) (on file with the Maryland Center for History and Culture) (written around the same time that the Poe Amendment was being debated, Judge Carter's letter expressed his approval of Poe as an ingenus legal draftsman and suggested that Poe had some white Republican backers). *See The First Integration*, *supra* note 2, at 40 (recalling that Dean Poe expelled black students at the University of Maryland Law School).
[147] Paul, *supra* note 141, at 274-75.
[148] *Id*.
[149] *Id.* at 275.
[150] Jane L. Phelps, *Charles J. Bonaparte and Negro Suffrage in Maryland*, 54 MD. HIST. MAG., 331, 340-41 (1959).
[151] Margaret L. Callcott, The Negro in Maryland Politics, 1870-1912, at 187 (1967) (Ph.D. dissertation, the University of North Carolina at Chapel Hill).

Amendment's understanding clause.[152] Even though the Poe Amendment passed the General Assembly, because it took the form of a proposed amendment to the state constitution, it would still have to be voted on by popular ratification in the November 1905 election.[153]

To defeat the passage of this Amendment, Republican leadership in Maryland used every effort at their disposal to encourage all Republican to come out and vote. Democrats outnumbered Republicans in many districts and as a result, local Republican clubs encouraged its membership to increase its numbers.[154] Black leaders, mostly in the Republican Party, also began to band together and soon formed the Suffrage League of Maryland, which was comprised of esteemed Black lawyers in the community including Harry Cummings and Ashbie Hawkins.[155] Throughout 1905, the Suffrage League held rallies, distributed pamphlets, raised donations, and taught illiterate Blacks about voting rules and procedures.[156] In September 1905, during the third anniversary of Men's Day celebrated at Methodist Episcopal Church, Harry Cummings addressed the congregation stating, "[n]ever before in the political history of this State has the right of the colored citizen to exercise the right of franchise been in such jeopardy."[157] By the end of September 1905, the Suffrage League was in a position to appoint new campaign committees and added new members to the finance committee.[158] During a meeting at the African Methodist Episcopal Zion Church, the Suffrage League gathered to discuss continuing the vigorous campaign against the Poe Amendment.[159] The campaign committee consisted of several well-known Republican leaders including Harry Cummings, Hiram Watty, and Reverend Alexander.[160]

Despite intense campaigning from both sides, Election Day voter turnout was low, with only sixty-three percent of registered voters turning out to cast a vote.[161] Surprisingly, voter registration among white voters was higher than the estimated eighty percent of Black voters in Baltimore who

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[152] *Id.* at 187-88.
[153] *Amendment Passes*, *supra* note 145, at 2.
[154] *See* Letters to Blanchard Randall, member of the Republican Club in Wash. Cnty. (1900) (on file with the Maryland Center for History and Culture) (speaking on the urgency to recruit and maintain more Republican voters and noting that in their district, Democrats made up 42.5% of voters while Republicans only made up 37.5% of voters).
[155] Paul, *supra* note 141, at 275.
[156] *Id.*
[157] *Harry S. Cummings Scores It: Discusses Amendment at Waters African Methodist Church*, BALT. SUN, Sept. 18, 1905, at 12.
[158] *Suffrage League: Holds Public Meeting and Appoints a New Campaign Committee - New Members Added to the Finance Committee,* BALT. AFRO-AM., Sept. 30, 1905, at 4.
[159] *Id.*
[160] *Id.*
[161] Paul, *supra* note 141, at 277-78.

were registered.[162] Yet, despite the tenacious control that the Democratic Party held on Maryland, their supporters lost in their bid to disenfranchise Black voters.[163] After the defeat of the Poe Amendment, the Democratic Party proposed other amendments to prevent Black citizens from voting and while these successive amendments would also be defeated, a new threat to Black autonomy was soon on the horizon.[164] Rather than seeking political disempowerment through further anti-suffrage attempts, the segregation movement instead sought to reestablish authority over African Americans through attempts at wholesale segregation.

In December of 1910, Baltimore passed the first residential segregation bill of its kind, which constituted an attempt to stem the wave of Black residents from moving into certain areas of the city.[165] This bill prevented Black and white Baltimoreans from moving onto blocks on which the majority of residents were of the other race.[166] Ashbie Hawkins and his law partner, another prominent Black attorney named George McMechen, endeavored to fight this ordinance through several court challenges.[167] During one such challenge in February 1911, the Superior Court of Baltimore declared the ordinance defective, noting that the bill vested the building inspector with an arbitrary power and that certain provisions called for unreasonable classifications which made the entire ordinance invalid as a whole.[168] Several more versions of the ordinance were passed before the 1913 iteration of the ordinance, which courts deemed legally sufficient.[169] Hawkins once more challenged this by initiating a test case using John Gurry, a Black man who attempted to move into a white block, and whom the police subsequently cited with violating the ordinance.[170] Arguing in front of the Criminal Court, Hawkins convinced Judge Elliot to invalidate the ordinance once more based on unclear and arcane language.[171] The city soon appealed

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[162] *Id.* at 275, 277.
[163] Boger, *supra* note 143, at 241.
[164] *See* Paul, *supra* note 141, at 278-82. In 1908, the Strauss Act was proposed which similarly contained a grandfather clause as well as three additional disqualifying clauses aimed at preventing blacks from voting. *Id.* at 278-79. After its unsuccessful debut, Republicans created the Digges Amendment, the third and final anti-suffrage statute that was proposed in 1910, which was almost exclusively aimed at preventing black votes and was also subsequently defeated. *Id.* at 282.
[165] ANTERO PIETILA, NOT IN MY NEIGHBORHOOD: HOW BIGOTRY SHAPED A GREAT AMERICAN CITY 22-23 (2010).
[166] BALT. MD. ORDINANCE 610 (Dec. 19, 1910).
[167] Boger, *supra* note 143, at 242.
[168] *West Law Defective: Court Holds it Invalid Because of Vague Title*, BALT. SUN, Feb. 5, 1911, at 12.
[169] PIETILA, *supra* note 165, at 25.
[170] Boger, *supra* note 143, at 249.
[171] *Id.*

to the Maryland Court of Appeals, which heard the case.[172]

The Court decided to examine whether the ordinance was a reasonable use of police power rather than focusing on the meaning and intent of the ordinance.[173] Writing for the Court, Judge Constable declared that while the separation of the races for the purposes of maintaining the peace was a reasonable use of state police powers, the separation of Black and white citizens was not necessary — as a section of the ordinance allotted for the residents in a given area to decide whether or not to allow a mixture of Black and white people to move in.[174] Furthermore, the ordinance had the unintended effect of unfairly removing the ownership rights of property owners at the time the ordinance was passed.[175] The decision in essence allowed the continuation of the ordinance and the perpetuation of racial segregation in housing. Soon, advocates, including Hawkins and the local chapter of the National Association for the Advancement of Colored People (NAACP), recruited another plaintiff, Thomas Jackson, in another test case before the Maryland Court of Appeals.[176] However, the court delayed a decision in this instance, instead opting to wait for the U.S. Supreme Court's ruling in a case involving a similar segregation statute originating from Kentucky.[177] The U.S. Supreme Court in *Buchanan v. Warley* would ultimately decide that laws in which residents were segregated based on race were unconstitutional infringements on the right to own property.[178] This decision would invariably lead to the Maryland Court of Appeals similarly ruling to nullify the ordinance in Baltimore.[179]

Though integration would still be a challenge for years to come, this success, due in part to Hawkins and the local NAACP chapter, would allow homeowners to sell to whomever they chose regardless of race. While the victories against the Poe Amendment and the segregated housing ordinances were remarkable demonstrations of the effectiveness of both protest movements and litigation, Black lawyers also possessed other avenues to aid them in reforming discriminatory practices. This included the advantages that came with attaining political power. For black politicians, instead of attacking discriminatory laws already in effect, it was significantly more advantageous to instead reshape political policy in pursuit of laws that bridged the widening gap of equal rights and opportunities between Black and white individuals.

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[172] *See* State v. Gurry, 121 Md. 534, 88 A. 546 (1913).
[173] *Id*. at 540, 88 A. at 549.
[174] *Id.* at 548, 88 A. at 551.
[175] *Id*. at 550, 88 A. at 553.
[176] Boger, *supra* note 143, at 252.
[177] PIETILA, *supra* note 165, at 31.
[178] *Id.* Buchanan v. Warley, 245 U.S. 60, 82 (1917)
[179] PIETILA, *supra* note 165, at 31.

V. HARRY CUMMINGS RESHAPING EDUCATIONAL POLITICAL POLICY

During the last half of the 19th century, few African Americans held public office across the nation.[180] States previously aligned with the Confederacy had disenfranchised Black individuals, and many Northern states had small populations of Black individuals.[181] A few states along the border had considerable Black populations, such as Maryland, where the cities of Baltimore, Annapolis, and Cambridge all elected Black city councilmen during the last half of the 19th century.[182] This adjustment proved to be hard work for these newly-elected men, with minor payoffs in the interest of preventing serious losses.[183] Despite the large presence of African Americans in Baltimore following the end of the Civil War and the growing influence of the Republican Party, few Black candidates were initially successful at winning public office.[184] James Montgomery mounted an unsuccessful congressional run in the sixth district in 1874, becoming the first Black citizen to run for office in Maryland.[185] Several black lawyers were successful in gaining appointments to positions of political influence. The governor appointed Warner McGuinn, a Black attorney who practiced with both Cummings and Johnson from 1893 to 1895, as a clerk to the state liquor board in 1896.[186] Another black lawyer, Malachi Gibson, was appointed to serve on the Judiciary Committee for the State of Maryland.[187] However, the election of Harry Cummings in 1891 would mark the first time that the Black community had a voice on the Baltimore City Council.[188]

On the eve of the municipal election in 1890, the spotlight fell on the eleventh ward, where Black Republicans made their case for their candidate in a packed hall on Biddle Street.[189] Here, a chorus of supporters lauded Harry Cummings, including Ashbie Hawkins, who made a desperate plea to the crowd to elect Harry Cummings — threatening that if the white Republicans did not support Cummings at the election, he would never vote for another

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[180] SUZANNE E. CHAPELLE & GLENN O. PHILLIPS, AFRICAN AMERICAN LEADERS OF MARYLAND: A PORTRAIT GALLERY 69 (2004).
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Dr. H.J. Brown: Political Activism*, MD. STATE ARCHIVES: THE RD. FROM FREDERICK TO THURGOOD: BLACK BALT. IN TRANSITION (1870-1920), https://msa.maryland.gov/msa/stagser/s1259/121/6050/html/11425200.html (last visited Sept. 26, 2023).
[185] *See* Callcott , *supra* note 151, at 93-94.
[186] SMITH, *supra* note 9, at 147.
[187] *Id*.
[188] MATTHEW A. CRENSON, BALTIMORE: A POLITICAL HISTORY 283 (2017).
[189] *Campaign Notes: Senator Gorman Going to New York-The Mass-Meetings Last Night*, BALT. SUN, Oct. 29, 1890, at 4.

Republican ticket.[190] Cummings succeeded in clenching the victory for the Republican Party, becoming the first African American Councilmember for Baltimore City.[191] All eyes now fell on Cummings, whom the Baltimore Sun had dubbed the "colored councilman."[192] He was known to take an active role in Republican politics and was also well regarded as a good organizer among his race.[193] When questioned about his platform as a new Councilmember, he stated his intent to make education his top priority.[194] The importance of such a promise was certainly crucial, especially considering the lamentable track record that Baltimore City possessed when it came to providing quality education to Black youth.

Baltimore first established public schools in 1829 to educate the children of white, mostly upper-class families.[195] The children of well-to-do white families received education from a variety of expensive religious schools and private academies, while most Black children in Baltimore attended free Sunday school or learned from friends or relatives.[196] Black families submitted several petitions to the mayor and city during the antebellum period in an effort to establish public funding for Black children, though all were routinely rejected.[197] Instead, Black school children were primarily educated by either private or religious institutions.[198] In 1865, the City Council finally responded to community pressure concerning the education of Black school children by appropriating $10,000 to "colored schools" for the purpose of improving the quality of education in these institutions.[199] The City Council was slow to act, however, and it would take another two years of debate until the Council passed an ordinance that allowed free public education for Black school children to become a reality.[200]

From 1890 to 1891, as a member of the Education Committee for the Baltimore City Council, Cummings voted on several ordinances aimed at

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[190] *Id*.
[191] City Council Elections Baltimore's Predominantly Black Wards 1890-1927 (on file with Maryland Center for History and Culture).
[192] *The Colored Councilman: A Pen-Picture of Harry S. Cummings- He Outlines his Public Course*, BALT. SUN, Nov. 5, 1890, at 6.
[193] *Id.*
[194] *Id.*
[195] *See* BAUM, *supra* note 77, at 25.
[196] *Id.* at 26.
[197] *Id.* at 27.
[198] Brian C. Morrison, Selected African American Educational Efforts in Baltimore, Maryland During the Nineteenth Century 88 (2008) (Ph.D. dissertation, Morgan State University) (on file with the Morgan State University Student Collection).
[199] Bettye C. Thomas, *Public Education and Black Protest in Baltimore 1865-1900*, 71 MD. HIST. MAG. 381, 383 (1976).
[200] *See id.*

increasing the educational opportunities of Black students, including an ordinance that provided for the purchase of two dwellings and lots for the use of male and female colored schools.[201] This ordinance was later voted on and signed into law by the mayor the next month.[202] During his next year in office, Cummings took direct action and introduced an ordinance to provide for the leasing of additional grounds for the use of colored grammar and primary schools.[203] This ordinance was followed by another ordinance for a manual training school for colored students.[204] The need for such a school geared towards instructing Black students was essential for the Black community. At the time, the only manual training school in Baltimore exclusively enrolled white students.[205] Black Marylanders saw this program as an innovative and progressive step at the time, especially due to the lack of adequate training programs for Black artisans.[206]

The ordinance for the establishment of a manual training school passed in February 1892 and, seven months later, on September 5, 1892, the Manual Training School for Colored Youth opened its doors with 105 pupils and five staff members, serving as one of the only institutions in the state that exclusively taught Black students skilled trades.[207] Despite this accomplishment, Cummings would lose his reelection bid in the fall of 1892.[208] Even as an ex-Councilmember, the Black community held Cummings in high regard, and Cummings continued to encourage social and political progress on behalf of Black citizens in Baltimore, causing his popularity within the Black community to rise. In 1897, Cummings was reelected to the Council to represent the eleventh ward once again.[209]

From 1897 to 1899, Cummings introduced a slew of proposals and amendments that were eventually passed by the Republican-controlled City

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[201] FIRST BRANCH CITY COUNCIL JOURNAL, 1890-1891 Sess. 272.
[202] *Id.* at 315.
[203] *Id*. at 271.
[204] *Id.* at 769.
[205] Morrison, *supra* note 198, at 177.
[206] *See* Thomas, *supra* note 199, at 390; Paul, *supra* note 141, at 127. A few years after the end of the Civil War, Isaac Myers sought to encourage the development of skilled black tradesmen and black trade unions by establishing the Colored National Labor Union in 1869. Paul, *supra* note 141, at 127. This effort included compelling all black workers especially those in skilled trades such as mechanics to assimilate in white unions or in the alternative to create independent black unions. *Id.* However, once this organization ceased to exist in the 1870s, black participation in the skilled trades, such as caulking and masonry, declined significantly. *Id.* at 158.
[207] *See* Thomas, *supra* note 199, at 390-91.
[208] *The Forgotten Era*, *supra* note 43, at 11.
[209] Greene, *supra* note 64, at 208.

Council.[210] Some of these proposals benefited both Black and white students, including the establishment of a citywide kindergarten course in all public schools.[211] Most of his legislative proposals, however, were geared towards improving the opportunities of Black teachers and students, including hiring a Black Directress of Sewing in Black schools.[212] In order to accommodate individuals with day jobs, he also introduced an ordinance establishing a night school at the Colored Polytechnic Institute.[213] After leaving the Council again at the end of his term in 1899, Cummings continued to rally against the structural barriers to Black people finding better work by calling out "unfair and unjust restrictions imposed [on black workers]."[214]

The highlight of Cummings' political involvement was delivering a speech to second the nomination of Theodore Roosevelt for president at the 1904 Republican National Convention in Chicago.[215] Despite some pushback from white Republican leaders, Senator Louis E. McComas nominated Harry Cummings to deliver this speech.[216] This engagement made him the first Black person to speak before such a body.[217] During his speech, not only did Cummings praise the accomplishments of President Roosevelt, but he also reminded the Republican Party about its mission to safeguard the rights of all citizens irrespective of race:

> This nomination will be an advanced step towards the fulfillment of the great mission of the Republican Party. And that mission will not be performed until every section of our Constitution and every amendment, thereof shall be respected and made effective and until every citizen of every section, of

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[210] *NEW CITY COUNCIL: ITS FIRST MEETING WILL BE HELD TODAY FOR THE PURPOSE OF ORGANIZATION, BALT*. SUN, NOV. 8, 1897, AT 10.
[211] Greene, *supra* note 64, at 208.
[212] *Id*.
[213] *Id*.
[214] *Their Hope is in Work: Harry S. Cummings, Colored, Gives Good Advice to His Race*, BALT. SUN, May 31, 1906, at 9.
[215] Letter from Theodore Roosevelt to Harry S. Cummings (June 24, 1904) (on file with Maryland Center for History and Culture) (noting that Roosevelt was thoroughly impressed with Cummings' speech).
[216] *See generally* Letter from John Carter Rose, J., U.S. Dist. Ct. for the Dist. of Md., to Theodore Roosevelt, President of the U.S. (June 10, 1904) (on file with the Maryland Center for History and Culture). Rose expressed his disapproval of Cummings delivering the speech as he believed Cummings was not prominent enough. *Id.* However, Rose's received a reply from Roosevelt's secretary, Mr. Barnes, the following day stating that the speech was provided to acting chairman Payne and was approved. Letter from B. F. Barnes, Acting Sec'y to President Theodore Roosevelt, to John Carter Rose, J., U.S. Dist. Ct. for the Dist. of Md. (June 11, 1904) (on file with the Maryland Center for History and Culture)
[217] Johnson, *supra* note 61, at 23.

> every race and of every religion shall proclaim in one grand chorus of that Constitution, Thou art my shield and buckler.[218]

Harry Cummings continued to fight for the rights of African Americans through the first few years of the 20th century up through the time he was elected to the City Council again in 1907.[219] During his third term, Cummings continued to make occasional strides in Black educational institutions, leading to improvements such as the separation of the teachers training course from the regular high school curriculum.[220] Cummings also continued his pledge to increase the educational opportunities for Black students. This mission sometimes put Cummings at odds with his white colleagues, who sought to reverse some of his progress by specifically transforming one of the schools meant for Black children into one that only educated white children.[221] Cummings' colleagues justified this action by explaining that the school was located in a mixed neighborhood.[222] Though the Baltimore City Council passed this legislation, Cummings convinced the mayor of the importance of educating Black youth, prompting the mayor to veto the legislation.[223]

One of Cummings' most difficult fights was against segregation ordinances proposed by the city in 1910, 1911, and 1913.[224] However, Baltimore's Black political community remained strong in its response to this latest threat and Cummings received widespread attention for labeling the new segregation laws "pure racism."[225] Cummings stressed the desire of Baltimore's Black community to integrate with white individuals, stating, "all they wanted was an opportunity to secure better homes, live under better conditions, [and] be better citizens."[226] The ordinances passed by the Council declared that Blacks could not live on a city block with a majority of whites and applications for building permits must include whether the area was to be used by "negros or whites."[227] While Hawkins and other advocates battled these ordinances through court challenges, Cummings utilized his position on the Council to buck the majority as he continued to speak out against new

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[218] Harry Cummings, Address in Seconding President Roosevelt's Nomination (June 1904) (transcript available in the Maryland Center for History and Culture).
[219] Greene, *supra* note 64, at 209.
[220] *Id.*
[221] *Id*.
[222] *Id.*
[223] *Id.*
[224] *See generally* Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42
MD. L. REV. 289, 300-306, 306 n.100 (1983).
[225] JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY, 26-27 (1998).
[226] *Id.* at 27.
[227] Greene, *supra* note 64, at 210; *see also* Power, *supra* note 224, at 299.

housing segregation proposals. In one session he stated, "this segregated Ordinance has had a hard time to get safely through this Council and to stand the test of judicial determination before just and fair judges, of which our city can justly boast. The reason for it is that the law is a bad law, and try as you will, you can never find a right way to do a wrong thing."[228]

Cummings would continue to exemplify the spirit of uplifting African American citizens in Baltimore throughout his final years on the council up until he passed away following a debilitating sickness on September 6, 1917.[229] Following his death, the flag at the City Hall was placed at half-mast by order of the mayor.[230] The Baltimore Sun, in an editorial at his death in 1917 said, "[t]hough never lukewarm in the cause of his own people, he knew instinctively how to conduct himself in a southern city. He made few enemies. Placed in a position where it was easy to arouse race prejudices, he took the wiser path and found that it paid both for himself and for his race."[231]

VI. CONCLUSION

The transformative work of the next generation of Black lawyers in Maryland cannot be overstated, as their legacy continued to reshape the ways in which African Americans sought to address the inequalities that endured. In fact, between 1885 and 1922, close to forty-two Black attorneys would eventually be added to the ranks.[232] The attorneys that took up the mantle continued the political, social, and legal advances of their predecessors through further measures aimed at increasing the agency of Black citizens. In the area of political reform, attorneys Warner T. McGuinn and William L. Fitzgerald would serve on the Baltimore City Council from 1919 to 1923, where they continued advocating for legislation to expand Black schools as well as create movie theaters and recreational facilities for Black citizens.[233] This effort came 30 years after Cummings and Johnson represented Black patrons who were denied access to similar public facilities. The impact of Black attorneys would reverberate throughout the 1920s and 1930s, culminating in the 1936 decision of the Maryland Court of Appeals in *Murray*

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[228] Johnson*, supra* note 61, at 23.
[229] *See* Memorandum from the Honorable Kurt L. Schmoke, Mayor of the City of Baltimore regarding the 100th Anniversary, November 10, 1990, of the Election and Oath of Office of Harry Sythe Cummings, the
First Black City Councilman in Baltimore City (unpublished manuscript) (on file with the Maryland Center
for History and Culture).
[230] *Id.*
[231] Editorial, BALT. NEWS, Sept. 7, 1917.
[232] SMITH, *supra* note 9, at 147.
[233] Greene, *supra* note 64, at 215, 219.

v. Pearson, where the Court of Appeals compelled the University of Maryland to admit Black students nearly 50 years after it closed its doors to African Americans with the expulsion of Dozier and Hawkins.[234]

From the end of Reconstruction through the early 20th century, Baltimore was without a doubt the focal point for civil rights activism that would continually change the lives of African Americans. While the spirit of activism arguably began in the decade following Reconstruction, it began to truly take shape in 1885 with the formation of the United Brotherhood of Liberty, which was one of the first civil rights organizations and arguably the precursor to the NAACP.[235] Yet for all the hard work and progress accomplished by this organization, none of it would have been possible without the team of dedicated lawyers willing to initiate lawsuits to fight against the injustices of the day. This same fervor would continue with the litigation strategies of Cummings, Johnson, and Hawkins, whose willingness to challenge the oppressive system present in Baltimore made them a force to be reckoned with. By the turn of the century, Harry Cummings' reform measures would ensure active Black political participation for the first time at the local level, especially in the fight for the education rights of underprivileged Black students and teachers in Baltimore City.

As the 20th century unfolded with the encroaches of the anti-suffrage and housing segregation movements, Black lawyers were involved in every struggle designed to push back against these existential threats against the inherent rights and liberties of Black citizens. Together these remarkable crusaders for justice would continue to systematically transform the legal and political system of Maryland into a bulwark against racial discrimination, the effects of which would have a profound impact in the continued fight for civil rights for decades to come.

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[234] RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 192-93 (1977); *see also The First Integration*, *supra* note 2, at 43. *See generally* Murray v. Pearson, 169 Md. 478, 594, 182 A. 590 (1936).

[235] Paul, *supra* note 141, at 207.

COMMENT

CHARGING CHILDREN AS ADULTS: THE CASE FOR REPEALING MARYLAND'S AUTOMATIC WAIVER STATUTE

By: Victoria Garner*

I. INTRODUCTION

In July 2022, forty-eight-year-old Timothy Reynolds was shot and killed in Baltimore, Maryland during a confrontation with a group of boys known as "squeegee kids" – children who clean windshields at Baltimore city intersections for money.[1] Within hours following the arrest of a fifteen-year-old boy suspected of murdering Reynolds, Baltimore City State's Attorney Marilyn Mosby charged the boy with first-degree murder, an offense for which children are automatically waived into adult court in Maryland.[2] The incident gained national attention, bringing renewed focus on how to handle children who commit serious crimes such as murder and calling into question Maryland's law allowing children to be automatically placed in adult court.[3] Currently, Maryland is in the minority of states that sends hundreds of

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[1] *Mike Hellgren, Document: Timothy Reynolds Shot 5 Times in July Encounter with Squeegee Workers*, CBS BALT. (NOV. 15, 2022, 11:22 PM), https://www.cbsnews.com/baltimore/news/document-timothy-reynolds-shot-5-times-in-july-encounter-with-squeegee-workers/; *see also* J. Brian Charles, *Maryland's Obsession with Trying Children as Adults*, Balt. Beat (Sept. 7, 2022), https://baltimorebeat.com/marylands-obsession-with-trying-children-as-adults/.

[2] *See Keith Daniels, Squeegee Kid Charged as Adult in Murder Raises Concern About Youth Crime in Baltimore*, ABC NEWS (NOV. 18, 2022, 1:10 PM), https://katv.com/news/nation-world/squeegee-kid-charged-as-adult-in-murder-raises-concern-about-youth-crime-in-baltimore-city-juvenile-violence-prevention-programs-mayor-brandon-scott-baltimoe-police; *see also* Charles, *supra* note 1.

[3] *See* Ashley McDowell, *Some Marylanders see the Process of Prosecuting Minors as an Issue*, ABC WMAR-2 NEWS, (Oct. 18, 2022, 11:12 PM), https://www.wmar2news.com/news/local-news/some-marylanders-see-the-process-of-prosecuting-minors-as-an-issue.

children into the adult system every year without considering the child's maturity, upbringing, or potential for rehabilitation.[4] However, Maryland Senator Jill Carter and House Delegate Charlotte Crutchfield have introduced a bill to the General Assembly labeled the Youth Equity & Safety Act (the "YES Act") to address this issue.[5] If enacted, the YES Act would repeal the provisions that automatically strip the juvenile court of its original jurisdiction over children alleged to have committed certain offenses.[6]

This comment examines the impact of the current Maryland statute allowing for, and sometimes mandating, juvenile adjudication in adult courts and whether the proposed YES Act adequately protects juvenile offenders faced with serious offenses.[7] Part II examines the origins, development, and purpose of the juvenile justice system in the United States and in Maryland.[8] Next, Part II explores the reasons for establishing a juvenile justice system separate from the adult criminal justice system. This section also outlines Maryland's processes of discretionary transfers from juvenile to adult courts and automatic filing of juvenile cases into adult criminal court.[9]

Part III considers social science research on juvenile brain development and analyzes the issues surrounding the effectiveness and racial impact of automatic waiver practices.[10]

Part IV examines recent Supreme Court holdings on issues of juvenile justice.[11] This section also examines the YES Act which has been introduced in the Maryland General Assembly to repeal the automatic waiver statute and analyzes whether the YES Act provides an adequate solution.[12]

Lastly, Part V offers a recommendation for state legislators to abrogate waiver statutes that allow for cases involving children to be adjudicated in adult criminal court.[13]

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[4] *See* Marcy Mistrett, *National Trends in Charging Children as Adults*, THE SENT'G PROJECT 6 (July 20, 2021), http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnJuvRefCncl/Sentencing-Project-National-Trends-in-Charging-Children.pdf.
[5] S. 93, 2023 Gen. Assemb., 445th Sess. (Md. 2023).
[6] *Id*.
[7] *See infra* Parts II-V.
[8] *See infra* Section II.A.
[9] *See infra* Sections II.B-C.
[10] *See infra* Sections III.A-B.
[11] *See infra* Section IV.A.
[12] *See infra* Section IV.B.
[13] *See infra* Part V.

II. HISTORICAL DEVELOPMENT

A. *Conception and Development: An Overview of the Juvenile Justice System in the United States*

Prior to the late 19th century, the United States criminal justice system provided no formal distinction between juvenile and adult offenders; children were incarcerated in the same facilities as adults and could be tried, convicted, and even sentenced to death in criminal courts.[14] It was not until the Progressive Era reforms at the turn of the 20th century that the concept of a juvenile justice system gained momentum to protect juvenile offenders from these harsh penalties.[15] Juvenile justice reform advocates, such as the Society for the Prevention of Pauperism (later known as the Society for the Reformation of Juvenile Delinquents), recognized that juvenile offenders were different from adult offenders in terms of their physical and mental development and maturity, which diminished their capacity for criminal culpability.[16] Relying on social and psychological research on juvenile development, reform advocates promoted the development of an entirely separate system for determining guilt and punishment for children that centered on rehabilitation rather than punishment.[17]

In the late 1800s, reformers successfully advocated for separate juvenile court systems and incarceration facilities based on the premise that children have qualities that make them fundamentally and developmentally different from adults and, therefore, less culpable for their actions and more amenable to rehabilitation.[18] The first juvenile court was established in 1899 in Cook County, Illinois.[19] This system adopted the principle of *parens patriae*, where "[t]he state, through its courts, had the inherent power and duty to provide protection to children by focusing on the child's welfare."[20]

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[14] *Juvenile Justice History*, CTR. ON JUV. & CRIM. JUST., https://www.cjcj.org/history-education/juvenile-justice-history (last visited Nov. 23, 2022); NAT'L RSCH. COUNCIL INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE 157 (Joan McCord et al. eds., 2001); *see also In re Gault*, 387 U.S. 1, 16 (1967) ("[C]hildren under seven were considered incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial, and in theory to punishment like adult offenders.").

[15] NAT'L RSCH. COUNCIL INST. OF MED., *supra* note 14, at 157.

[16] *See* Chelsea Ellen Heaney, *Youthfulness Matters: A Call to Modernize Juvenile Waiver Statutes*, 43 HASTINGS CONST. L.Q. 389, 395 (2016).

[17] *Youth in the Justice System: An Overview*, JUV. L. CTR., https://jlc.org/youth-justice-system-overview (last visited Nov. 23, 2022); *see also* Heaney, *supra* note 16, at 392.

[18] *Youth in the Justice System: An Overview*, *supra* note 17.

[19] Eric Fritsch & Craig Hemmens, *Juvenile Waiver in the United States 1979-1995: A Comparison and Analysis of State Waiver Statutes*, 46 JUV. & FAM. CT. J. 17, 20 (1995).

[20] Ellie D. Shefi, *Waiving Goodbye: Incarcerating Waived Juveniles in Adult Correctional Facilities Will Not Reduce Crime*, 36 U. MICH. J. L. REFORM 653, 658 (2003); *see* Shari R.

"By 1925, every state had established juvenile courts[,]" and generally, the processes of these early juvenile courts were private, informal, and minors had no legal representation. [21]

By the late 1960s, there was growing concern about the juvenile justice system's effectiveness and lack of procedural safeguards.[22] Several decisions by the United States Supreme Court addressed these concerns and subsequently altered the nature of the juvenile courts.[23] In 1967, the Supreme Court challenged the principle of *parens patriae* and acknowledged in its landmark decision, *In re Gault,* that the juvenile justice system's lack of formal proceedings and constitutional due process could potentially lead to substantial deprivations of children's liberties.[24] The Court held that the Constitution requires children to have many of the same due process rights guaranteed to adults accused of crimes, such as notice of the charges against them, the right to legal counsel, and the right to confront witnesses.[25] In the years following the *Gault* decision, the Supreme Court extended other constitutional rights to children, including the right to have charges proven beyond a reasonable doubt and the right against double jeopardy.[26] Therefore, juvenile offenders were able to enjoy the same Constitutional protections as adults while continuing to benefit from the protections of the juvenile justice system.[27]

B. *The Rise of Charging Juvenile Offenders as Adults*

Despite the expansion of constitutional rights to children during the first half of the twentieth century, in response to rising juvenile crime rates in

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Kim, *Parens patriae? Automatic Waiver to Criminal Court and its Toll on Youth and Society*, AM. PSYCH.-L. SOC'Y (Oct. 2014), https://www.apadivisions.org/division-41/publications/newsletters/news/2014/10/innocence-research; *see also Parens Patriae*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/parens_patriae (last visited Aug. 9, 2023) (explaining that *parens patriae* is a doctrine that grants the inherent power and authority to the state to act as a guardian for those who are legally unable to act on their own behalf).

[21] *Juvenile Justice History*, *supra* note 14; Shefi, *supra* note 20, at 658-59.

[22] Shefi, supra note 20, at 658-59.

[23] *See* Kent v. United States, 383 U.S. 541, 561 (1966) (holding that sufficient investigation must be conducted prior to waiving a child's case to adult court); *See also In re* Gault, 387 U.S. 1, 30-31 (1967) (holding that the Due Process clause of the 14th Amendment applies to juvenile adjudicatory proceedings).

[24] *See In re Gault*, 387 U.S. at 29–31.

[25] *Id.* at 59-60. (Black, J., concurring); Heaney, *supra* note 16, at 393.

[26] *See* In re Winship, 397 U.S. 358, 368 (1970) (holding that the state must prove charges against a juvenile "beyond a reasonable doubt" in juvenile court proceedings); *see also* Breed v. Jones, 421 U.S. 519, 541 (1975) (holding that the Double Jeopardy Clause of the Fifth Amendment applies to juvenile court proceedings).

[27] Fritsch & Hemmens, *supra note 19,* at 21; *Kent*, 383 U.S. at 556.

the late 1970s and early 1980s, state and federal legislators across the United States began adopting more punitive "tough on crime" policies that emphasized deterrence and punishment over rehabilitation for these offenders.[28] The popular, racist "super-predator" theory exacerbated public fear; John Dilulio, a prominent criminologist at Princeton University in the 1990s who coined the term "super-predator," asserted that violent crime was "[m]ost acute among black inner-city males."[29] Dilulio predicted that these children, who he described as a "wolf pack" of "radically impulsive, brutally remorseless" teens who had "no respect for human life," would take to the streets to rape, burglarize, and murder.[30] Dilulio later admitted that his predictions were wrong and the rate of juvenile offenses had already begun to decline at the time of his assertions.[31] Nevertheless, his predictions, coupled with incidents of crimes committed by juvenile offenders,[32] caused a panic.[33] The belief that juvenile courts were too lenient led almost every state legislature to enact procedures throughout the 1990s that made it easier to deprive children of the juvenile system's protections.[34] One of these

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[28] Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities,* JUST. POL'Y INST., 12 (2006), https://justicepolicy.org/wp-content/uploads/2022/02/06-11_rep_dangersofdetention_jj.pdf ("[T]he 'tough-on-crime' concerns of the 1990s changed the priorities and orientation of the juvenile justice system. Rising warnings of youth 'superpredators,' 'school shootings,' and the amplification of serious episodes of juvenile crime in the biggest cities fueled political momentum to make the system 'tougher' on kids."); *see also* Clyde Haberman, *When Youth Violence Spurred 'Superpredator' Fear*, N.Y. TIMES (Apr. 6, 2014), https://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html.

[29] John Dilulio, *The Coming of the Super-predators*, WASH. EXAM'R (Nov. 27, 1995, 12:00 AM), https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators; *see also* John J. Dilulio Jr., *My Black Crime Problem, and Ours*, CITY J. (1996), https://www.city-journal.org/html/my-black-crime-problem-and-ours-11773.html ("[N]ot only is the number of young black criminals likely to surge, but also the black crime rate, both black-on-black and black-on-white, is increasing, so that as many as half of the juvenile super-predators could be young black males.").

[30] John J. Dilulio Jr., *My Black Crime Problem, and Ours,* CITY J.(1996), https://www.city-journal.org/article/my-black-crime-problem-and-ours; *The Superpredator Myth, 25 Years Later*, EQUAL JUST. INITIATIVE (Apr. 7, 2014), https://eji.org/news/superpredator-myth-20-years-later/.

[31] *See* Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. TIMES, (Feb. 9, 2001), https://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html.

[32] *The Superpredator Myth, 25 Years Later, supra* note 30.

[33] *Id.*

[34] *See* NAT'L RSCH. COUNCIL INST. OF MED., *supra* note 14, at 158; Fritsch & Hemmens, *supra note 19,* at 17.

procedures is known as "waiver".[35] Although there are several different types of waiver, one common method is "judicial" or "discretionary" waiver, which allows juvenile court judges to waive jurisdiction and refer the cases to adult criminal court jurisdiction. [36]

Another form of waiver that garnered much attention and criticism is "mandatory" or "automatic" waiver.[37] This form of waiver bypasses the juvenile court altogether and places juvenile offenders into adult criminal court if they meet certain criteria for age, severity of offense, and/or prior criminal record.[38] Despite the availability of juvenile courts, a considerable number of states, including Maryland, continue to treat certain children as adults, charging and prosecuting them in the adult criminal justice system.[39]

C. *Automatic Waiver for Children in Maryland*

Throughout the 1900s, Maryland was one of only three states (including Mississippi and Pennsylvania) to automatically charge children as adults if the child was fourteen years or older and accused of murder.[40] Throughout the 1980s and 1990s, however, Maryland's legislature followed the "tough on crime" trend and assembled a list of other offenses for which children could be automatically transferred into adult criminal courts, making it significantly easier to charge children as adults.[41] Over time, the number of offenses prompting automatic waiver rose from one to thirty-three.[42] Currently, Maryland law allows juvenile cases to be adjudicated in adult criminal court through either discretionary judicial waiver or automatic waiver.[43]

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[35] *See Judicially Waived Cases,* YOUTH.GOV, https://youth.gov/youth-topics/juvenile-justice/judicially-waived-cases (last visited Nov. 23, 2022); ("A judicial waiver refers to the mechanism wherein a juvenile judge waives jurisdiction over a case and refers it to criminal court jurisdiction instead.").

[36] *Id.*

[37] Fritsch & Hemmens, *supra note 19, at 18.*

[38] *Id.*

[39] *See* Patrick Griffin, et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, U.S. DEP'T OF JUST. (Sept. 2011), https://www.ojp.gov/pdffiles1/ojjdp/232434.pdf.

[40] *See* Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes to Juvenile Waiver Statutes*, 78 J.OF CRIM. L. AND CRIMINOLOGY 471, 512-13 (1987).

[41] Wendy Hess, et al., *Just Kids: Baltimore's Youth in the Adult Criminal Justice System* 4-6 (Oct. 2010), https://justkidsmaryland.org/wp-content/uploads/2014/06/Just-Kids-Report.pdf.

[42] *Id*. at 6.

[43] *See infra* Section II.C.

Discretionary waiver statutes in Maryland permit a Juvenile Court judge to hold a hearing to decide whether to waive a juvenile offender into adult court.[44] If the child is not yet fifteen years old and "[i]s charged with committing an act that, if committed by an adult, would be punishable by life imprisonment," the judge has the discretion to transfer the case to adult court.[45] Unlike automatic waiver, discretionary waiver allows the Juvenile Court to consider several factors, including the child's mental and physical condition, and supposed amenability to treatment in making its decision.[46]

Maryland's automatic waiver statute, however, involves a type of "offense exclusion" that automatically excludes certain offenses from Juvenile Court jurisdiction altogether.[47] Juvenile Court jurisdiction is excluded for children as young as fourteen who are charged with committing a crime that, "[i]f committed by an adult, would be punishable by life imprisonment."[48] The statute also automatically excludes Juvenile Court jurisdiction for children ages sixteen or older who are charged with a multitude of designated crimes ranging from second degree murder to violations of traffic laws.[49] A child who is automatically waived into adult court is granted the opportunity to have a "waiver hearing" to argue that his or her case should be transferred to juvenile court.[50] This transfer process is known as a "reverse waiver."[51]

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[44] MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-06(b) (West 2020).
[45] *Id.* at § 3-8A-06(a)(1)-(2).
[46] *Id.* at § 3-8A-06(e)(1)-(5).
[47] Hess et al., *supra* note 41, at 6.
[48] MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-03(d)(1) (West 2023); *see also Maryland's Transfer Laws*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/tryingjuvasadult/states/md.html (last visited Jan. 6, 2023) (statutory exclusion offenses include: "crimes punishable by death or life imprisonment, second degree murder or the attempt, manslaughter, Second degree murder or the attempt, manslaughter, abduction, kidnapping, first degree assault, armed robbery or the attempt, second degree rape, second and third degree sexual offenses in violation of specified statutes, attempted rape, attempted second degree sexual assault, carjacking and armed carjacking, certain firearms violations, including wearing, carrying, or transporting a handgun on the person or in a vehicle without a permit; possessing or using a machine gun for aggressive purposes or in the perpetration or attempted perpetration of a crime of violence; violating restrictions on the transfer, sale, or possession of regulated firearms; knowingly possessing, selling, or transferring a stolen regulated firearm; possessing a short-barreled rifle or shotgun; and using, wearing, carrying, or transporting firearms during and in relation to a drug trafficking crime.")
[49] *See* CTS. & JUD. PROC. § 3-8A-03(d)(2)-(4).
[50] *See* MD. CODE ANN., CRIM PROC. § 4-202(b)(1)-(3)(West 2023).
[51] *Maryland's Transfer Laws*, *supra* note 48.

In early 2022, lawmakers in the Maryland General Assembly passed a number of juvenile justice reforms in the state.[52] The reforms, which came after years of research and discussion on juvenile brain development, included generally prohibiting minors under thirteen years old from facing criminal charges (unless for serious offenses, such as murder), banning jail time for children who commit low-level offenses such as misdemeanors, requiring police to notify a child's parents or legal guardians before interrogating them, setting a minimum age for children to receive criminal charges, and creating a probation term time limit.[53] Many juvenile justice reform advocates hailed this as a huge success and movement towards the Department of Juvenile Services "treating children like children."[54] However, despite these reforms, Maryland remains one of the few states that still allows for children as young as fourteen years old to be charged and prosecuted as an adult.[55]

III. ISSUE: WHY JURISDICTION MATTERS AND THE NEED TO REPEAL AUTOMATIC WAIVER

A. Prosecuting Children in Adult Courts is Ineffective and Harmful

Automatically charging Maryland children as adults disregards important scientific findings about the cognitive development of children.[56] Over the past two decades, scientific research has shown that children lack the cognitive development of adults, which impacts a child's decision making, impulse control, and susceptibility to peer pressure.[57] Social science research shows that children are significantly less capable than adults at weighing the risks and consequences of their actions, regulating their impulses and behaviors, managing stressful situations, and ignoring peer

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[52] *Maryland Enacts Sweeping Youth Justice Reforms*, ANNIE E. CASEY FOUND.(June 22, 2022), https://www.aecf.org/blog/maryland-enacts-sweeping-youth-justice-reforms.

[53] Lea Skene & Darcy Costello, *Juvenile Justice Reform Bills Clear Maryland General Assembly, Head to Governor's Desk*, Balt. Sun, (Mar. 31, 2022, 5:35 PM), https://www.baltimoresun.com/politics/bs-md-pol-juvenile-justice-bills-clear-statehouse-20220331-n5cpi73htjdhnchdctcc4mi7ne-story.html; *see* S. 691, 442nd Gen. Assemb., Reg. Sess. (Md. 2022); *see also* S. 53, 442nd Gen. Assemb., Reg. Sess. (Md. 2022).

[54] Lea Skene & Darcy Costello, *Juvenile Justice Reform Bills Seeking to 'Treat Children as Children' Could Mean Big Changes for Maryland's Youth,* BALT. SUN (Mar. 31, 2022, 10:12 AM), https://www.baltimoresun.com/politics/bs-md-pol-juvenile-justice-bills-maryland-20220330-zuw76v5njvdjld5v5gg5yz5xoq-story.html.

[55] McDowell, *supra* note 3.

[56] Hess et al., *supra* note 41, at 15.

[57] Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 814-16 (Feb. 2003).

pressure.[58] Generally, the section of the brain that deals with decision-making is not fully developed until a person reaches their early twenties.[59] Although this does not excuse children from criminal responsibility, the law widely recognizes that children are less criminally blameworthy than adults and more capable of change and rehabilitation.[60]

In a number of decisions addressing juvenile justice laws over the last two decades, the U.S. Supreme Court has cited research showing cognitive development differences between children and adults as part of its rationale in striking down harsh sentencing schemes for children.[61] Unfortunately, this recognition did not discourage Maryland from routinely charging children in the adult criminal justice system through waiver laws.[62] Between 2013 and 2022, Maryland charged approximately 8,692 minors as adults.[63] Per capita, available data shows that the only state that automatically sends more of its young children into adult courts than Maryland is Alabama.[64]

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[58] Hess et al., *supra* note 41, at 15; *see also* Morgan Tyler, *Understanding the Adolescent Brain and Legal Culpability*, A.B.A. (Aug. 1, 2015), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-34/august-2015/understanding-the-adolescent-brain-and-legal-culpability/ ("As the cognitive control system matures through adolescence it provides: increased impulse control, better emotional regulation, more foresight and detection of options, better planning and anticipation of outcomes, greater resistance to stress and peer pressure.").

[59] Graham v. Florida, 560 U.S. 48, 68 (2010)

[60] *See* Hannah Gaskill, *Juvenile Justice Bill Seeks to Address Failures of Many Systems*, MD. MATTERS (Mar. 4, 2022), https://www.marylandmatters.org/2022/03/04/juvenile-justice-bill-seeks-to-address-failures-of-many-systems/; *see also* Courtney M. McSwain, *Focusing on Racial Justice and Systemic Reform Helped Advocates Raise the Minimum Age in Maryland*, NAT'L JUV. JUST. NETWORK (July 28, 2022), https://njjn.org/article/focusing-on-racial-justice-and-systemic-reform-helped-advocates-raise-the-minimum-age-in-maryland-; *Id.,* at 68 ("Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults . . . it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.").

[61] *See* Roper v. Simmons, 543 U.S. 551, 569-70 (2005) (holding that the death penalty for juvenile offenders is unconstitutional; *see also Graham,* 560 U.S. at 74 (holding juvenile offenders cannot be sentenced to life imprisonment without parole for non-homicide offenses); *see also* J.D.B. v. North Carolina, 564 U.S. 261 (2011) (holding that age is relevant when determining police custody for Miranda purposes).

[62] *See* Hess et al., *supra* note 41, at 2, 6.

[63] *See Juveniles Charged as Adults Dashboard,* GOVERNOR'S OFF. OF CRIME PREVENTION, YOUTH, AND VICTIM SERVS, http://goccp.maryland.gov/data-dashboards/juveniles-charged-as-adults-dashboard/ (last visited Sept. 28, 2023).

[64] Mistrett, *supra* note 4, at 6; *see also* Hannah Gaskill, *Senators Consider Reversing Law on Charging Children as Adults*, BALT. SUN (Feb. 16, 2023, 7:13 PM), https://www.baltimoresun.com/politics/bs-md-pol-juvenile-justice-20230217-t66dj3hq6jbi3gdfxv6toipogi-story.html (explaining that Maryland is second only to Florida in the number of children it sends to adult court).

Maryland's automatic waiver limits the analysis of a juvenile offender's suitability for juvenile or adult court to an examination of the child's age and the offense committed.[65] This limitation unacceptably ignores individualized consideration of the culpability, background, maturity, and personal circumstances of a juvenile offender. Although lawmakers designed these automatic waiver provisions to deter children from committing certain crimes and severely punishing and incapacitating those who were not deterred, a concept embodied in the slogan, "Adult Time for Adult Crime," this effect has not been realized.[66] The University of California, Los Angeles (UCLA) School of Law's Juvenile Justice Project reviewed the effects of juvenile cases prosecuted in adult courts and found little, if any, deterrent effect.[67] In fact, in a number of states, recidivism rates *increased* when children were charged as adults.[68] Perhaps, in part, because children charged in adult court cannot access or benefit from the services made available through juvenile court, such as educational programs, community programs and services, and other resources specifically designed for juvenile development.[69] Many adult facilities lack basic necessities, including education and mental health counseling options.[70]

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[65] Gaskill, *supra* note 64.

[66] *See* Hess et al., *supra* note 41, at 11.

[67] *See The Impact of Prosecuting Youth in the Criminal Justice System: A Review of the Literature*, UCLA SCH. OF L. JUV. JUST. PROJECT 30 (July 2010), http://www.antoniocasella.eu/restorative/UCLA_july2010.pdf [hereinafter *The Impact of Prosecuting Youth*].

[68] *Id.* ("Transfer has not proven successful thus far on any justifying outcome measures. It has not led to increased deterrence of juvenile crime. Many studies have found that transfer has increased recidivism"); *see also* Nicole Scialabba, *Should Juveniles be Charged as Adults in the Criminal Justice System?* A.B.A. (Oct. 3, 2016), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/should-juveniles-be-charged-as-adults/; *see also* Gordon Bazemore & Mark Umbreit, *Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime*, 41 CRIME & DELINQ. 296, 299-300 (1995) (explaining that one of the reasons children tried as adults face higher recidivism rates is that the adult system has less focus on rehabilitation and family support); *see also* Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?, U.S. DEP'T OF JUST. OFF. OF JUV. JUST. AND DELINQ. PREVENTION* 4 (June 2010), https://www.ojp.gov/pdffiles1/ojjdp/220595.pdf ("[Y]outh tried in adult criminal court generally have greater recidivism rates after release than those tried in juvenile court.").

[69] Scialabba, *supra* note 68; *see also* Rachel Baye, *Maryland Tries Hundreds of Juvenile Defendants as Adults. One Annapolis Bill Tries to Change That*, WYPR (Feb. 17, 2023 5:12 PM), https://www.wypr.org/wypr-news/2023-02-17/maryland-tries-hundreds-of-juvenile-defendants-as-adults-one-annapolis-bill-tries-to-change-that ("[O]nly in the juvenile system do [juveniles] have access to psychologists, psychiatrists and medical professionals who can diagnose and issue a course of treatment not just for mental health, but for all kinds of issues.").

[70] *See* Baye, *supra* note 69.

Prosecuting children as adults has also proven to be harmful and puts children at risk.[71] Children in the adult criminal justice system face a higher risk of sexual abuse, physical assault, and suicide.[72] Current law also requires children charged with violent crimes such as first-degree murder to stay in adult jails while they await trial.[73] Nationally, children held in adult facilities are considerably susceptible to physical harm.[74] The probability of suicide, aggressive assault, and sexual assault drastically increases for children housed in adult facilities.[75] Furthermore, children are significantly more likely to commit suicide in an adult jail than if they are held in a juvenile facility.[76] Although only 1% of all adult jail inmates nationwide are children, 21% of the victims of sexual violence in adult jails are those under eighteen.[77] For safety purposes, children held in Maryland adult prisons and jails are occasionally put in isolation.[78] Although this tactic may temporarily protect the children from certain harms, it simultaneously creates new problems in addition to exacerbating others.[79] A juvenile in isolation is typically constrained to his or her cell for 23 hours per day.[80] This often leads children to become "[p]aranoid, anxious, and despondent, all of which exacerbate mental health conditions and suicidal tendencies."[81] Isolation is generally prohibited in the juvenile justice system because its known to harm children's mental well-being.[82]

B. *The Automatic Waiver Statute Disproportionately Impacts African American Children*

Automatic waiver laws have created vast racial disparity, with African American children making up 84 percent of all children charged as adults in Maryland.[83] Evidence shows that Maryland's automatic waiver has

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[71] *See The Impact of Prosecuting Youth*, *supra* note 67, at 28.
[72] *Id.*
[73] William J. Ford, *Lawmakers, Advocates Push for Changes in Youth Juvenile Justice System,* MD. MATTERS (Feb. 21, 2023), https://www.marylandmatters.org/2023/02/21/lawmakers-advocates-push-for-changes-in-youth-juvenile-justice-system/.
[74] Hess et al., *supra* note 41, at 13.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] Hess et al., *supra* note 41, at 13.
[81] *Id.*
[82] *Id.*
[83] *See* COMM'N ON JUV. JUST. JURIS., FINAL REPORT TO THE GOVERNMENT AND GENERAL ASSEMBLY COMMISSION ON JUVENILE JUSTICE JURISDICTION 35 (Sept. 30, 2001),

created massive disparities by driving a substantially high number of mostly African American children to be tried as adults, and referring "[m]ore children to adult court than California, which is six times its size."[84] Many juvenile cases that originate in adult court through automatic waiver are waived to juvenile court.[85] However, there are clear racial disparities regarding which cases are transferred to juvenile court from the adult system.[86] Nearly all white juvenile defendants have their cases transferred to juvenile court, whereas less than half of African American juvenile defendants have their cases transferred.[87]

IV. Maryland Should Repeal Automatic Waiver and End the Policy of Charging Children as Adults

Child offenders are fundamentally different from adults, and the goals of the juvenile system, successful reentry into the community through rehabilitation, treatment, and guidance, are not served when children are charged as adults.[88] Specifically, the Maryland Juvenile System purports to "[p]rovide for the care, protection, and wholesome mental and physical development" of children and to "[p]rovide for a program of treatment, training, and rehabilitation consistent with the child's best interests and the protection of the public interest."[89] The goals of the juvenile justice system are different from those of the adult system with the understanding that children are fundamentally different from adults.[90] Therefore, the Maryland Legislature should repeal the automatic waiver statute.

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https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/000000/000424/unrestricted/20040824e.pdf ("[A]lmost 80% of those charged with excluded offenses are Black."); *see also* S. 93, 2023 Gen. Assemb., 445th Sess. (Md. 2023).

[84] J. Brian Charles, *Maryland's Obsession with Trying Children as Adults*, BALT. BEAT, (Sept. 7, 2022), https://baltimorebeat.com/marylands-obsession-with-trying-children-as-adults/; *see also* S. 93, 2023 Gen. Assemb., 445th Sess. (Md. 2023).

[85] Hess et al., *supra* note 41, at 8.

[86] *See* Rachel Baye, *Maryland Tries Hundreds of Juvenile Defendants as Adults. One Annapolis Bill Tries to Change That*, WYPR (Feb. 17, 2023, 5:12 PM), https://www.wypr.org/wypr-news/2023-02-17/maryland-tries-hundreds-of-juvenile-defendants-as-adults-one-annapolis-bill-tries-to-change-that.

[87] *Id*.

[88] *See Juvenile Justice*, YOUTH.GOV, https://youth.gov/youth-topics/juvenile-justice#:~:text=The%20primary%20goals%20of%20the,of%20youth%20into%20the%20community (last visited Feb. 23, 2023).

[89] MD. CODE ANN., CTS. AND JUD. PROC., § 3-8A-02(a)(4) (West 2023).

[90] *Juvenile Justice*, *supra* note 88.

A. Recent Supreme Court Precedent Should Inform Maryland's Legislature on Juvenile Waiver

The United States Supreme Court addressed the fundamental differences between children and adults in *Miller v. Alabama*.[91] Here, the Supreme Court held that mandatory life imprisonment without parole for those who were children at the time of their crimes, violated the Eighth Amendment's prohibition on cruel and unusual punishment.[92] The Court reasoned that such a sentence "[p]recludes consideration of [a defendant's] chronological age and its hallmark features-among them, immaturity, impetuosity, and failure to appreciate risks and consequences."[93] The Court stated that, "'[j]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered' in assessing his culpability.[94]

The Court concluded that its holding is meant to set forth a certain process for judges to follow when determining whether it is appropriate to impose such a severe sentence on a juvenile.[95] Specifically, this holding requires that judges "[c]onsider the 'mitigating qualities of youth.'"[96] The *Miller* decision identified several features that courts should consider before sentencing children to life without parole: "[i]mmaturity, impetuosity, failure to appreciate risks and consequences, brutal or dysfunctional family and home environments, impacts of peer pressure, and the circumstances of the crime itself, including the extent of the child's involvement."[97]

Miller is a seminal case recognizing that children's specific, unique characteristics associated with their youth which make them unsuitable recipients of the law's most severe punishments.[98] The Supreme Court's findings emphasize the importance of not only exercising judicial discretion when sentencing children, but also of discontinuing practices that sentence

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[91] Miller v. Alabama, 567 U.S. 460, 471-72 (2012) (holding that mandatory life sentences without the possibility of parole for juvenile offenders violates the Eighth Amendment).
[92] *Id.* at 465.
[93] *Id.* at 477.
[94] *Id*. at 476 (quoting Eddings v. Oklahoma, 455 U.S. 104, 116 (1982)) (identifying numerous mitigating factors based on the juvenile petitioners' backgrounds including childhood abuse at the hands of their parents, spending time in and out of foster care, development of a dependency on drugs and alcohol, and previous suicide attempts).
[95] *See Miller*, 567 U.S. at 483.
[96] *Id.* at 476 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).
[97] Heaney, *supra* note 16, at 413; *Miller*, 567 U.S. at 477.
[98] *See Ten Years After Miller v. Alabama*, EQUAL JUST. INITIATIVE, (June 24, 2022), https://eji.org/news/ten-years-after-miller-v-alabama/.

children as adults without considering their youth, maturity, and potential for rehabilitation.[99]

The emphasis on consideration of children's unique characteristics and judicial discretion should inform the development of waiver laws in Maryland. To date, Maryland's automatic waiver statute fails to do this by preventing judges from considering the unique factors of youth identified by social and psychological research and recognized by the Supreme Court and the Maryland Legislature over the past decade.[100] Therefore, the Maryland Legislature should amend these laws to reflect the importance of considering all of these factors in deciding which cases go to juvenile court or adult court.

Maryland's discretionary transfer statutes are more consistent with both the Supreme Court's holding in *Miller* and the goals of Maryland's juvenile justice system; further, these statutes suggest that Maryland already has a framework in place to consider such relevant factors before deciding to transfer jurisdiction from juvenile to adult court.[101] Discretionary waiver, unlike automatic waiver, allows the court to consider not only a child's age and the nature of the offense committed, but also the child's mental and physical condition, and potential for rehabilitation.[102] If juvenile offenders are to be waived into the adult court system, an action which could potentially impose serious consequences on their lives, then at the very least, children should be granted a hearing in juvenile court before any waiver determination can be made.

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[99] *See Miller*, 567 U.S. at 471-72; *see also* Roper v. Simmons, 543 U.S. 551, 571 (2005) ("Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults . . . retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.").

[100] *See supra* Section II.C.

[101] *Id*.

[102] *Id*.

B. *The General Assembly Should Pass the YES Act to Repeal Automatic Waiver in Maryland*

As stated earlier, Maryland legislators have enacted sweeping juvenile justice reforms over the last few years.[103] In addressing the failures of automatic waiver to achieve any of the goals of the juvenile justice system, Maryland lawmakers on the Juvenile Justice Reform Council have also introduced the YES Act to repeal the automatic waiver statute.[104] The YES Act:

> expands the jurisdiction of the juvenile court to establish original jurisdiction over (1) children older than age 14 who are alleged to have done an act which, if committed by an adult, would be a crime punishable by life imprisonment; (2) children older than age 16 who are alleged to have committed specified crimes; and (3) children who have previously been convicted as an adult of a felony and are subsequently alleged to have committed an act that would be a felony if committed by an adult.[105]

The YES Act will also repeal the existing provisions that govern the transfers of such children from criminal court to the juvenile court through reverse waiver and designate the acts currently excluded from the juvenile court's jurisdiction as "reportable offenses" in the Criminal Procedure and Education Articles.[106]

As outlined in the Racial Equity Impact Note accompanying the YES Act, an important rationale for the push to repeal automatic waiver is acknowledging the history of racism that led to its implementation, as well as the "racial inequity" and "injustice" that has resulted from its practice in Maryland.[107] Another important rationale is to shift the burden that is automatically placed on children to prove why they should have their case adjudicated in juvenile court, essentially leaving discretionary waiver as the main option for transferring a juvenile case to adult court.[108] The sponsor of the bill and member of Maryland's Juvenile Justice Reform Council,

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[103] *See supra* Sections I, III.C; *see also* S. 494, 2021 Gen. Assemb., 443rd Sess. (Md. 2021).
[104] S. 93, 2023 Gen. Assemb., 445th Sess. (Md. 2023).
[105] DEP'T OF LEGIS. SERV., RACIAL EQUITY IMPACT NOTE, S. 93, 445th Sess., at 1 (2023).
[106] *Id.*
[107] *See Hannah Gaskill, Reform Council Recommends Ending Policy of Automatically Charging Some Youth as Adults, Md. Matters (Sept. 9, 2021), https://www.marylandmatters.org/2021/09/09/reform-council-recommends-ending-policy-of-automatically-charging-some-youth-as-adults/.*
[108] *Id*.

Maryland State Senator Jill Carter, explained that the burden would instead be placed on the state's attorneys to argue why the criminal court should have jurisdiction over the case."[109] Leaving the decision to the juvenile court's discretion mandates the consideration of several important factors that are not initially considered under the automatic waiver law, including the mental and physical condition of the child, the amenability of the child to treatment in an institution, facility, or program available to delinquent children, and public safety.[110]

As stated previously, one of the underlying rationales for enacting the automatic waiver statute was specific incapacitation of repeat juvenile offenders.[111] If the legislative goal is to incapacitate repeat juvenile offenders, then excluding offenders solely on the basis of the seriousness of an offense would not prove to be an effective strategy because repeat offenders are distinguishable by their *pattern* of criminal activity, not by the *seriousness* of their offense.[112] Proponents of repealing automatic waiver statutes also recognize that the offense exclusion that occurs through automatic waiver focuses on retribution, reminiscent of an earlier era of "tough on crime" policies, which is at odds with a core philosophy of the juvenile justice system: rehabilitation.[113]

Legislators enacted Maryland's current automatic waiver statute in response to the increase in juvenile crime from a period that ended more than two decades ago.[114] Furthermore, the Maryland General Assembly relied on the ill-founded and now discredited "super-predator" theory when enacting the waiver statute.[115] Repealing Maryland's automatic waiver in favor of solely using the discretionary waiver statute will improve the balancing between public safety and protection from juvenile offenders who may not be amenable to rehabilitation or treatment in the juvenile justice system, with protecting juvenile offenders' constitutional rights and furthering the goals of the juvenile system. Moreover, Maryland's discretionary waiver statute will allow for due consideration of each juvenile on a case-by-case basis before a waiver determination is made.[116] Consideration of such factors is especially

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[109] *Id*.
[110] *See* MD. CODE ANN., CRIM. PROC. § 4-202 (West 2023).
[111] *See supra* Section III.A.
[112] Feld, *supra* note 40, at 496-97.
[113] *See id.* at 510 ("This legislative attention to the most serious present offenses reflects the values of *retributivism*, a belief that certain heinous offenses deserve adult consequences.").
[114] Hess, et al., *supra* note 41, at 6.
[115] *Id.*; *see also* Amanda Engel, *Bill to End Auto Charging Kids in Adult Court Heard in Committee*, ABC WMAR-2 (last updated Mar. 17, 2023, 12:10 PM), https://www.wmar2news.com/infocus/bill-to-end-auto-charging-kids-in-adult-court-to-be-heard-in-committee.
[116] *See* MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-06(a)(1)-(2) (West 2020).

crucial in light of the potentially devastating impacts of holding children or sentencing children to time in adult facilities.

C. The YES Act Still May Not Go Far Enough in its Effort to Protect Children in Maryland

Legislators and supporters of the YES Act aim to repeal automatic waiver to not only keep children in the juvenile system, but also to help juvenile offenders receive the resources they need and protect them from the harsh environment of the adult system.[117] However, the YES Act may not go far enough in its effort to protect children. Current law still requires children charged with violent crimes such as first-degree murder to stay in adult jails awaiting trial, which places them at greater risk of physical and mental harm.[118] With this in mind, the YES Act should also include language that all children who are held pre-trial, including those charged with serious or violent crimes, should be held in juvenile facilities. Adding language to this effect is important to ensure that all children can access the resources in juvenile facilities and to help protect their safety prior to their trial dates.

V. CONCLUSION

The youthfulness of children and the unique characteristics attendant to their youthfulness are meaningful. Repealing Maryland's automatic waiver statute in favor of the discretionary waiver statute will allow for the courts to take these characteristics into consideration before waiving children into the adult court system. Although discretionary waiver allows for examination of these characteristics, in consideration of the racial impact, harms and inadequacies associated with waiving children into adult court, the Maryland legislature should further consider abrogating *all* the laws through which juvenile cases are waived into the adult system.

The juvenile system was created for adjudicating cases where children are the alleged perpetrators of both violent and non-violent offenses. Therefore, if Maryland is going to have a juvenile system and provide for the care, protection, and mental and physical development of children, then the juvenile system should be used, even for the most difficult of cases. It is long overdue for Maryland to allow what is known about juvenile development and the effects of charging children as adults and holding children in adult

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[117] *See* Dennis Valera, *Proposed Senate Bill Aims to Prevent Maryland Youth from Being Charged as Adults*, CBS NEWS BALT. (Feb. 16, 2023, 10:35 PM), https://www.cbsnews.com/baltimore/news/proposed-senate-bill-aims-to-prevent-maryland-youth-from-being-charged-as-adults/.

[118] *See supra* Section III.A.

facilities, rather than past debunked theories, to inform the development of its juvenile adjudicatory laws and policies.

COMMENT

THROUGH THE CAMERA LENS: THE WEAKENING OF THE FOURTH AMENDMENT VIA LOCAL LAW ENFORCEMENT AND HOME SECURITY CAMERAS

By: Yakira Price*

INTRODUCTION

It was a typical Wednesday morning and Baltimore City Police Officer Smith had just sat down at his desk.[1] Officer Smith had been tasked with investigating a string of package thefts across the city. His fellow officers had already identified a suspect but were unable to make contact with him. Officer Smith was hoping to get in touch with the suspect's cousin, John, to learn more information about the suspect's whereabouts. Unfortunately, no one knew where John was currently living. It was Officer Smith's job to find him. Officer Smith uploaded an image of John's driver's license to the police department's image database and pressed "find a match."[2] Within seconds, Officer Smith's computer screen was flooded with millions of images and videos of John from the past year. Unbeknownst to John, he had been recorded. There were videos of him going out to eat with his family, taking out his trash, and walking his dog. Officer Smith began clicking through the images and jotting down notes to create a map of John's movements, hoping to identify John's current residence.

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* Yakira Price: J.D. Candidate, 2024, University of Baltimore School of Law. I would like to thank my faculty advisor, Professor David Jaros, and the 2022-2023 Comments Editor, Ilianna Murgallis, for their direction and guidance throughout the research and writing process. I would also like to acknowledge Professor Katie Kronick who instilled in me a passion for Fourth Amendment privacy protection considerations. I extend a huge thank you to the 2023-2024 University of Baltimore Law Forum executive board and staff for their hard work and dedication throughout the editorial process. Thank you to my amazing family, specifically my husband and parents, for their unwavering support and encouragement throughout the comment process and law school in general. And finally, thank you to my beautiful daughter for being a constant source of comfort, love, and happiness.

[1] The following is a hypothetical scenario crafted based on the prevalence of surveillance cameras that people encounter on a daily basis and the surveillance methodology utilized by law enforcement; *see infra* Parts I and II; *see also* Section II.e (discussing the *Tuggle* case and the use of surveillance methodologies to track a suspect over time).

[2] *See, e.g.*, *Facial Recognition Privacy Protection Act: Hearing on S.B. 192 Before the S. Jud. Proc. Comm.*, 2023 Leg., 445th Sess. (Md. 2023) (written testimony of Scott D. Shellenberger, State's Atty. for Balt. Cnty.) (describing a police investigation involving the use of various Maryland databases and facial recognition software to identify a potential suspect).

Officer Smith's search results may seem extreme, but they are not. Technological growth, in areas such as surveillance, home security, and facial recognition, is affecting society's understanding of privacy in a way that poses a threat to individual privacy rights under the Fourth Amendment of the United States Constitution.[3] With the type of technology that is becoming increasingly available to law enforcement, innocent people may become more susceptible to invasive searches like the one conducted by Officer Smith. This Comment addresses the concern that Maryland's laws are inadequate and expose individuals to privacy concerns triggered by the rise in home security camera installation, homeowner cooperation with law enforcement agencies, and facial recognition technology development.

Part I of this Comment serves as an introduction to individual privacy rights under the Fourth Amendment and explains the relevant U.S. Supreme Court privacy right jurisprudence.[4] In addition, Part I provides background information on the recent rise in home security installation, existing partnerships between law enforcement agencies and homeowners in the context of home security cameras, and the development of facial recognition technology ("FRT").[5] Part II of this Comment addresses the existing partnerships between Maryland law enforcement agencies and homeowners, the use of FRT in Maryland, and the current stance of Maryland's legislature and courts on these issues.[6] Part II also illustrates the potential for law enforcement to aggregate these technologies in a way that threatens privacy protections.[7] Lastly, Part III of this comment discusses Maryland's proposed and existing legislation that can further protect citizens' privacy rights, as well as examples of protective legislation in other states on this topic.[8] Part III will also suggest ways that the Maryland legislature and courts can address this concern.[9]

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[3] *See infra* Parts I, II.
[4] *See infra* Part I.
[5] *See infra* Part I.
[6] *See infra* Part II; S.B. 192, 445th Gen. Assemb., 2023 Sess. (Md. 2023).
[7] *See infra* Part II.e.
[8] *See infra* Part III.
[9] *See infra* Part III.

I. FOCUSING IN: LAW ENFORCEMENT'S USE OF VIDEO SURVEILLANCE AND FACIAL RECOGNITION TECHNOLOGY IN THE UNITED STATES

a. *Brief Overview of the Constitutional Right to Move Around Anonymously*

i. The Fourth Amendment Right to Privacy

The Fourth Amendment to the United States Constitution guarantees that the right of all individuals "[t]o be secure in their persons . . . against unreasonable searches . . . shall not be violated . . . ."[10] In its seminal decision, *Katz v. United States*, the U.S. Supreme Court introduced the reasonable expectation of privacy test.[11] The *Katz* test analyzes whether a person has a subjective expectation of privacy as well as an objectively reasonable expectation of privacy upon which one may justifiable rely.[12] The *Katz* majority opined that "[t]he Fourth Amendment protects people, not places."[13] As most Fourth Amendment violation analyses focus on whether the government erroneously searched a location or item, Justice John Marshall Harlan clarified the majority's perspective in his concurring opinion.[14]

Justice Harlan explained that an individual possesses a reasonable expectation of privacy when they have a subjective expectation of privacy that society is willing to accept as reasonable.[15] Thus, as Justice Harlan explains, most activities and conversations occurring inside of a person's home are likely protected by the Fourth Amendment.[16] However, activities and conversations taking place in public are "[e]xpose[d] to the plain view of outsiders [and] are not protected" because that person was not attempting to keep those activities or conversations private.[17] This standard focuses on the reasonability of privacy.[18] Thus, what one "[k]nowingly exposes to the public" is outside of the protection of the Fourth Amendment.[19] Conversely,

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[10] U.S. CONST. amend. IV.
[11] *See* Katz v. United States, 389 U.S. 347, 360-62 (1967) (Harlan, J., concurring); *Expectation of Privacy*, CORNELL L. SCH. LEGAL INFO. INST. (Dec. 2022), https://www.law.cornell.edu/wex/expectation_of_privacy.
[12] *See Katz*, 389 U.S. at 361; *Expectation of Privacy*, *supra* note 11.
[13] *Katz*, 389 U.S. at 351.
[14] *See id.* at 361 (Harlan, J., concurring).
[15] *Id.*
[16] *Id.*
[17] *Id.* (internal quotations omitted).
[18] *See id.*
[19] *Katz*, 389 U.S. at 351.

what one "[s]eeks to preserve as private," regardless of whether the area is public or not, may be protected by the Constitution.[20]

Katz's reasonable expectation of privacy test remains one of the leading test for individual privacy rights under the Fourth Amendment, as it provides a medium for understanding the boundaries of an individual's right to privacy in both private and in public spaces.[21] However, as society evolves and technology develops, the Court has begun questioning whether the 1967 *Katz* test is overbroad and should be reconfigured to address modern considerations.[22] In the concurring opinion, Justice Sotomayor lays out the key implications of Fourth Amendment privacy analysis as technology develops.[23] Justice Sotomayor noted, "awareness that the government may be watching chills associational and expressive freedoms."[24] Further, Justice Sotomayer cautioned that the government's ability to string together parts of one's private life is often unchecked and is thereby prone to an abuse of power.[25] The government's powerful ability may "'alter the relationship between citizen and government in a way that is inimical to democratic society.'"[26] Opinions such as the one expressed by Justice Sotomayor demonstrate the potential weaknesses of the *Katz* test as modern technology develops and individual privacy expectations evolve.

ii. Blurring the Lines of Privacy

In *Carpenter v. United States*, the United States Supreme Court offered a refreshing stance on digital privacy protection.[27] In *Carpenter*, the Court demonstrated its willingness to protect privacy rights in the digital age by holding that an individual has a reasonable expectation in their historical cell-site location information ("CSLI") and the fact that the government obtained the defendant's CSLI through a third party[28] did not overcome the defendant's Fourth Amendment protection.[29] In the past, the Court has

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[20] *Id.*
[21] *Expectation of Privacy, supra* note 11.
[22] *See* Andrew G. Ferguson, *Persistent Surveillance*, 74 ALA. L. REV. 1, 25-26 (2022) (discussing the *Jones* concurring Justices' concerns with the traditional test used for searches and technology).
[23] *See* United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring).
[24] *Id.* at 416.
[25] *See id.*
[26] *Id.* (quoting United States v. Cuevas-Perez, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).
[27] *See infra* Section I.A.ii; *See generally* Carpenter v. United States, 138 S. Ct. 2206 (2018).
[28] Evan H. Caminker, *Location Tracking and Digital Data: Can Carpenter Build a Stable Privacy Doctrine?*, 2018 U. OF MICH. SUP. CT. REV. 411, 431 (2019); *Carpenter*, 138 S. Ct. 2206, 2217 (2019).
[29] *Carpenter*, 138 S. Ct. at 2217.

supported instances of police access to personal information belonging to third parties like banks and telephone companies.[30] In *Carpenter*, the Court demonstrated its willingness to view certain digital search cases with a different perspective than traditional searches because of the heightened privacy implications.[31] As new surveillance technologies emerge and are subsequently incorporated into policing tactics, the Court's perspective on digital searches is increasingly relevant.

b. *Focusing In: Law Enforcement's Use of Video Surveillance and Facial Recognition Technology in The United States*

i. The global rise in home security camera installation

In recent years, there has been a surge in homeowners recognizing the value of adding security measures to their homes, which include home security cameras.[32] According to a report prepared by Grand View Research, Inc. ("Grand View Research"), a market research and consulting company, the global home security camera market was valued at 7.37 billion U.S. Dollars ("USD") in 2022.[33] The report predicted that this market will grow at a compound annual growth rate ("CAGR") of 19.2% from 2023 to 2030.[34] Specifically, the North American home security camera market size was valued at 2.99 million USD in 2022.[35] Grand View Research anticipated that the North American market will grow at a CAGR of 19.8 percent by the year 2030.[36]

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[30] *See* Ferguson, *supra* note 22, at 26-27.
[31] *See* Ferguson, *supra* note 22, at 27; *Carpenter*, 138 S. Ct. at 2218 ("[T]he rule the Court adopts must take account of more sophisticated systems that are already in use or development . . . "); Kyllo v. United States, 533 U.S. 27, 36 (2011).
[32] *North America Smart Home Security Cameras Market Size, Share & Trends Analysis Report by Product (Wired, Wireless), by Application (Doorbell Camera, Indoor Camera), and Segment Forecasts, 2023-2030*, GRAND VIEW RSCH., https://www.grandviewresearch.com/industry-analysis/north-america-smart-home-security-cameras-market-report (last visited July 10, 2023), [hereinafter *North American Smart Camera Report*].
[33] *Smart Home Security Cameras Market Size, Share & Trends Analysis Report by Technology (Wired, Wireless), by Application (Doorbell Camera, Indoor Camera, Outdoor Camera), by Region, and Segment Forecasts, 2023-2030*, GRAND VIEW RSCH., https://www.grandviewresearch.com/industry-analysis/smart-home-security-camera-market (last visited July 24, 2023), [hereinafter *Smart Home Security Camera Report*].
[34] *Id.*
[35] *North American Smart Camera Report*, *supra* note 32.
[36] *Id.*

This rapid expansion is due in part to the ease and convenience of home security camera installation.[37] Further, security cameras are increasingly available to the modern-day consumer.[38] Security camera systems also offer homeowners high levels of protection from intruders at low costs.[39] While these benefits drive the market growth and increase the number of home security systems across the nation, homeowners are not the only ones benefitting from the security system installations.

ii. Partnerships Between Law Enforcement Agencies and Homeowners

The ability of law enforcement agencies to utilize technology to advance criminal investigations is not a new concept; law enforcement agencies have long recognized the benefits of mass surveillance technology to maintain crowds and survey illegal activity.[40] In 2015, following the killing of Freddie Gray, the Baltimore Police Department used aerial surveillance technology, facial recognition technology ("FRT"), and other surveillance methodology to track and identify individuals who participated in public protests related to his murder.[41] Just years later, in 2020, the U.S. Department of Homeland Security employed drones and helicopters across various U.S. cities to oversee the protests that ensued following the murder of George Floyd.[42] Although law enforcement agencies have long utilized mass public surveillance technologies, the rising popularity of home security cameras introduces a new level of increased surveillance relied upon by law enforcement.

Between 2015 and 2018, Google's Nest, which offers an array of home security packages to consumers, reportedly provided customer personal data to law enforcement agencies 300 times.[43] In a transparency report explaining how it handles requests for user information, Nest clarified that it

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[37] *See* Laura Mazzuca Toops, *Security Convenience Merge in Smart Home Ecosystem*, SDM MAG. (Feb. 13, 2023), https://www.sdmmag.com/articles/101638-security-convenience-merge-in-smart-home-ecosystem.

[38] *See North American Smart Camera Report*, *supra* note 32.

[39] *See Smart Home Security Camera Report*, *supra* note 33.

[40] *See* Nicol Turner Lee & Caitlin Chin-Rothmann, *Police Surveillance and Facial Recognition: Why Data Privacy Is Imperative for Communities of Color*, BROOKINGS (Apr. 12, 2022), https://www.brookings.edu/research/police-surveillance-and-facial-recognition-why-data-privacy-is-an-imperative-for-communities-of-color/.

[41] *Id.*

[42] *Id.*

[43] *See* Thomas Brewster, *Smart Home Surveillance: Governments Tell Google's Nest to Hand Over Data 300 Times*, FORBES (Oct. 13, 2018, 8:31 AM), https://www.forbes.com/sites/thomasbrewster/2018/10/13/smart-home-surveillance-governments-tell-googles-nest-to-hand-over-data-300-times/?sh=705c8e8d2cfa.

only complies with valid legal requests and is careful to narrow the scope of personal data to only hand over what is necessary.[44] Notably, Nest is not the only home security provider that has partnered with law enforcement agencies in criminal investigations.[45]

Amazon's Ring, another retailer offering home security devices, has faced scrutiny[46] over the years for its willingness to partner with law enforcement agencies.[47] Neighbors by Ring is an app aimed at promoting security.[48] The Neighbors App utilizes footage from Ring cameras and allows users to post and receive updates on criminal activity from locals in their neighborhoods and public safety agencies.[49] Ring also operates the Neighbors Public Safety Service ("NPSS"), which allows law enforcement agencies to communicate and connect with each other and users via the Neighbors app.[50] Ring has reportedly offered incentives to law enforcement agencies who promote the use of Ring. [51] One of the unique NPSS features law enforcement agencies utilize is the ability to see the location of Ring cameras within their local region and request video footage from those Ring users for the purposes of criminal investigation.[52] Ring and Nest both follow proper legal procedures and only collect video footage with the consent of users or through a valid warrant.[53] However, the practice of handing over user data to

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[44] *Transparency Report: Requests for User Information*, NEST LEGAL ITEMS, https://nest.com/legal/transparency-report/ (last visited Mar. 10, 2023) [hereinafter *Transparency Report*].

[45] *See* Drew Harwell, *Doorbell-camera Firm Ring has Partnered with 400 Police Forces, Extending Surveillance Concerns*, WASH. POST (Aug. 28, 2019, 6:53 PM), https://www.washingtonpost.com/technology/2019/08/28/doorbell-camera-firm-ring-has-partnered-with-police-forces-extending-surveillance-reach/ (explaining how Ring and law enforcement agencies have partnered in an effort to protect neighborhoods and support criminal investigations).

[46] *See id.* (describing the concern posed by Ring's partnerships with police noted by legal professionals and privacy advocates).

[47] *See* Caroline Haskins, *Amazon Told Police It Has Partnered with 200 Law Enforcement Agencies*, VICE: MOTHERBOARD (July 29, 2019, 1:43 PM), https://www.vice.com/en/article/j5wyjy/amazon-told-police-it-has-partnered-with-200-law-enforcement-agencies.

[48] *See Neighbors by Ring App*, RING, https://ring.com/neighbors (last visited July 10, 2023).

[49] *Id.*

[50] *Neighbors Public Safety Service*, RING, https://ring.com/neighbors-public-safety-service (last visited July 10, 2023) [hereinafter *NPSS*].

[51] Haskins, *supra* note 47.

[52] *Id.*; *NPSS*, supra note 50.

[53] *See* Brewster, *supra* note 43; *Transparency Report*, supra note 44 ("For example, if a US government agency presented us with a search warrant to investigate a crime they think was captured on a Nest Cam, we wouldn't just hand over user data."); Haskins, *supra* note 47.

law enforcement agencies still has tremendous privacy implications for both Ring and Nest users, and the broader public.[54]

c. *The Development of Facial Recognition Technology*

In recent years, law enforcement agencies have recognized the benefits of using facial recognition technology ("FRT") in criminal investigations.[55] FRT operates by using two sets of images, typically a still image containing an individual's face, and a database of still and moving images to match the individual in the original image to the images of individuals in the database.[56] Private companies such as Vigilant Solutions and Clearview AI offer FRT services to law enforcement agencies.[57] In 2021, the Government Accountability Office reported that approximately half of the forty-two federal agencies that employ law enforcement agencies utilized FRT in their practices.[58]

Because FRT offers uniquely precise surveillance capabilities, FRT's popularity has increased dramatically among law enforcement agencies.[59] The rising utilization of FRT by law enforcement agencies demonstrates the extent of potential civilian surveillance.[60] While this concern exists across the entire nation, Maryland boasts tight-knit partnerships between local homeowners and law enforcement agencies.[61] Further, with the increase in FRT technology, Maryland's already robust databasing practices have the potential to offer tremendous surveillance capabilities.[62]

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[54] *See generally* Brewster, *supra* note 43 (discussing Nest's cooperation with governmental data requests and the lack of transparency surrounding the disclosure of user data); *see also* Haskins, *supra* note 47 (discussing Ring's collaboration with law enforcement to fight crime).

[55] Turner Lee & Chin-Rothmann, *supra* note 40.

[56] Andrew G. Ferguson, *Facial Recognition and the Fourth Amendment*, 105 MINN. L. REV. 1105, 1115 (2021).

[57] *See generally Vigilant FaceSearch - Facial Recognition System,* MOTOROLA SOLS., https://www.motorolasolutions.com/en_xa/products/command-center-software/analysis-and-investigations/vigilant-facesearch-facial-recognition-system.html (last visited Nov. 1, 2022); *Solutions: Law Enforcement*, CLEARVIEW AI, https://www.clearview.ai/law-enforcement (last visited Mar. 19, 2023).

[58] Turner Lee & Chin-Rothmann, *supra* note 40.

[59] *See id.*

[60] *See id.*

[61] *See* Brandon M. Scott, *CitiWatch Resident Online Application: What is the CitiWatch Community Partnership?*, BALT. CITY POLICE DEP'T, https://citiwatch.baltimorecity.gov/ (last visited July 19, 2023) (describing the collaborative nature of the CitiWatch program between the City's law enforcement agencies and residents).

[62] *See Jurisdiction Maryland*, PERPETUAL LINE-UP, https://www.perpetuallineup.org/jurisdiction/maryland (last visited Nov. 2, 2022) (describing the Maryland Image Repository databasing system which possesses vast

II. FOCUSING IN: CONCERNING RECORDATION AND DATABASING PRACTICES EMPLOYED BY MARYLAND POLICE DEPARTMENTS

Maryland law enforcement agencies heavily rely on collected technological data from Maryland citizens to assist them with policing.[63] From there, Maryland police departments can utilize FRT to further policing efforts.[64] Without proper restraint from the Maryland legislature and courts,[65] the practice of technological data collection seriously decreases Maryland citizens' privacy expectations.[66]

a. *Partnerships Between Maryland Law Enforcement Agencies and Homeowners*

Homeowners are not the only ones ready to jump on the bandwagon of home security camera installation. Various Maryland law enforcement agencies are taking advantage of the many secured homes in their districts. In July 2022, the Montgomery County Council passed a bill that allows residents and business owners to apply for reimbursement for the cost of their security cameras.[67] In return, police can request video footage from the camera owners.[68] While this practice is new in Montgomery County, Baltimore City residents have already been utilizing a similar program.

In addition to the hundreds of government operated CitiWatch cameras dispersed throughout public locations in Baltimore City,[69] Baltimore Police Department's ("BPD") CitiWatch Community Partnership program ("CitiWatch") allows local home and business owners to register their

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amounts of citizen data); *see also CityView: Services, Facilities and the City Activities: Find: CCTV Cameras*, BALT. CITY, https://cityview.baltimorecity.gov/cityview21/?theme0=CCTVE%20Cameras&place=null (last visited July 19, 2023) (providing an interactive map that pinpoints the government operated cameras in Baltimore City which play a huge role in the State's databasing abilities).

[63] *See infra* Sections II.a, II.c. (discussing Maryland law enforcement's camera rebate programs and its use of the Maryland Image Repository System).

[64] *See infra* Section II.b.

[65] *See infra* Sections II.c, II.d.

[66] *See infra* Section II.e.

[67] Jasmine Hilton, *Montgomery County to Offer Rebates for Private Security Cameras*, WASH. POST (July 29, 2022, 6:18 PM), https://www.washingtonpost.com/dc-md-va/2022/07/29/montgomery-county-private-cameras-rebate/.

[68] *Id.*

[69] *Who's Watching the More Than 700 CitiWatch Cameras Across Baltimore?*, CBS BALT. (Jan. 17, 2018, 11:11 PM), https://www.cbsnews.com/baltimore/news/baltimore-citiwatch-cameras/.

security cameras with BPD to support criminal investigations.[70] CitiWatch offers rebates and vouchers to qualifying individuals who register their cameras with BPD.[71] Although BPD cannot access live camera footage, it can request recorded footage from registrants.[72] Registrants are not required to comply with BPD's request for video footage, but the CitiWatch website makes it clear that "[p]articipants should be willing to work with the City's public safety agencies, including [BPD], if contacted."[73] Partnerships like the Montgomery County rebate program and CitiWatch indicate the vast amount of daily surveillance by law enforcement that is taking place on the streets of Maryland. The current state of Maryland's mass surveillance threatens Maryland citizens' understanding of privacy. Just as surveillance practices are increasing, awareness of surveillance is increasing as well. As more citizens become aware that they are constantly being recorded, the less claim they will have over their private lives.[74]

b. *Surveillance Databasing in Maryland and the Use of FRT: Maryland Image Repository System*

With vast amounts of citizen data collected daily, law enforcement needs comprehensive digital databases to efficiently store collected images and videos of individuals for later use in criminal investigations. The Maryland Department of Public Safety and Correctional Services ("DPSCS") operates a database called the Maryland Image Repository System ("MIRS") which includes millions of driver's license photos, mug shots, and other personal images.[75] MIRS is available to various Maryland law enforcement agencies.[76] To varying degrees, these agencies can search MIRS utilizing its facial recognition capabilities to search for suspects.[77] After a tragic incident, MIRS was shown to be extremely beneficial for Maryland law enforcement.

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[70] *CitiWatch Community Partnership Program Overview*, BALT. CITY POLICE DEP'T, https://www.baltimorepolice.org/community/citiwatch-community-partnership-overview (last visited Nov. 23, 2022).
[71] *Id.*
[72] *Frequently Asked Questions*, CITIWATCH RESIDENT ONLINE APPLICATION, https://cityservices.baltimorecity.gov/CitiWatchResident/Faq.aspx (last visited Mar. 10, 2023).
[73] *CitiWatch Community Partnership Program Overview*, *supra* note 70.
[74] *See supra* Section I.a.i (discussing how courts analyze privacy rights based on the general public's understanding of privacy).
[75] *Jurisdiction Maryland*, *supra* note 62.
[76] *Id.*
[77] *Id.*

In 2018, MIRS received praise after law enforcement officers captured the shooter in a mass shooting at the Capital Gazette headquarters.[78] Despite the suspect refusing to speak with officers and the police department failing to make an identification based on his fingerprint, officers were able to identify Jarrod Ramos ("Ramos") as the shooter after feeding his image into the MIRS database.[79] This widely celebrated achievement was not without critique.[80] People voiced various concerns for police use of MIRS following the arrest of Ramos.[81] Firstly, critic expressed concerns that although police was supposed to remove images that were run through the system of suspects who turned out to be innocent, it is unclear whether police is complying with the measure.[82] Further, questions surrounding the accuracy of FRT, specifically when the technology is used on members of minority groups, are plentiful, and answers and data are scarce.[83]

c. *Current Video Surveillance Laws in Maryland*

Even though security cameras are rapidly becoming a key method of citizen surveillance in the United States and around the world, only fifteen (15) states have implemented laws restricting security camera usage.[84] Naturally, each state's legislation varies in its degree of restrictiveness, but is nonetheless a step in the direction towards promoting privacy.[85] Under the current federal jurisprudence and Maryland legislation, Maryland residents are not receiving protection against law enforcement's persistent use of mass video surveillance. Article 26 of Maryland's Declaration of Rights is

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[78] *Praise for Face Recognition in Maryland Shooting*, IDENTITY WK.: PLANET BIOMETRICS (July 3, 2018), https://identityweek.net/praise-for-face-recognition-in-marlyand-shooting/.
[79] Derek Hawkins, *The Cybersecurity 202: Maryland Scored a Win Using Facial Recognition Software in Annapolis Shooting*, WASH. POST (July 2, 2018, 7:29 AM), https://www.washingtonpost.com/news/powerpost/paloma/the-cybersecurity-202/2018/07/02/the-cybersecurity-202-maryland-scored-a-win-using-facial-recognition-software-in-annapolis-shooting/5b391be71b326b3348addc39/.
[80] *See id*. (discussing the different civil liberty groups who voiced concern for the use of FRT and MIRS).
[81] *See id.* (discussing concerns of improper oversights of the MIRS database and the way FRT contributes to systemic racism).
[82] *Id.*
[83] *Id.*; *see* Kahri Johnson, *Face Recognition Software Led to His Arrest. It Was Dead Wrong*, WIRED (Feb. 28, 2023, 7:00 AM), https://www.wired.com/story/face-recognition-software-led-to-his-arrest-it-was-dead-wrong/ (discussing the potential inaccuracies of FRT specifically for Black people).
[84] Aliza Vigderman & Gabe Turner, *Are Security Cameras Legal?*, SECURITY.ORG (May 10, 2023), https://www.security.org/security-cameras/legality/ (explaining that certain U.S. cities and counties have specific laws pertaining to their own areas).
[85] *See generally id.*

Maryland's equivalent to the Fourth Amendment to the U.S. Constitution.[86] It states, in pertinent part, "that all warrants, without oath or affirmation, to search suspected places . . . and all general warrants to search suspected places . . . ought not to be granted."[87] Although the text of Article 26 does not follow the exact language of the Fourth Amendment, Maryland courts follow the same federal interpretation and application afforded by the protections of the Fourth Amendment.[88]

Maryland's current Wiretap Statute, with some exceptions carved out for law enforcement, makes it illegal to conduct an auditory recording of other individuals without their consent.[89] However, it is legal to record other individuals with audio so long as the recording occurs in a public space.[90] This is not without limitation though, as it remains illegal to film someone if the camera is aimed inside the private residence of another individual.[91] Although these limitations narrow one's ability to freely record others in all public spaces, wide range of opportunity still exists for recordation to occur. In the context of home security surveillance systems, under the current law in Maryland, one may record other individuals who enter or pass by their property so long as the camera is not directed towards the inside of another person's home.[92]

Further, Maryland's visual surveillance laws offer some protections for individuals in "private places."[93] According to Maryland Code Section, 3-901, a "private place" is a "[d]ressing room or restroom in a retail" facility.[94] Further, the Code states that lawful surveillance by law enforcement officers in these areas are not prohibited.[95] Other provisions in Maryland's criminal code pertaining to visual surveillance also construe a "private place" to solely include areas where one would reasonably be expected to undress, such as a bathroom or tanning salon.[96] It is also lawful

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[86] MD. CONST. art. XXVI; DAN FRIEDMAN, THE MARYLAND STATE CONSTITUTION: A REFERENCE GUIDE 36-37 (2006).

[87] MD. CONST. art. XXVI ("That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.").

[88] FRIEDMAN, *supra* note 86.

[89] MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(3) (West 2019).

[90] *Id.* § 10-402(c)(7); *see* Malpas v. State, 116 Md. App. 69, 83, 695 A.2d 588, 595 (1997) (stating that a violation of Maryland's Wiretap Statute depends on whether one of the parties had a reasonable expectation of privacy).

[91] MD. CODE ANN., CRIM. LAW § 3-903(c) (West 2012).

[92] *See* CTS. & JUD. PROC. § 10-402(c)(3); *see also* CRIM. LAW § 3-903(c).

[93] *See* CRIM. LAW §§ 3-901 to -903.

[94] CRIM. LAW § 3-901(a)(2).

[95] *Id*. § 3-901(b).

[96] *See* CRIM. LAW § 3-902(a)(5)(i)-(ii).

to place a video surveillance camera on real property so long as the intention is not to film individuals inside a private residence.[97] One may also film the outside of a private residence if the camera is not placed on the property where the residence is located.[98] These laws make it clear that ample opportunity is available to record others without consent so long as the area has not been defined as a private space. Unfortunately, the understanding of private and public spaces has not been redefined over time to reflect the technological advancements that threaten to expand individuals' understanding of what constitutes a public space. This lack of specificity leads to an increase in surveillance which, in turn, weakens individuals' Fourth Amendment privacy protections.

d. *Maryland Court's Current Position, Or Lack Thereof, On Citizen's Privacy Expectations.*

Maryland's General Assembly has chosen to afford Maryland citizens the same privacy rights granted to them by the Fourth Amendment to the U.S. Constitution via Article 26 of the Maryland Constitution's Declaration of Rights ("Art. 26"). Accordingly, Maryland courts have followed the federal court's Fourth Amendment interpretation when evaluating possible infringements on citizen's privacy rights.[99] It is important to note, however, that the majority of Maryland cases applying Art. 26 do so in the context of warrants and search and seizure executions and not consideration of personal privacy.[100] While there are some Maryland cases discussing expectations of privacy, those cases mainly stand for the proposition that one does not have an expectation of personal privacy to be free from a search of someone else's

[97] CRIM. LAW § 3-903(b)(2).
[98] *Id*. § 3-903(b)(7).
[99] *See generally* Richardson v. State, 481 Md. 423, 282 A.3d 98 (2022) (applying Fourth Amendment privacy standard's to the warrantless search of a backpack); *see also* Owens v. State, 322 Md. 616, 589 A.2d 59 (1991) (holding that the defendant has a reasonable expectation of privacy in the contents of his personal bag); *see, e.g.,* State v. Andrews 227 Md. App. 350, 134 A.3d 324 (2016)(holding that a person has a reasonable expectation of privacy against being tracked via a cell site simulator without a search warrant based on probable cause).
[100] *See generally* Padilla v. State, 180 Md. App. 210, 949 A.2d 68 (2008) (holding that Article 26 of the Maryland Constitution's Declaration of Rights does not require reasonable articulable suspicion for drug dog scans of a stopped vehicle); *see also* Jones v. State, 407 Md. 33, 962 A.2d 393 (2008) (holding that the officers' received consent to search the area, thus did not violate Article 26 of the Maryland Constitution's Declaration of Rights); *see also* Ford v. State, 184 Md. App. 535, 967 A.2d 210 (2009) (vacating defendant's drug convictions as Article 26's probable cause requirement had not been established).

property.[101] This notion seems self-intuitive and hardly answers the question of where the line of privacy is drawn for Maryland citizens.

e. *The concerning ability to aggregate collected videos and images.*

With little direction from Maryland Court's detailing the boundaries of privacy rights for Maryland citizens, it is important to consider how this will impact Marylanders as technology develops and surveillance methodology increases. Though the following case, *United States v. Tuggle*, does not arise out of Maryland, it offers a chilling example of the direction that our privacy rights are headed in.[102]

Between the years of 2013 and 2016, various law enforcement agencies conducted scrupulous investigation into Travis Tuggle ("Tuggle") for his suspected role in a methamphetamine distribution conspiracy.[103] During this time, three video cameras were installed without a search warrant on utility poles near Tuggle's home to capture any activity at his residence.[104] Each of these cameras were aimed at the outside of Tuggle's home and the surrounding areas.[105] These cameras resulted in approximately eighteen months of recorded surveillance of Tuggle's property.[106] The collected video footage was then used against Tuggle in his criminal prosecution. The footage included depictions of individuals arriving at and entering Tuggle's home and images of Tuggle carrying items to a shed across the street from his home.[107] Tuggle was subsequently indicted.[108] The Seventh Circuit Court of Appeals affirmed Tuggle's conviction on appeal.[109]

The court upheld Tuggle's convictions on the grounds that the video camera surveillance did not rise to the level of a search under the Fourth Amendment.[110] It explained that the government had not invaded an expectation of privacy that society would have accepted as reasonable since the surveillance was conducted in a public area and the technology used was

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[101] *See, e.g.*, Richardson v. State, 252 Md. App. 363, 259 A.3d 156 (2021) (holding that one does not have a reasonable expectation of privacy in abandoned property); *see also* Gahan v. State, 290 Md. 310, 430 A.2d 49 (1981) (holding that one has no reasonable expectation of privacy in a camper belonging to another individual).
[102] *See generally* United States v. Tuggle, 4 F.4th 505 (7th Cir. 2021).
[103] *Id.* at 511.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.* at 511-12.
[108] *Tuggle*, 4 F.4th at 512.
[109] *Id.* at 529.
[110] *Id.* at 511.

in the hands of the general public.[111] Thus, anyone who passed by Tuggle's property could have made the same observations as law enforcement.[112] Further, the court reasoned that stationary cameras are not invasive as they only captured a limited amount of a person's movement and did not inform law enforcement of any of Tuggle's movements that occurred in areas outside the proximity of his home.[113]

While the case illustrated above involved events occurring outside of Maryland, it is not difficult to imagine the dangers that rulings such as the one in *Tuggle* pose to individual privacy rights, considering the extensive web of stationary cameras throughout the state of Maryland.[114] As camera installation increases, so does surveillance.[115] With advanced tracking methodology, such as FRT, currently in the hands of law enforcement[116], the ability to track individuals for prolonged periods of time rises as well. All of this complicates individuals' understanding of privacy under the Fourth Amendment. Perhaps the following case, which arose from events occurring in Maryland, helps to illuminate this point.[117]

In 2016, BPD launched a program using advanced aerial surveillance technology.[118] After the program received tremendous backlash from the community, BPD ceased its efforts.[119] However, BPD relaunched the program in 2019 as the Aerial Investigation Research ("AIR") Program.[120] The program would have allowed BPD to collect images of Baltimore City via planes and integrate the images with data from other Maryland databases, such as CitiWatch, to advance criminal investigations.[121] In 2021, the Fourth Circuit Court of Appeals granted a preliminary injunction against BPD reasoning that the AIR program was "like 'attach[ing] an ankle monitor' to every person in the city."[122] The court determined that the AIR program violated the Fourth Amendment since it opened "'an intimate window' into

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[111] *Id.* at 514.
[112] *Id.* at 516.
[113] *Id.* at 524.
[114] *See generally supra* Section II.a (discussing the prevalence of video surveillance in Maryland).
[115] *See generally supra* Sections I.b.ii, II.a (discussing the connection between home security camera installation, partnerships between homeowners and law enforcement, and surveillance capabilities).
[116] *See supra* Section I.c (discussing the use of FRT by law enforcement agencies).
[117] *See generally* Leaders of a Beautiful Struggle v. Balt. Police Dep't, 2 F.4th 330 (4th Cir. 2021) (en banc).
[118] *Id.* at 333.
[119] *Id.*
[120] *Id.*
[121] *Id.* at 334.
[122] *Id.* at 341 (quoting Carpenter v. United States, 138 S. Ct. 2206, 2218 (2018)).

a person's associations and activities."[123] Although the result of this case was that the program ceased and most of the collected footage was allegedly deleted, the practices employed by BPD through the AIR program demonstrate the potential BPD possesses to corroborate its surveillance databases. As described by the AIR program, the current surveillance practices in Maryland potentially broaden individuals' understanding of public and private spaces and pose a threat to Marylander's Fourth Amendment privacy rights. With courts still analyzing claims of invasions of privacy under the Reasonable Expectation of Privacy standard,[124] increases in surveillance dangerously blur the lines between public and private spaces. As individuals begin to recognize the increased surveillance and recordation occurring around them, their claim to privacy protections is weakened.[125]

III. FAST-FORWARDING TO THE FUTURE: SOLUTIONS TO THE PRIVACY RIGHT IMPLICATIONS POSED ON MARYLAND CITIZENS

The Maryland Constitution affords citizens the same privacy rights as the U.S. Constitution's Fourth Amendment; thus, Maryland citizens face similar concerns under their state laws and protections. It is important to note that even though states are given the latitude to provide their citizens with greater protections than those afforded under the federal constitution, Article 26 does not offer Maryland Citizens greater privacy protections than the Fourth Amendment.[126] Though it is unlikely that Article 26 will be revised, Maryland residents' expectations of privacy can be protected in the growing digital age by turning to the local legislature and state court to define exactly when and how the government can use such persistent investigative methodology.[127]

a. *Changes can be made at the state level regarding the use of FRT*

It is apparent that the Maryland Legislature is beginning to recognize the importance of citizen privacy protection. In April of 2023, Senate Bill 192

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[123] *Leaders of a Beautiful Struggle,* 2 F.4th at 342 (quoting *Carpenter*, 138 S. Ct. 2206 at 2217).
[124] *See supra* Section I.a.i.
[125] As the claim to privacy is based on what one's understanding of privacy is, as more recordation becomes known and accepted, the claim to privacy in those spaces is weakened. *See supra* Section I.a.i; Katz v. United States, 389 U.S. 347, 351-52 (1967) (because the *Katz* standard hinges an individual's knowledge of public spaces, as technology develops and more spaces are understood to be public via recordation, the claim to privacy is lessened).
[126] Henderson v. State, 89 Md. App. 19, 24, 597 A.2d 486, 488 (1991).
[127] *See infra* Sections III.a, III. b.

("SB 192"), sponsored by Senator Charles E. Sydnor, III, passed its third reading in the Maryland House of Delegates.[128] SB 192 went into effect on October 1, 2023, and added a new subsection to the Maryland Code related to FRT.[129] Though SB 192 attempts to create rigorous boundaries around the use of FRT in criminal investigations in Maryland, it falls short leaving great discretion in the hands of individual law enforcement agencies and judges as to when FRT can be used.[130] Further, SB 192 does not address the vast amount of surveillance occurring in Maryland which threatens citizens' privacy.[131]

On its face, SB 192 creates strict parameters around the use of facial recognition software by Maryland law enforcement agencies.[132] Most notably, SB 192 prohibits FRT results from being used as evidence in most criminal proceedings and juvenile court delinquency proceedings.[133] In the limited circumstances when FRT can be used as evidence, additional independently obtained evidence is also required.[134] Further, SB 192 only allows FRT to investigate serious crimes or for a compelling need such as identifying a missing person.[135] Importantly, SB 192 also requires the Department of Public Safety and Correctional Services ("DPSCS") to create training for all agencies utilizing facial recognition software.[136] Any employee of these agencies who personally operates FRT must annually complete DPSCS's training.[137] Additionally, agencies that use FRT must complete annual audits indicating their compliance with the bill.[138] These agencies must also complete annual reports on their use of FRT.[139] While

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[128] H.D. 1422, 2023 Gen. Assemb. (Md. 2023); S. 192, 2023 Gen. Assemb., 445th Sess. (Md. 2023).
[129] *See* S. 192.
[130] *Id.* (regarding exceptions carved out in SB 192 for permissible uses of FRT in criminal investigations).
[131] Though restricting the unchecked use of FRT by Maryland law enforcement agencies is one step towards protecting citizens' privacy, by omitting any language relating to the ongoing use of surveillance cameras, which are huge feeders for the data run through FRT, SB 192 does not address the full picture of the way local law enforcement uses technology to usurp privacy rights from Maryland residents. *See generally id.*
[132] *See* MD. GEN. ASSEMB. DEP'T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, S. 192, 2023 Gen. Assemb. 445th Sess., at 1 (2023).
[133] *Id.* at 2.
[134] *Id.*
[135] *Id.*
[136] *Id.* at 1.
[137] *Id.*
[138] *See* MD. GEN. ASSEMB. DEP'T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, S. 192, 2023 Gen. Assemb. 445th Sess., at 3 (2023).
[139] *Id.*

these new requirements offer some level of protection against the use of FRT, certain aspects of the bill leave important questions unanswered.

Under SB 192, law enforcement can use FRT to investigate serious crimes.[140] Serious crimes include acts such as crimes of violence, human trafficking offenses, hate crimes, and crimes that pose an ongoing threat to public or national safety.[141] Notably, the bill does not define what would constitute a threat to public safety.[142] Without clear direction, it is conceivable that one law enforcement agency might define a threat to public safety as an act of terror while another might choose to draw the line at a string of armed home invasions. This can lead to hasty "on the fly" decision by individual law enforcement agencies seeking to use FRT in their investigations and individual judges tasked at reviewing the use of FRT. As SB 192 places too much subjectivity in the hands of individuals, the legislature must consider amending the bill to include explanatory language.

b. *Changes to be made on the legislative level regarding the use of video surveillance and recordation*

While Maryland's Annotated Code does in some ways address the concern of video surveillance and recordation, the current law is limited at best.[143] With an absence of greater restrictions on the legislative level in Maryland related to home surveillance and databasing practices, perhaps Maryland's legislature can look to other states that afford their citizens greater protections for guidance. For example, in Georgia, so long as a camera is in plain view of the ordinary person, surveillance cameras in public and private areas are legal.[144] Hawaii boasts more restrictive surveillance laws requiring the consent of all recorded individuals if the recordation occurs in private.[145] Other states like Kansas, Delaware, New Hampshire, and Maine require consent from individuals being filmed under the "reasonable

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[140] *See id.* at 2.
[141] *Id.*
[142] *See* S. 192, 2023 Gen. Assemb., 445th Sess. (Md. 2023).
[143] *See* MD. CODE ANN., CRIM. LAW §§ 3-901 to -903 (West 2023).
[144] *See* Vigderman & Turner, *supra* note 84.
[145] *See* HAW. REV. STAT. §§ 711-1100, -1110.9, -1111 (West 2023) (defining a private place as a location "[w]here one may reasonably expect to be safe from casual or hostile intrusion or surveillance, but does not include a place to which the public or a substantial group thereof has access"); *Hawai'i: Reporters Recording Guide*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/reporters-recording-guide/hawaii/#:~:text=The%20consent%20requirements%20for%20recording,has%20consented%20to%20the%20recording (last updated May 2020).

expectation of privacy" theory.[146] These laws are not without flaws and could be more restrictive but may serve as a guide to more protective legislation.

Further, Maryland's robust databasing and surveillance methodology perhaps requires its own unique model of legislation that accounts for the vast amount of tracking occurring in Maryland. To be clear, Maryland has welcomed the opportunity to restrict access to its databases in certain scenarios. In 2021, the Maryland General Assembly amended Md. Code Ann., Gen. Prov. § 4-320.1 to account for concerns that U.S. Immigration and Customs Enforcement ("ICE") was utilizing the Maryland Image Repository System ("MIRS") to deport suspected undocumented individuals.[147] Because MIRS is supervised by the Department of Public Safety and Correctional Services ("DPSCS"), any federal and state agency is able to gain access to the data contained on MIRS through DPSCS's system.[148] Accordingly, data showed that ICE had requested data from MIRS via DPSCS fifty-six times between 2018 and 2019.[149] Interestingly, Maryland was reported as the only state allowing ICE to access its citizens' data without requiring significant authorization.[150] Section 4-320.1 now requires any federal agency seeking to enforce federal immigration law to present State officials with a valid warrant prior to performing a facial recognition search on the MIRS database.[151]

The amendment to Section 4-320.1 is an example of the Maryland General Assembly's willingness to afford undocumented individuals greater protection from surveillance and databasing methodology. If the General Assembly is open to enforcing protection against unwarranted searches for non-residents, it follows that it would also do so for its own citizens. Enacting legislation that protects the rights of Maryland citizens against comprehensive and unwarranted surveillance and databasing policing methodologies will afford comfort to Maryland citizens that their privacy rights are respected and protected by their State. This will also decrease the amount of unjustified surveillance, which can lead to a greater claim of privacy for Maryland residents. If this cannot be accomplished in the

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[146] Vigderman & Turner, *supra* note 84; *see* KAN. STAT. ANN. § 21-6101(a)(6) (West 2010); DEL. CODE ANN. tit 11, § 1335(a)(6) (West 2017); N.H. REV. STAT. ANN. § 570-A:2 (1969).
[147] *See* H.D. 23, 2021 Gen. Assemb., 443rd Sess. (Md 2021); *see also Public Information Act – Motor Vehicle Administration – Warrant for Personal Information and Reporting: Hearing on H.D. 892 Before the H. Env't and Transp. Comm.*, 2020 Leg., 441st Sess. 2-3 (Md. 2020) [hereinafter *Hearing on H.D. 892*] (statement of Del. Dana M. Stein, Member, H. Env't and Transp. Comm.) (supporting House Bill 892 which was introduced during the 2020 legislative session regarding the same issue).
[148] *Hearing on H.D. 892*, *supra* note 147, at 2.
[149] *Id.*
[150] *Id.*
[151] MD. CODE ANN., GEN. PROVISIONS § 4-320.1(b) (West 2022).

legislative sphere, perhaps greater privacy protections can be afforded through judicial interpretation.

c. *Changes that can be made in the courts*

In the digital age, it is important to recognize the need to adapt unfitting frameworks to address modern understandings. As technology develops and government surveillance practices evolve, the need for courts to re-evaluate the way Fourth Amendment privacy rights are understood is more important than ever. While it is true that judges are not opposed to considering modern technological considerations when rendering a decision, at this point in time, it is nothing more than that, a consideration.

When the Fourth Circuit Court of Appeals addressed the Baltimore City Police Department's ("BPD") Aerial Investigation Research ("AIR") Program, the majority was not naive to the role technology plays in one's expectation of privacy.[152] The Court of Appeals reversed the lower court's denial of a preliminary injunction against the AIR program recognizing that the aggregation of individuals' images stored on various state databases would allow BPD, and perhaps other Maryland law enforcement agencies, to easily access intimate details of a person's life in a way that was sought to be protected by *Katz*.[153] Although the Court of Appeals was deliberate in its decision to apply the Reasonable Expectation of Privacy test in a way that considered the potential risks posed by persistent databasing practices and technological advancements, the court's decision did not change the way Fourth Amendment technology cases will be handled in the future and courts in other jurisdictions are not required to follow in the court's footsteps.[154]

One way for courts to address the threat to individual privacy rights posed by technological advancements is to adapt the *Katz* framework to modern times. In her concurring opinion in *Jones*, Justice Sotomayor proposed a framework that would allow courts to generously account for modern considerations without straying from the traditional Fourth Amendment privacy test.[155] Justice Sotomayor suggested that instead of asking the traditional question posed in *Katz*, courts should ask whether an individual had a reasonable expectation "that their movements [would] be

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[152] *See generally* Leaders of a Beautiful Struggle v. Balt. Police Dep't, 2 F.4th 330 (4th Cir. 2021).
[153] *Id.* at 346.
[154] *See* United States v. Bowers, No. 2:18-CR-00292-DWA, 2021 U.S. Dist. LEXIS 196899, at *12 (W.D. Pa. Oct. 11, 2021) (stating that the Fourth Circuit's holding in *Beautiful Struggle* did not affect its decision because of the difference in the technology at hand); *see also* Sanchez v. L.A. Dep't of Transp., 39 F.4th 548 (9th Cir. 2022) (distinguishing the persistent tracking in *Beautiful Struggle* from the location tracking at issue).
[155] *See* United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring).

recorded and aggregated in a manner that enables the government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on."[156] Just like the *Katz* test, this framework focuses on individual and societal reasonable expectations of privacy. Where the framework differs, however, is that it introduces the consideration of recordation and aggregation. Justice Sotomayor's framework identifies societal values that ought to be afforded greater protection. If Maryland courts were to adopt this framework for evaluating privacy challenges, Maryland residents' privacy rights would be protected in a way unlike ever before.

CONCLUSION

With rapid expansions in technology, evaluations of privacy have become a growing concern. In recent years there has been a rise in the installation of home security surveillance systems due to the ease, low cost, and convenience of these systems.[157] This increase expands the amount of surveillance systems in public areas. Maryland law enforcement agencies are aware of this growth and have begun utilizing data collected from homeowners to supplement their already robust surveillance capabilities.[158]

When considered alongside the development of facial recognition technology, the expansion of surveillance systems across the State allows for extensive surveillance practices by Maryland law enforcement.[159] Since evaluations of privacy hinge on public versus private spaces,[160] and these practices expand the areas that individuals consider part of their private life, extensive surveillance threatens to expose Maryland residents to increased lawful surveillance. Accordingly, it is integral for the Maryland legislature to take action to protect the constitutional privacy rights of Maryland residents as the current legislation in Maryland falls short.[161] In addition, Maryland courts have the ability to fill in the gaps in Maryland legislation through judicial interpretation.[162] As such, Maryland courts should consider adopting a more restrictive interpretation of the Fourth Amendment and its Maryland counterpart, Article 26 to address the concerns to privacy posed by the growing digital age and surveillance methodology expansion. In doing so, Maryland can ensure that the privacy rights of its citizens, an integral guarantee of the Constitution, are protected.

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[156] *Id*.
[157] *See supra* Section I.b.i.
[158] *See supra* Sections II.a, II.b.
[159] *See supra* Section II.e.
[160] *See supra* Section I.a.i.
[161] *See supra* Section III.a, III.b.
[162] *See supra* Section III.c.

RECENT DEVELOPMENT

BELTON V. STATE: STATEMENTS DISPLAYING IMMEDIATE HOSTILITY UPON DEFENDANT'S ARRIVAL ARE PERTINENT TO A SELF-DEFENSE CLAIM, MAKING THEIR EXCLUSION BY THE COURT A HARMFUL, REVERSIBLE ERROR.

By: Jayna Peterson

The Supreme Court of Maryland held that the trial court's exclusion of the victim's statement, "[t]his is my block," harmed Defendant Terrance Belton's defense as it reasonably affected the verdict. *Belton v. State*, 483 Md. 523, 542, 557, 295 A.3d at 623, 632 (2023). The court determined that the due process guarantee of a fair and impartial judge extends to matters on appeal. *Id.* at 558, 295 A.3d at 615. The court also emphasized the importance of judicial discretion given modern perceptions and our history of racial tensions. *Id. at 529, 550-51, 295 A.3d at 615, 628.*

In December 2018, Terrance Belton ("Belton") and his mother, Shakiea Worsley ("Worsley"), went to the street corner where Worsley frequently distributed narcotics. Edward Calloway ("Calloway") was another seller in this area and was known for combative behavior when he drank alcohol. The night before the shooting, Worsley witnessed Calloway's drunken behavior. The morning of the incident, Calloway was immediately hostile upon Worsley and Belton's arrival on the street corner, making territorial remarks like "[t]his is my block" and waving a gun in Belton's face. Attempting to diffuse the situation, Belton and Calloway agreed to a fistfight.

While Belton and Calloway separated to prepare for the fight, Worsley feared that Calloway would shoot her son with the gun Calloway kept hidden in the nearby corner store. Worsley attempted to protect Belton by initiating a physical altercation with Calloway, drawing the attention of Belton and others. Belton neared the corner and observed Calloway's aggressive, unyielding demeanor, causing Belton to shoot Calloway after he noticed Calloway's gun. At trial, Belton testified that this is when Calloway said, "[t]his is my block." The State objected to admitting this statement into evidence on grounds that it was hearsay. The defense argued that the statement was not being offered for its truth but instead to show Calloway's state of mind when he arrived on the corner and its effect of creating reasonable fear in Belton. The trial judge excluded Calloway's statement as hearsay.

Belton was convicted of voluntary manslaughter in Baltimore City Circuit Court. Subsequently, Belton appealed his conviction to the Appellate Court of Maryland, arguing that Calloway's declaration spoke to Belton's fear of

bodily harm, making the statement admissible for its importance to his case-in-chief. However, the intermediate court affirmed Belton's conviction. The court found that, although the circuit court improperly excluded the statement, the exclusion was harmless to the outcome of Belton's case because other evidence proved Calloway's agitation, notwithstanding his initial remark. The court used several literary references to illustrate this decision, including *Beowulf, Norman Rockwell, and Whistler.* Belton later filed a motion to reconsider with the Appellate Court, finding issues with, among other things, "the inappropriate and racially-charged comparisons" within the opinion. The Appellate Court of Maryland denied the motion, and Belton filed a petition for writ of certiorari, which the Supreme Court of Maryland granted.

The Supreme Court of Maryland decided two issues about Calloway's statement: (1) whether the statement would be admissible non-hearsay for its effect on Belton, and (2) whether the trial court's exclusion of the statement was a harmless, reversible error. *Belton*, 483 Md. at 542, 295 A.3d at 623. The Supreme Court of Maryland analyzed the court records, finding Calloway's statement admissible on the grounds that it was offered to prove the effect on Belton and was relevant to establishing self-defense because Belton reasonably feared bodily harm. *Id.* at 542, 544-45, 295 A.3d at 623-25.

When an error occurs at the trial court, the burden is on the State to show beyond a reasonable doubt that the error in no way affected the outcome of the trial. *Belton, 483 Md. at* 542, 295 A.3d at 623. The notion of cumulative evidence is critical to the Supreme Court of Maryland's harm analysis, which highlights the harmless effect of evidentiary errors if such evidence is "materially indistinguishable" from others offered. *Id.* at 543, 295 A.3d at 624. Here, the court reasoned that Calloway's statement, coupled with the territorial nature of Calloway's attitude and understanding of past relations, created an objectively reasonable fear beyond hostility that no other evidence established. *Id.* at 545, 295 A.3d at 624-25. The court asserted that Calloway's statement was cumulative because the words in context illustrated why Belton reasonably feared Calloway as an imminent physical threat such that Belton's actions would be considered self-defense. *Id.* at 542, 544-45, 295 A.3d at 623.

The court distinguishes the statement ("[t]his is my block") from other evidence by the public aspect of the announcement. *Belton, 483 Md.* at 546, 295 A.3d at 625. Making such an open statement to the block gave further weight to the Belton's reasonable belief and fear that a violent encounter could not be subdued. *Id.* The court recognized that the statement would have bolstered Belton's defense such that a reasonable jury could have arrived at a different verdict, establishing a harmful but reversible error. *Id.*

at 542, 546, 295 A.3d at 623, 625. Having determined the error was not harmless and possibly impacted the jury's decision, the court ordered a new trial on the charges of voluntary manslaughter. *Id* at 546, 295 A.3d at 625.

However, the Supreme Court of Maryland went further and opined that the appellate process also requires fairness and impartiality. *Belton, 483 Md.* at 528, 295 A.3d at 615. A considerable portion of the court's opinion admonishes the Appellate Court's framing of the present case, as their choice of language and analogies laced the opinion with tones that many could perceive as racially prejudicial. *Id.* at 549, 553, 295 A.3d at 627, 629. The Appellate Court introduced its opinion with an analogy to the Old English epic of *Beowulf, comparing Belton to the monster Grendel. Id.* at 537, 550, 295 A.3d at 620, 628. In a separate section titled "Demythologizing Mother[,]" the lower court's dicta focused on Worsley, using comparisons to contend that Belton's mother did not require protection as a frail old woman would. *Id.* at 537-39, 551-52, 295 A.3d at 620-21, 628. While not intended to have racial undertones, such associations are problematic as they demonize African Americans, a population that has endured a long history of prejudice in America. *Id.* at 550-51, 295 A.3d at 628. The judiciary aims to portray neutrality; courts should be cognizant of this effort. *Id.* at 551, 295 A.3d at 628.

Both concurring opinions outline disagreements with the majority's dissection of the Appellate Court's choice of language and analogy. *Belton, 483 Md.* at 559-60, 562-63, 295 A.3d at 633, 635 (Booth, J. and Gould, J., concurring). Specifically, as Justice Gould writes, the majority contradicts its decision to decline analyzing whether the Appellate Court abused its discretion by ultimately examining the Appellate Court opinion's tone and analogies. *Id.* at 562-63, 295 A.3d at 635 (Gould, J., concurring). Justice Booth's concurrence duplicates the majority's call for impartiality but emphasizes that a reviewing court shall not inspect a lower court's dicta where it is not necessary to the decision. *Id.* at 559-60, 295 A.3d at 633 (Booth, J., concurring).

The holding clarifies that a court may reverse a lower court's exclusion if a statement demonstrates an effect on the defendant's state of mind such that it establishes an element of defense. As the court has now attributed weight to statements of initial aggression in the context of self-defense, practitioners should emphasize such evidence and be aware of this distinction, particularly when defending against comparable hearsay objections. Judges hearing such objections may consider hearsay rules and their circumstances more closely following this decision. Furthermore, the court formally reinforced defendants' rights by extending the guarantee of fairness and impartiality to the appellate process. Courts must be mindful of the impact of their dicta,

especially when it potentially perpetuates racial stereotypes, because failure to do so could result in unintentional bias that warrants appeals.

RECENT DEVELOPMENT

COMPTROLLER OF MD V. FC-GEN OPERATIONS INV., LLC: COURTS REVIEWING TAX CONTROVERSIES SHOULD DEFER TO INTERPRETATIONS BY THE MARYLAND COMPTROLLER, NOT THE TAX COURT, AND PASS-THROUGH ENTITIES ARE ENTITLED TO REFUNDS FOR ERRONEOUS TAX PAYMENTS.

By: Kayla Hoffmaster

The Supreme Court of Maryland held that when courts review the Maryland Tax Court's alleged error of law, the courts should defer to the Comptroller's statutory interpretation when the interpretation deals with an area the Comptroller regularly addresses. *Comptroller of Md. v. FC-GEN Operations Inv., LLC,* 482 Md. 343, 379, 287 A.3d. 271, 292(2022). Here, the court reviewed the Maryland Comptroller's statutory interpretation of tax law and ruled that pass-through entities may receive refunds for erroneous tax payments. *Id.*

FC-GEN Operations Investments ("FC-GEN") is a limited liability company incorporated in Delaware. As an out-of-state company with subsidiaries that provide services in Maryland, FC-GEN qualifies as a "pass-through entity" under state tax law. A pass-through entity is a business enterprise not independently subject to taxation since it consists of shareholders, partners, and other members who may live in-state or out-of-state. Thus, income, losses, deductions, and credits from a pass-through entity flow through its members, who are then subject to taxation on that income. Taxes that flow through a pass-through entity's members qualify as taxes paid on behalf of non-resident members.

In 2012, FC-GEN paid taxes based on its projected yearly income. While preparing its annual tax return, FC-GEN calculated a $598,131 annual loss and subsequently applied for a refund of this amount by submitting a Composite Return. Pursuant to the Comptroller of Maryland's ("Comptroller") regulations, Composite Returns allow business entities to submit income tax returns on behalf of themselves and any non-resident members who do not receive other forms of income in Maryland. Out of the 2012 tax year's twenty-eight FC-GEN members, two non-resident individuals informed FC-GEN that they were eligible for inclusion on the Composite Return.

After including the two non-resident members on the Composite Return and timely filing, FC-GEN still had not received a refund, and contacted the Comptroller of Maryland for an update. The Comptroller informed FC-GEN that its refund was in process and scheduled for payment. After several years

of back and forth, in 2017, the Comptroller denied FC-GEN's refund request and claimed that the statute of limitations for FC-GEN's refund had expired. FC-GEN appealed this decision to the Comptroller's Office of Hearing and Appeals.

At the hearing, the Comptroller abandoned its statute of limitations argument and instead claimed that the Office should deny FC-GEN's refund because two non-resident FC-GEN members were ineligible despite FC-GEN's timely Composite Return. Here, the Comptroller claimed that FC-GEN's Composite Return should not have included its two non-resident members because the non-residents received alternate sources of Maryland income. In a Notice of Final Determination, the Office denied FC-GEN's refund request and deemed FC-GEN's Composite Return regulatorily improper.

After the hearing, FC-GEN appealed to the Maryland Tax Court. Ruling in FC-GEN's favor, the Tax Court ordered the Comptroller to refund FC-GEN due to FC-GEN's compliance with applicable tax law in its original refund request. The Comptroller then petitioned for judicial review to the Circuit Court for Anne Arundel County. The Circuit Court affirmed the Tax Court's order.

Subsequently, the Comptroller appealed to the Appellate Court of Maryland, which considered deferring to the Tax Court's interpretation of regulations and factual findings as necessary. As a result, the Appellate Court upheld the Tax Court's decision that FC-GEN appropriately filed the Composite Return according to regulations. The Comptroller then petitioned the Supreme Court of Maryland for a writ of certiorari, specifically to address questions of agency deference, the Tax Court's role in addressing alleged errors of law, and FC-GEN's statutory entitlement to a refund for erroneous taxes paid in 2012.

In addressing administrative deference, the court noted that Maryland applies either "no deference" or "some deference" to the state agency. *Comptroller,* 482 Md. at 360, 287 A.3d. at 281. The court explained that Maryland utilizes a 'sliding-scale approach' in contrast with a highly deferential standard like the *Chevron* doctrine. *Id.* at 362, 287 A.3d. at 282. Maryland, instead, gives weight to agency interpretation only in matters that the agency frequently handles. *Id.* In considering circumstantial factors, the sliding-scale standard led the court to give more weight to an agency's interpretation "when (1) the interpretation resulted from a process of 'reasoned elaboration' by the agency;" (2) the agency "applied the interpretation consistently over time;" or (3) "adversarial proceedings or formal rule making" produced the agency's statutory interpretation. *Id.* at 363, 287 A.3d. at 283.

Under Maryland's approach, the court held that, in questions of interpretation and application of tax law, reviewing courts owe deference to the Comptroller. *Comptroller*, 482 Md. at 364, 287 A.3d at 283. In support of its holding, the court reviewed the legislative power granted to the Comptroller and Tax Court, the functions of both agencies, and Maryland case law addressing tax issues and agency deference. *Id.* at 365-68, 287 A.3d at 284-86. While analyzing the role of the Tax Court, the court noted that Maryland courts apply the substantial evidence standard during judicial review. *Id.* at 359, 287 A.3d at 280. The substantial evidence standard assesses whether a rational mind could reasonably arrive at the same factual conclusions as the agency. *Id.* Under this test, the reviewing court grants deference to an agency's fact-finding, inferences, and the agency's application of law to facts. *Comptroller,* 482 Md. at 364, 287 A.3d at 283. The court also highlighted that the Maryland Constitution does not grant the General Assembly the authority to create new judicial powers. *Id.* at 368-69, 287 A.3d at 286-87. Thus, the Tax Court functions as a quasi-judicial agency limited to addressing matters prescribed by the General Assembly, including determinations of factual disputes. *Id.* at 377-78, 287 A.3d at 291-92.

Conversely, the court referred to the Maryland Constitution and statutory language to show that the General Assembly entrusted the Comptroller to adopt reasonable regulations and administer tax laws. *Comptroller,* 482 Md. at 366, 287 A.3d at 284. Still, the court stressed that the court retains the ability to undermine the Comptroller's authority should the Comptroller present unreasonable statutory interpretations or enact unreasonable administrative regulations. *Id.* at 380-81, 287 A.3d. at 293-94.

After establishing the Comptroller's administrative authority and the judicial branch's exclusive role in review of *de novo* matters, the court addressed FC-GEN's legal entitlement to a refund for the erroneous taxes it paid in 2012. *Comptroller*, 482 Md. at 379, 287 A.3d at 292. In ruling in favor of FC-GEN, the court disagreed with the Comptroller's interpretation of Maryland tax law, as the Comptroller based its argument on its own unreasonable regulations to assert FC-GEN as an improper claimant. *Id.* Additionally, the court noted that the Comptroller made its argument without consulting the state's refund provision. *Id.* at 388-89, 287 A.3d. at 297-98 (citing MD. CODE. ANN., TAX-GEN. § 13-901(a)(1) (West 1988)).

The Supreme Court of Maryland first found that the Comptroller's analysis forced entities with losses to distribute refunds to members without distributable cash flow, contradicting the statutory tax law's intent. *Comptroller,* 482 Md. at 392-93, 287 A.3d. at 300. The Court also ruled that the term "claimant" had no clear-cut statutory definition. *Id.* at 393, 287 A.3d at 301. Using the legislative history of § 13-901 as support for a broad definition, the court ruled that "claimant" refers to the "one" who filed taxes

and is "therefore entitled to file a claim for a refund under the plain language of § 13-901." *Id*. at 390-91, 287 A.3d at 299-300 (citing MD. CODE. ANN., TAX-GEN. § 13-901). As the entity that filed taxes, the court ultimately affirmed FC-GEN's right to its $598,131 refund erroneous 2012 tax payments. *Id.* at 394, 287 A.3d. at 301. Judge Friedman's prior concurring opinion provided a historical perspective on this matter, pointing out that the Maryland General Assembly and Maryland Judiciary had historically delegated to the Comptroller's interpretation of tax statutes it administered. *Id.* At 356, 287 A.3d. at 278-79 (citing *Comptroller of Md. V. FC-Gen Operations Investments, LLC*, 2022 WL 325940, at *7 (Md. App. Ct, Feb. 3, 2022) (Friedman, J., concurring)).

The Supreme Court of Maryland's decision in *Comptroller* marks a significant departure from a trend in recent Maryland case law, which predominantly supported statutory deference to the Tax Court rather than the Comptroller. The *Comptroller* decision carries important implications for attorneys even if their primary practice area does not relate to tax law. This implication is particularly pertinent as both federal and state judiciaries reevaluate the extent of deference they afford to administrative agencies and their duties.

RECENT DEVELOPMENT

CRAWFORD V. CNTY. COUNCIL OF PRINCE GEORGE'S COUNTY: UNDER THE SUBSTANTIAL EVIDENCE STANDARD, SIGNIFICANT DEFERENCE IS GIVEN TO AGENCY DECISIONS.

By: Ryan Powelson

The Supreme Court of Maryland held that there was substantial evidence to support the Prince George's County Planning Board's decision to approve an Amazon last-mile delivery hub. *Crawford v. Cnty. Council of Prince George's Cnty.,* 482 Md. 680, 704, 290 A.3d 571, 585 (2023). The court determined the dispute was a mixed question of fact and law, because the parties agreed that the Prince George's County Planning Board ("Planning Board") identified the correct statute and the record supported the Planning Board's factual conclusions. *Id.* at 695-96, 290 A.3d at 580. Thus, the court applied the substantial evidence standard of review to this case. Based on the proposed use of the property, sufficient evidence was in the record to support the Planning Board's decision. *Id.* at 704, 290 A.3d at 585.

In 2020, Amazon acquired a building and land (collectively "Property") in Upper Marlboro, Maryland. The Property is in an employment park zoned for industrial use, including "warehouses and distribution facilities." The Property's zoning designation is part of a larger Comprehensive Design Plan ("CDP"). Amazon intended for the Property to be used as a "last-mile delivery station" for housing merchandise before loading the merchandise into vehicles for delivery to customers. After the acquisition, Amazon sought approval from the Planning Board to make improvements to the Property. These improvements included the addition of new paved surfaces to accommodate increased traffic from Amazon's delivery vehicles.

In July 2020, the Planning Board held a hearing where it listened to comments from experts and the public regarding the Property. During the public comment period, Petitioner Crawford contended that the proposed use was not warehousing as permitted by the zoning ordinance. Nonetheless, the Planning Board can only deny applications that fail to comply with the applicable zoning ordinances or the CDP. Thus, the Planning Board approved Amazon's proposal, reasoning that the delivery model fell within the permitted uses within the zoning ordinance.

Crawford sought review from the Prince George's County District Council, which affirmed the Planning Board's decision. The District Council can only reverse "if the decision was one the Planning Board was not authorized to make, is not supported by substantial evidence of record, is

arbitrary or capricious, or is otherwise illegal." The Council highlighted that Amazon's delivery center constituted a distribution business engaged in "operations to receive, store, sort, and deliver or distribute to customers." Crawford then sought judicial review in the Circuit Court for Prince George's County, which affirmed the decision of the Planning Board. The Supreme Court of Maryland granted certiorari before the Appellate Court of Maryland heard the case.

The Supreme Court of Maryland first addressed the applicable standard of review. *Crawford*, 482 Md. at 692-93, 290 A.3d at 578. Questions of law are reviewed *de novo* and limited to the application of law, whereas mixed questions of law and facts on the record are subject to the substantial evidence standard of review. *Id* at 696, A.3d at 580. The parties agreed that the Planning Board correctly identified the controlling statute and that the record supported the stated facts. *Id.* Therefore, the Court's review turned on whether the Planning Board correctly applied the facts to the law, a mixed question of fact and law. *Crawford*, 482 Md. at 695, 290 A.3d at 579-80. Under this standard of review, courts affirm agency decisions if the agency's decision is "fairly debatable," and the agency reasonably reached its factual conclusions. *Id.* at 695-696, A.3d at 579-80.

The Property is zoned for employment and industrial use, which permits use for "warehouses and distribution facilities." *Crawford*, 482 Md. at 696, 290 A.3d at 580 (citing PGCC § 27-515(b)(2)). The Prince George's County Code defines warehouse units as buildings used in a wholesale operation, or for the storage of goods for use in a distribution business. *Crawford*, 482 Md. at 696, 290 A.3d at 580 (citing PGCC § 27-107.01(a)(256)). To determine whether Amazon's proposed use met this definition, the court analyzed whether substantial evidence supported the Planning Board's decision. *Crawford*, 482 Md. at 696, 290 A.3d at 580.

First, the court turned to the meaning of storage, absent a definition in the statute. *Crawford*, 482 Md. at 697, 290 A.3d at 581. When statutory language does not provide a definition, the court can turn to a dictionary definition. *Id.* (citing *Berry v. McQueen*, 469 Md. 674, 688-90, 233 A.3d 42, 49-50 (2020)). Courts refer to dictionary definitions to determine an application that aligns with the statute's legislative intent. *Crawford*, 482 Md. at 697-98, 290 A.3d at 581 (citing *Lockshin v. Semsker*, 412 Md. 257, 274-76, 987 A.2d 18, 28 (2010)). The court applied the plain meaning of the term: to "lay away, accumulate." *Crawford*, 482 Md. at 698, 290 A.3d at 581-82. The court found that the evidence on record sufficiently supported a reasonable finding that Amazon's last mile-facility was engaged in storage. *Id.* at 698-699, 290 A.3d at 581-582. Based on an industry manual, Crawford argued that merchandise is not 'warehoused' unless it is left in place for a minimum period. *Id.* at 697, 290 A.3d at 581. The court rejected this

restriction because the Prince George's County Code imposes no time minimum. *Id.* at 698, 290 A.3d at 581. Therefore, the court found that the Planning Board's determination that Amazon's proposed use, storage, was "fairly debatable," thus satisfying the substantial evidence standard. *Id.* at 699, 290 A.3d at 582.

Next, the court analyzed the plain meaning of the term distribute. *Id.* at 699, 290 A.3d at 582. The court again looked to the dictionary definition, reasoning that distribution here meant "to give out or deliver." *Id.* Therefore, operations at the last-mile facility would consist of drivers loading goods into vehicles and driving the items to the customer. *Id.* The court held that the evidence before the Planning Board supported its approval of the facility. *Id.*

Finally, the Court resolved the meaning of "distribution business" in the Prince George's County Code. *Crawford*, 482 Md. at 700, 290 A.3d at 582-83. The statute does not define the term distribution business. *Id.* at 700, 290 A.3d at 582-583 (citing PGCC § 27-107.01(a) (66.4)). However, the statute does define a "distribution facility" as a facility that a wholesaler or retailer uses to store or distribute. *Crawford*, 482 Md. at 700, 290 A.3d at 582-583 (citing PGCC § 27-107.01(a) (66.4)). Notably, there is no minimum storage time requirement in the statute. *Crawford*, 482 Md. at 698, 290 A.3d at 581-82 (citing PGCC § 27-107.01(a) (66.4)). In the view of the court, it was "fairly debatable" that Amazon's business activity consists of storage and distribution to a customer. *Crawford*, 482 Md. at 699, 290 A.3d at 582.

The Court was not convinced that, by amending another section of the Prince George's County Code, the County Council intended to include last-mile hubs in a separate statutory category. *Crawford*, 482 Md. at 701-702, 290 A.3d at 582-583. The amendment in question added a category of use, known as a "Merchandise Logistics Center[,]" whose definition more closely resembled the "last mile" model. *Id.* at 702, 290 A.3d at 583-584. However, the court reasoned that, even though the new category more closely resembles a "last mile" hub, the use nonetheless fits within the previously existing zoning category. *Id.* Additionally, the amendment of another code section does not automatically abrogate the existing provision in all other code sections. *Id.* at 702-703, 290 A.3d at 584.

E-commerce represents a large and ever-increasing share of retail business activity. Amazon and other online retailers have shifted to utilizing gig economy workers who often provide their own vehicles to deliver goods to the customer. This evolution represents a shift from the centralized kind of warehousing, which was commonplace when the ordinance code was ratified. By applying the substantial evidence standard, the Court has given significant deference to the Planning Board in applying the existing code to these emerging applications. As a result, administrative agencies will play an outsized role in interpreting local zoning ordinances. The ground is now

ripe for the Maryland General Assembly to amend the existing code and appeal process to better meet the needs of a rapidly changing economy.

FAULKENBERRY V. U.S. DEP'T OF DEF.: PERIODICAL MISGENDERING, UNPROFESSIONAL TREATMENT, AND VERBAL INSULTS AGAINST TRANSGENDER EMPLOYEES DO NOT EQUATE TO A HOSTILE WORK ENVIRONMENT UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

By: Spencer Baldacci

The United States District Court for the District of Maryland held that isolated instances of misgendering, verbal insults, and "unprofessional treatment" did not meet the "severe" or "pervasive" threshold under Title VII of the Civil Rights Act of 1964 ("Title VII"). *Faulkenberry v. U.S. Dep't of Def.*, No. 1:22-CV-01150-JMC, 2023 WL 3074639, at *11 (D. Md. Apr. 25, 2023). The court also held that there was no causal link between a protected activity and Faulkenberry being placed on administrative leave. *Id.* at *13, 14. Lastly, the court held that "exacerbated anxiety" resulting from sharing medical records with unauthorized persons constitutes a tangible injury under the Rehabilitation Act. *Id.* at *15.

Stacey Faulkenberry ("Faulkenberry") was a transgender employee of the U.S. Department of Defense ("DOD") and a U.S. Army and Army Special Forces veteran. Faulkenberry specifically worked as a Tasker Workflow Manager within the Defense Information Systems Agency ("DISA") of the DOD. Faulkenberry's direct supervisor was Sharon Ontiveros ("Ontiveros"). During a phone call with Faulkenberry, Ontiveros believed Faulkenberry to be male based on the sound of Faulkenberry's voice until Faulkenberry informed Ontiveros she was a transgender woman. After learning that Faulkenberry was transgender, Ontiveros became cold in her demeanor towards Faulkenberry, responding curtly to Faulkenberry for the rest of the call. Shortly after starting her position as Task Flow Manager, Ontiveros assigned Faulkenberry to the less prestigious and lower-skilled position of Issuance Manager.

In addition to the change in duties, Ontiveros amended Faulkenberry's position to reduce Faulkenberry's "interaction[s] with senior leadership." Ontiveros referred to Faulkenberry as "it" and generally did not include Faulkenberry in activities Ontiveros considered "a girls thing" such as group lunch outings. When Faulkenberry attempted to transfer to a different job within the DOD, the interviewer misgendered Faulkenberry, who lost interest in hiring Faulkenberry after learning that Faulkenberry was a transgender woman. After this experience, Faulkenberry stated to several coworkers that she was going to "cross the Rubicon" and that "management is going to have

a bad day on Monday." On April 23, 2018, Ontiveros told Faulkenberry that Faulkenberry was being placed on administrative leave because of her "threat[s] of violence" towards the agency. Faulkenberry was then escorted out of the building. Faulkenberry later professed that management placed her on administrative leave because of her "comment that management would have a bad day on Monday." While on administrative leave, Faulkenberry submitted medical documents in support of a work accommodation request. Ontiveros found and forwarded Faulkenberry's medical records to Ontiveros's husband, Ontiveros's personal email, and other members of the staff who were not privileged to the records. Faulkenberry then experienced "exacerbated anxiety" because of her personal information being shared with coworkers for whom it was not intended.

On May 1, 2018, Faulkenberry filed an informal Equal Employment Opportunity ("EEO") complaint alleging discrimination and retaliation. On May 12, 2022, Faulkenberry filed a complaint against the DOD and, on December 15, 2022, filed an amended complaint in the United States District Court for the District of Maryland alleging three counts: "(1) a hostile work environment based on sex and gender identity, (2) retaliation in violation of Title VII, and (3) violation of confidentiality provisions of the Rehabilitation Act." Before the court were the DOD's Motion to Dismiss ("DOD's Motion") and Faulkenberry's Motion for Discovery ("Faulkenberry's Motion").

First, the court analyzed whether Faulkenberry exhausted her administrative remedies before petitioning the federal court. *Faulkenberry*, 2023 WL 3074639, at *8. Faulkenberry amended her federal complaint to include additional claims not in the original EEO complaint. *Id.* at *9. The U.S. Department of Defense ("DOD") argued that because the new allegations in the amended complaint were not part of Faulkenberry's EEO complaint, Faulkenberry did not exhaust all administrative remedies. *Id.* However, the court found that, because the allegations in the amended complaint were "reasonably related" to those in the EEO complaint, Faulkenberry was permitted to bring them forth in court. *Id.*

Next, the court held that Faulkenberry's allegations did not meet the threshold for a hostile work environment. Specifically, the court found that the facts alleged were insufficiently "severe or pervasive to alter . . . conditions of employment and to create an abusive work environment." *Faulkenberry,* 2023 WL 3074639, at *10*,* (quoting *Strothers v. City of Laurel*, 895 F.3d 317, 328 (4th Cir. 2018)). The court utilized the *Hooten* standard, which states that the discrimination faced "should be judged from the perspective of a reasonable person" for an actionable claim. *Faulkenberry*, 2023 WL 3074639, at *10.

The court determined that Faulkenberry's claims were not "pervasive" or "severe" as they were "sporadic occurrences" that did not involve physical threats. *Faulkenberry*, 2023 WL 307463, at *11. Ontiveros and others had misgendered Faulkenberry; however, it was merely occasional and not consistent occurrences. *Id.* While the court stated that Ontiveros' unwelcoming behavior towards Faulkenberry was "[reprehensible]," the court found that this behavior also did not meet the threshold for "severe or pervasive." *Id.* at *10-12. Lastly, the court found that the alleged harassment did not have an overall negative effect on Faulkenberry's work or productivity, thereby leading the court to conclude that the discrimination did not lead to a hostile work environment. *Id.* at *11.

In its second holding, the court held that there was no retaliation towards Faulkenberry for making administrative, workplace, and EEO complaints about discrimination. *Faulkenberry*, 23 WL 3074639, at *14. A retaliation claim requires "(1) engagement in a protected activity; (2) adverse employment action; and (3) a causal link between" the two. *Id.* at *12. The court found that Faulkenberry's placement on administrative leave was related to her making perceived physical threats rather than her conversations about making EEO or administrative complaints. *Id.* at *13. Faulkenberry's amended complaint "admits that the reason for her placement on administrative leave" was due to her comments saying, "management would have a bad day on Monday" and that she was going to "cross the Rubicon." *Id.* at *13-14. The court reasoned that Faulkenberry being escorted out of the building and placed on administrative leave following her perceived threats was appropriate considering her background in combat and military training. *Id*.

Finally, the court held that Faulkenberry's "exacerbated anxiety" from Ontiveros sharing confidential medical documents meets the tangible injury requirement. *Id.* at *15. The Rehabilitation Act requires the plaintiff to "show that an unauthorized disclosure of medical information resulted in a tangible injury." *Id.* at *14. Faulkenberry shared medical documents with a new supervisor as part of her reassignment request. *Id.* at *15. Ontiveros then shared those medical records with her husband and other staff members who did not need them and were part of Faulkenberry's claims. *Id.* The court stated that the supervisors may have a "right to know of the necessary restrictions and accommodations" but not the exact contents of the medical record. *Id.*

The *Faulkenberry* decision further established the threshold required for cases of sex discrimination regarding Title VII. Members of the LGBTQIA+ community, especially transgender women, are frequently the victims of violence, verbal and physical harassment, and many types of discrimination inside and outside of the workplace. The standard imposed by the court for

transgender employees to allege workplace discrimination is high and therefore likely to deter individuals from seeking relief in court. Practitioners should be mindful that isolated incidents of misgendering will not meet the threshold of severe and pervasive harassment for hostile work environment claims. While there are many levels of harassment, practitioners seeking relief in court for their transgender clients will need to focus on incidents that are severe in nature and occur often over a substantial period of time.

RECENT DEVELOPMENT

GAMBRILL V. BD. OF EDUC. OF DORCHESTER CNTY.: STATE NEGLIGENCE CLAIMS AGAINST TEACHERS AND SCHOOL ADMINISTRATORS ARE NEITHER PREEMPTED BY THE FEDERAL COVERDELL ACT NOR BARRED BY THE EDUCATIONAL MALPRACTICE DOCTRINE.

By: Grace Andrews-Becker

The Supreme Court of Maryland held the federal Coverdell Act does not preempt state negligence claims against school board administrators and teachers for the acts or omissions committed within the scope of their employment. *Gambrill v. Bd. of Educ. of Dorchester Cnty.,* 481 Md. 274, 308-09, 281 A.3d 876, 896 (2022). Specifically, the court held that the Maryland procedural law for asserting negligence claims against school staff falls "squarely within" the provisions of the Coverdell Act. *Id.* at 308, 281 A.3d at 895-96. The court also refused to expand the educational malpractice doctrine to include negligence claims against school employees when such claims do not involve educational decisions. *Id.* at 312, 281 A.3d at 898.

Sixth-grader S. Gambrill ("S.") was the subject of physical and verbal bullying by her peers at Mace's Lane Middle School ("Mace's Lane") during the 2016-2017 school year. After the first bullying incident, S.'s parents (collectively "the Gambrills") notified the Assistant Principal of Mace's Lane, Ms. Woolford, who assured them the bullying would be "handled." When the bullying persisted, the Gambrills also notified the Principal of Mace's Lane, Dr. Collins, and the Supervisor of Student Services, Dr. Bell. Despite the Gambrills' repeated notifications to Mace's Lane and school board staff, the bullying worsened. By June 2017, S. had sustained two concussions, developed antisocial behaviors, and subsequently transferred to another school.

The Gambrills filed a complaint against Dr. Bell, Dr. Collins, Ms. Woolford, two substitute teachers, and the Board of Education ("the Board") in the Circuit Court for Dorchester County. The court granted summary judgment for the Board and its staff, holding the Coverdell Act provided immunity to the individual defendants, and the educational malpractice doctrine barred negligence claims involving educational decisions against the Board. The Gambrills appealed to the Appellate Court of Maryland, which affirmed the lower court's holding and reasoning. The Gambrills filed a petition for writ of certiorari, which the Supreme Court of Maryland granted.

The Supreme Court of Maryland addressed three issues: (1) whether the federal Coverdell Act preempts Maryland law and immunizes teachers and

school board administrators from liability in negligence actions, (2) whether the educational malpractice doctrine barred the Gambrills' negligence claim, and (3) whether the lower court erred in granting summary judgment. *Gambrill,* 481 Md. at 296, 281 A.3d at 888-89.

The Supreme Court of Maryland began its analysis with an overview of preemption, explaining that "federal law is supreme over state law." *Gambrill*, 481 Md. at 298, 281 A.3d at 890. However, there is a general presumption in tort actions that Congress did not intend federal law to preempt state law. *Id.* at 299, 281 A.3d at 890 (citing *Columbia Venture, LLC v. Dewberry & Davis, LLC,* 604 F.3d 824, 830 (4th Cir. 2010)). The court held the Coverdell Act's plain language and provided exceptions do not overcome this presumption. *Gambrill,* 481 Md. at 302, 281 A.3d at 892.

The court then examined the plain language of the Coverdell Act in its preemption analysis. *Gambrill,* 481 Md. at 307, 281 A.3d at 895. The Coverdell Act provides that "no teacher in a school shall be *liable for harm* caused by an act or omission of the teacher." *Id.* at 307, 281 A.3d at 895 (quoting 20 U.S.C. § 7946(a)) (emphasis added). The court distinguished "liability for damages" from "immunity from suit" and determined the Coverdell Act protects teachers against the monetary damages associated with their negligence. *Gambrill,* 481 Md. at 307, 281 A.3d at 895.

Next, the court reviewed the Coverdell Act's exceptions and whether Maryland law fits within an exception. *Gambrill,* 481 Md. at 308, 281 A.3d at 895-96. The Coverdell Act permits states to create laws that hold schools liable for the conduct of their teachers proportionate to an employer's liability for the conduct of its employees. *Id.* at 308, 281 A.3d at 896 (citing 20 U.S.C. § 7946(b)(2)). Maryland's procedural law for asserting tort claims against school boards and employees provides that a school employee, acting within the scope of their employment, cannot be held personally liable for the monetary damages that result from their conduct. *Gambrill,* 481 Md. at 308, 281 A.3d 896 (citing MD. CODE ANN., Cts. & Jud. Proc. § 5-518 (LexisNexis 2015)). Instead, Maryland law requires that the school board is joined as a party to indemnify the employee for their monetary damages. *Gambrill*, 481 Md. at 308, 281 A.3d at 896.

The court concluded that Maryland law is consistent with the federal Coverdell Act. *Gambrill,* 481 Md. at 308, 281 A.3d at 396. Both the Coverdell Act and Maryland law prohibit holding teachers liable for the monetary damages associated with their negligence. *Id.* Moreover, the Coverdell Act's exceptions permit Maryland's procedural law requiring the Board to be a party in the action. *Id.* Because the Coverdell Act does not provide teachers with "heightened protection," compared to Maryland law, the court refused to overcome the general presumption and preempt state law. *See id.* at 298, 281 A.3d at 890.

The court next addressed whether the educational malpractice doctrine barred the Gambrills' negligence claim. *Gambrill*, 481 Md. at 309, 281 A.3d at 896. Claims based on educational malpractice ask courts to evaluate educational decisions and whether those decisions breached a standard of reasonableness for an educational program. *Id.* at 309, 281 A.3d at 897 (quoting *Ross v. Creighton Univ.*, 957 F.2d 410, 416 (7th Cir. 1992)). Educational malpractice is not a cognizable cause of action because it presents several public policy concerns that courts are reluctant to address. *Gambrill,* 481 Md. at 310, 281 A.3d at 897 (citing *Gupta v. New Britain Gen. Hosp.*, 687 A.2d 111, 119 (Conn. 1996)). These concerns include ambiguity in evaluating the reasonableness of conduct concerning educational decisions, calculating the onset and severity of damages that result from such conduct, and determining what, if any, burdens the doctrine imposes on school systems. *Gambrill,* 481 Md. at 311, 281 A.3d at 897 (citing *Hunter v. Board of Educ. of Montgomery Cnty.,* 292 Md. 481, 487, 439 A.2d 582, 585 (1982)).

The court held that the Gambrills' claim was firmly "rooted in negligence." *Gambrill*, 481 Md. at 312, 281 A.3d at 898. Specifically, the claim asked the court to evaluate whether the school employees had a duty to protect S. on school grounds. *Id.* Furthermore, the policy concerns were absent from the Gambrills' claim. *Id.* at 312-13, 281 A.3d at 898. Asserting negligence provided the court with a well-established standard to evaluate the teacher's conduct and the customary damages arising from physical and mental harm. *Id.* at 313, 281 A.3d at 898-99. Nor did this claim impose a heightened burden on the school system because Maryland law holds school boards liable for the conduct of their employees. *Id.* at 313, 281 A.3d at 899 (citing MD. CODE Ann., Cts. & Jud. Proc. § 5-518(b)-(c) (LexisNexis 2015)). Therefore, the court refused to expand the educational malpractice doctrine to the Gambrills' claim because the claim did not question the educational decisions or present issues the court could not address. *Gambrill*, 281 Md. at 313, 281 A.3d at 899.

Finally, the court evaluated whether the lower court erred in granting summary judgment for the defendants. *Gambrill*, 481 Md. at 314, 281 A.3d at 899. The court reversed the grant of summary judgment, finding that because the Gambrills' claim was neither preempted by the Coverdell Act nor barred under the educational malpractice doctrine, several factual issues remained. *See id.* at 322-24, 281 A.3d at 904-05.

The *Gambrill* decision removed barriers for asserting negligence claims against teachers and school boards for their acts or omissions concerning bullying in school. While this decision provides bullied students with a cognizable cause of action, it also highlights the competing interests and challenges of families and school staff. Nearly one-quarter of public school

students experience bullying, but Maryland public schools struggle to adequately staff classrooms. Time will tell whether this holding opens a door to relief for students or a floodgate of litigation against the school system.

RECENT DEVELOPMENT

SATTERFIELD V. STATE: PETITIONERS REQUESTING POST-CONVICTION DNA TESTING MUST ESTABLISH A REASONABLE PROBABILITY THAT RESULTING EVIDENCE WILL TEND TO PROVE THEIR INNOCENCE.

By: Karrington Hatton

The Supreme Court of Maryland held that the petitioner for post-conviction DNA testing admission under Maryland's Criminal Procedure Code § 8-201 failed to show a reasonable probability that DNA testing could produce exculpatory or mitigating evidence. *Satterfield v. State*, 483 Md. 452, 484 294 A.3d 166, 184 (2023) (citing MD. CODE ANN., CRIM. PROC. § 8-201 (West 2001)). Additionally, because the petitioner did not meet this burden, the court was required to deny the petition without a hearing. *Satterfield*, 483 Md. at 472, 294 A.3d at 177-78. Lastly, the court found that unless a petition can be dismissed as a matter of law, a petitioner has a right to respond to the State's answer. *Id.* at 477-79, A.3d at 181-82.

In September 2006, John Satterfield ("Satterfield") participated in the armed robbery of Randy Hudson and the murder of Hudson's daughter's grandfather, Eric Fountain ("Mr. Fountain"). Satterfield was convicted of fourteen criminal offenses, including first-degree murder, and sentenced to life imprisonment plus 150 years. The police identified Satterfield as a suspect based on their interview with Chalene Smith ("Ms. Smith"). At trial, the State relied on Tori Kucz's ("Ms. Kucz") testimony to convict Satterfield. Both Ms. Smith and Ms. Kucz participated in the crime and were in the getaway car in an alley near Mr. Fountain's home. The State also relied on DNA and cell tower evidence that placed Satterfield at the crime scene. The authorities identified female DNA on an undamaged cigarette butt found outside of the murder victim's house, consistent with Ms. Kucz's testimony that she and Ms. Smith were in the alley smoking around the time of the crime.

In August 2022, Satterfield filed a petition for post-conviction DNA testing, alleging there was a reasonable probability that DNA testing of the cigarette butt would produce exculpatory evidence. Satterfield argued that the results would impeach Ms. Smith and Ms. Kucz as witnesses. The State filed an answer, and the Circuit Court for Baltimore County denied the petition without a hearing or an explanation. Satterfield filed a motion for reconsideration, which the circuit court denied. Satterfield then filed a notice of appeal to the Appellate Court of Maryland seeking review of his petition

denial and the decision not to have a hearing or to allow him to reply to the State's answer. The appellate court then transferred the appeal to the Supreme Court of Maryland.

The Supreme Court of Maryland clarified the following issues: (1) the standard for exculpatory evidence under Crim. Proc. § 8-201; (2) whether a petitioner for post-conviction DNA testing has a right to a hearing; and (3) whether a petitioner has a right to respond to the state's answer. *Satterfield*, 463 Md. at 465-84, 294 A.3d at 173-84.

The court first considered whether a "reasonable probability" existed that the DNA test would produce exculpatory evidence. *Satterfield*, 483 Md. at 466, 294 A.3d at 174. "Exculpatory" means evidence that would "tend to show" that the petitioner is innocent. *Id*. at 467, 294 A.3d at 174-75 (quoting *Givens v. State*, 459 Md. 694, 707-08, 188 A.3d 903, 910–11 (2018)). The court also proffered various non-exhaustive factors the court may consider for this determination, including the physical and temporal proximity of the evidence to the crime, how close in time the suspect's interaction with the evidence was to the crime, and whether the evidence is instrumental to the crime. *Id.* at 467-68, 294 A.3d at 175 (quoting *Edwards v. State*, 453 Md. 174, 199, 160 A.3d 642, 657 (2017)).

The court found that Satterfield failed to meet his burden of proof for the following reasons. *Satterfield*, 483 Md. at 470, 294 A.3d at 176. Although the cigarette butt was near the crime scene, it was not an instrumentality of the crime. *Id.* at 468, 294 A.3d at 175. Ms. Kucz already testified that she and Ms. Smith were smoking the night of the crime. *Id.* at 469, 294 A.3d at 175. Defense counsel previously challenged both witnesses' credibility at trial and highlighted their motivations to lie. *Id.* at 468-69, A.3d at 175. DNA testing of the cigarette would not exculpate Satterfield, as the facts of the record already established the cigarette contained female DNA. *Id.* at 461, 469, 294 A.3d at 171, 175-76. Lastly, there was enough incriminating evidence unrelated to these witnesses to find Satterfield guilty. *Id.* at 470, 294 A.3d at 176. As such, the court found Satterfield's petition insufficient as a matter of law and affirmed its denial. *Id.* at 484, 294 A.3d at 184.

Next, the court examined the procedural requirements of Crim. Proc. § 8-201, governed by Maryland Court Rules 4-701 through 4-709. *Satterfield*, 483 Md. at 470-72, 294 A.3d at 176 77 (citing MD. CODE ANN., CRIM. PROC. § 8-201). If a petitioner cannot show a reasonable probability that DNA testing would likely show that the petitioner is innocent under Crim. Proc. § 8-201, the court must deny the petition without a hearing. *Satterfield*, 483 Md. at 472, 294 A.3d at 177-78. If the court does not hold a hearing, it must provide a written explanation of why a hearing is not required. *Id.* at 473, 294 A.3d at 178. Since Satterfield did not meet the requirements of Crim. Proc. § 8-201, the circuit court was not required to hold a hearing. *Id.* at 474,

294 A.3d at 178. The court acknowledged that, although the circuit court failed to provide an explanation, remand would be "futile" because the petition was frivolous. *Id*. at 483, 294 A.3d at 184. Thus, the lack of explanation was not a reversible error. *Id*.

The court also conducted a holistic examination of Maryland Rules 4-707 and 4-708 to determine whether Satterfield should have been allowed to reply to the State's answer to his petition before the court issued its ruling. *Satterfield*, 483 Md. at 475-76, 294 A.3d at 179-80. The court conceded that, although Rule 4-708 seems to give the petitioner a right to respond, Rule 4-707 does not require courts to wait for the petitioner's response in order to make a ruling. *Id.* at 476, 294 A.3d at 180. The notes of the Rules Committee state that when the denial of a petition requires a finding of fact, a right to respond should be warranted out of fairness. *Id.* at 478, 294 A.3d at 181. In other words, unless the petition is insufficient as a matter of law, the petitioner should have the right to respond. *Id.* at 479, 294 A.3d at 181. The court also acknowledged a right to respond when the State's response is inadequate. *Id.* at 482, 294 A.3d at 183-84 (citing *Blake v. State*, 418 Md. 445, 448, 15 A.3d 787, 789 (2011)). The court found that the rules are ambiguous and may prevent justified petitioners from responding, but the Rules Committee, while acknowledging this issue, chose not to alter the language. *Satterfield*, 483 Md. at 478-79, 294 A.3d at 181-82.

In Satterfield's case, the circuit court denied the petition, deeming it insufficient as a matter of law; as such, Satterfield did not have a right to respond. *Satterfield*, 483 Md. at 462-63, 482, 294 A.3d at 172, 183. Furthermore, the court found that Satterfield's unsuccessful motion for reconsideration served the same effect as the requested response. *Id.* at 482, 294 A.3d at 183.

In *Satterfield*, the court reaffirms the burden on petitioners seeking post-conviction DNA testing. Reinforcing facts established at trial is not enough to meet this standard. Furthermore, because trial courts can sometimes consider the petition and the state's response alone to make a ruling, petitioners are reminded to make their strongest arguments upfront and, if possible, file a quick response. This burden may be challenging for imprisoned petitioners who file a petition pro se and have yet to be appointed counsel; the petition could be denied before an attorney reviews it for legal sufficiency. The rules governing how a court grants a hearing have also been greatly clarified – favoring strong petitions and punishing those who allege insufficient facts to meet DNA testing requirements under Crim. Proc. § 8-201.

RECENT DEVELOPMENT

UNITED PARCEL SERV. V. STROTHERS: TO MEET THE PREPONDERANCE OF THE EVIDENCE STANDARD FOR A WORKERS' COMPENSATION ACCIDENTAL HERNIA CLAIM, CLAIMANTS MUST PRODUCE EVIDENCE OF QUALITY RISING TO A "DEFINITE PROOF" STANDARD.

By: Veronica Giron

The Supreme Court of Maryland held that the phrase "definite proof" as used in § 9-504(a) of the Workers' Compensation Act ("the Act") applies to the quality of evidence claimants must produce to meet their burden of production for an accidental hernia claim. *United Parcel Serv. v. Strothers*, 482 Md. 198, 204, 221-22, 286 A.3d 23, 27, 38 (2022). The court concluded that the burden claimants bear in accidental hernia claims is a preponderance of the evidence. *Id.* at 212, 286 A.3d at 32.

In May 2016, while employed by United Parcel Service ("UPS"), David Strothers ("Strothers") was injured while on the job. In September of that year, Strothers visited his physician, Dr. Joshua B. Macht ("Dr. Macht"), who confirmed that Strothers suffered a left inguinal hernia and an umbilical hernia that he believed were related to the work injury from May 2016. Thus, Strothers filed a workers' compensation claim with the Maryland Workers' Compensation Commission ("the Commission"), and the Commission granted his claim.

In September 2019, Strothers was again injured on the job while employed at UPS. Strothers visited Howard County General Hospital ("HCGH") for treatment. A CT scan of Strothers' abdomen revealed an increase in the size of fat in his hernia. Dr. Macht inferred this after comparing this imaging to abdomen imaging from May of 2016. Strothers promptly filed a First Report of Injury or Illness with the Commission. On November 14, 2019, Strothers underwent surgery for his September 2019 hernia. In January 2020, Dr. Macht evaluated Strothers and determined that Strothers' 2019 hernia resulted from his 2019 work injury.

The Commission found in favor of Strothers, concluding that the 2019 injury during employment caused his current hernia and he was totally disabled from September 2019 to January 2020.

After the Commission denied UPS's request for a rehearing, UPS filed for judicial review in the Circuit Court for Howard County. Agreeing with the Commission, the circuit court found that "definite proof" did not require an accidental hernia claimant to meet a higher burden of proof, and Strothers' hernia was a new hernia resulting from the 2019 case. Next, UPS appealed

to the Appellate Court of Maryland, which affirmed the Circuit Court's opinion, determining that "definite proof" describes the quality of evidence and that Strothers met his burden by producing an expert medical opinion. Thus, UPS appealed this case to the Supreme Court of Maryland.

The Supreme Court of Maryland granted certiorari to determine whether the phrase "definite proof" under § 9-504 of the Workers' Compensation Act refers to the quality of evidence the claimant is required to produce or to the burden of proof the claimant must meet, thereby elevating the standard from a preponderance of the evidence to clear and convincing evidence. *Strothers,* 482 Md. at 204-05, 286 A.3d at 27-28.

The Supreme Court of Maryland began its analysis by distinguishing between the burden of production and persuasion. *Strothers,* 482 Md. at 211, 286 A.3d at 31-32. Section 9-504(a) of the Act requires an employer to compensate an employee who sustains a hernia from an on-the-job injury so long as "the covered employee provides *definite proof*" that it was a new hernia. *Id.* at 214, 286 A.3d at 33 (quoting MD. CODE ANN., LAB. & EMPL. § 9-504(a)(1)) (West 1991)) (emphasis added). Hernia claims are distinguished from other types of injuries due to the many "abdominal pressure[s] that can cause" them. *Strothers,* 482 Md. at 217, 286 A.3d at 35.

The court next looked to the plain language of the Act. *Strothers,* 482 Md. at 212-13, 286 A.3d at 32. Because the phrase "definite proof" was not defined by the Labor and Employment Article, nor was it found elsewhere in the Maryland Annotated Code, the court turned to the definitions of "definite" and "proof" at the time of enactment. *Id.* at 214-15, 286 A.3d at 33-34. The court defined the word "definite" as "'precise in detail[]'; … meant to 'restrict[]' or 'limit[]' the noun it modifies." *Id.* at 215, 286 A.3d at 33 (quoting *Definite*, Webster's New International Dictionary of the English Language (2d. 1934)). To define "proof[,]" the court relied on a dictionary definition, reading "[t]hat degree of cogency, arising from evidence, which convinces the mind of any truth or fact and produces belief.'" *Strothers,* 482 Md. at 215, 286 A.3d at 33-34 (quoting *Proof*, Webster's New International Dictionary of the English Language (2d. 1934)). Thus, "definite" as used in the Act means to "restrict or limit the type of proof needed" in hernia cases, indicating that the phrase refers to the quality of evidence necessary to meet the burden of production. *Strothers,* 482 Md. at 215, 286 A.3d at 34.

Next, the court considered the statutory purpose of the Act, which is to protect workers, as well as their families, who are facing hardships after sustaining work-related injuries. *Strothers,* 482 Md. at 217, 286 A.3d at 35 (quoting *Matter of Collins*, 468 Md. 672, 686, 228 A.3d 760 (2020)). The General Assembly intended for the Act to be followed in accordance with this purpose but also recognized that hernias can result from numerous causes. *Strothers,* 482 Md. at 217, 286 A.3d at 35. To remedy this, the

General Assembly required more of hernia claimants by requiring "definite proof." *Id.* The court found that interpreting definite proof to apply to the burden of production rather than the burden of persuasion "harmonious[ly] balance[d]" the Act's remedial purpose and the heightened hernia claims requirement. *Id.* at 218, 286 A.3d at 35.

The court noted that the General Assembly has not modified the statute's language to indicate that definite proof heightens the burden of persuasion a claimant must meet. *Strothers,* 482 Md. at 218, 286 A.3d at 36. The General Assembly is aware of the burden of persuasion and has in the past placed the most demanding standard, clear and convincing evidence, on serious, life-altering matters. *Id.* at 219, 286 A.3d at 36. Given the Act's remedial purpose, the court found it unlikely that the General Assembly would require the heaviest burden be placed on workers seeking compensation for hernias sustained on the job. *Id.* at 219-20, 286 A.3d at 36. Thus, the court concluded that the fact that the General Assembly did not clearly require the clear and convincing evidence standard for the burden of persuasion, further indicated that "definite proof" refers to the quality of evidence offered. *Id.* at 220, 286 A.3d at 37.

Having established that the phrase "definite proof" applies to the quality of evidence required to meet his burden of production, the court found that Strothers' satisfied this burden by producing the expert medical opinion of Dr. Macht, who concluded that the September 2019 hernia was a new hernia unrelated to the hernia sustained in May 2016. *Strothers,* 482 Md. at 220, 286 A.3d at 37. Because UPS failed to present its own expert medical evidence to dispute Dr. Macht's opinion, the court could not conclude that the Commission misinterpreted the law in determining that Strothers had satisfied his burden of proof. *Id.* at 221, 286 A.3d at 37-38.

The Supreme Court of Maryland held that, as used in § 9-504(a) of the Workers' Compensation Act, "definite proof" describes the quality of evidence a claimant must produce to satisfy their burden of production under a workers' compensation claim seeking compensation for an accidental hernia. Moving forward, any claimant who brings a workers' compensation claim for an accidental hernia will not be confused as to the standard for satisfying their burden of production and persuasion, allowing them to prepare their case better. Hernia claimants will not have to meet their burden by clear and convincing evidence but rather by the lesser standard of preponderance of the evidence. However, claimants must ensure they provide definite proof that their hernia resulted from a work-related injury. This clarity will create efficiency in the judicial system by ruling out claims that do not produce "definite proof" and allowing those that do to proceed.