

# UNIVERSITY OF BALTIMORE LAW FORUM

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## LETTER FROM THE EDITOR-IN-CHIEF

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Dear Reader:

The Editorial Board and Staff of the *University of Baltimore Law Forum* are thrilled to present the second issue for the 2024-2025 academic year. The *Law Forum* is proud to offer our readers a collection of work that embodies Volume 55's commitment to civil rights, criminal justice reform, and access to justice. By providing insights into Maryland's pressing legal issues and facilitating meaningful discourse, this issue reflects our commitment to shaping Maryland's future.

We begin Volume 55.2 with a foreword by Dean LaVonda N. Reed, commemorating the University of Baltimore's centennial year and reaffirming our commitment to legal education that balances rigor and addresses current societal challenges. Next, we welcome our articles analyzing Maryland's current appellate review for admissions of expert testimony under the *Daubert* standard. Derek Stikeleather, Esq., presents the significant Maryland case law since the adoption of *Daubert* in *Rochkind v. Stevenson* with an emphasis on the appellate level disagreement in the application of the abuse of discretion standard. Steve Klepper, Esq., expands on Mr. Stikeleather's piece by analyzing Justice Booth's concurring opinion in *KatzAbosch* and proposing procedural and substantive error categories to more accurately define appellate review. These pieces served as the foundation for our Discussion About *Daubert* panel, which brought together law students, practitioners, and judges to discuss the pitfalls of *Daubert*. Issue 2 also includes an article by Kristen M. Mack, Esq., and Cary J. Hansel, Esq., calling for prosecutorial liability in cases of gross negligence and malice. Lastly, Colin Miller, Esq., analyzes the consequences of victim impact statements in post-conviction proceedings and argues for the overturning of *Syed v. Lee*.

Issue 2 includes three thought-provoking student comments. First, I explore the tensions that emerge when judges consider a defendant's lack of remorse alongside their assertion of innocence in petitions for sentence reductions under the Juvenile Restoration Act. Second, Grace Andrews-Becker analyzes the challenges teachers face and how the current law does not allow them to adequately address these problems, specifically advocating for Maryland to allow class size to be included in collective bargaining. Third, Jessica Kweon evaluates the benefits and harms of artificial intelligence use in employment decisions, calling for research to protect against discrimination and privacy concerns. Finally, Volume 55.2 concludes with five recent development pieces that highlight some of the Supreme Court of Maryland's most important rulings this year and convey their impact on the legal community. For more work from this year, please visit [ublawforum.com](http://ublawforum.com) to read our Hot Topics.

As my time as Editor-in-Chief concludes, I want to extend my sincere gratitude to *Law Forum*'s Staff Editors, Associate Editors, and Executive Board for their efforts in providing this publication to you – our readers. I am immensely proud of the collection of work published in Volume 55.2, which served as a call to action for many reforms. This staff also took on the addition of the Maryland Jailhouse Lawyer's Manual, a project close to my heart that will be published online this year and updated with each new Board. I want to offer a personal thank you to Jessica Kweon and Emmett Hallameyer for being the most dedicated Articles Editors throughout this process.

On behalf of the *University of Baltimore Law Forum*, we thank you, our subscribers and readers, for your lasting support and interest in our publication. We hope you enjoyed this volume.

Sincerely,

Jayna Peterson

Editor-in-Chief

*University of Baltimore Law Forum*, Volume 55, Issue 2

Member, National Conference of Law Reviews

**UNIVERSITY OF BALTIMORE LAW FORUM**

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## FOREWORD

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### UNIVERSITY OF BALTIMORE: A CENTURY OF OPPORTUNITY, A FUTURE OF LEADERSHIP

By: Dean LaVonda N. Reed\*

Thank you to *the University of Baltimore Law Forum* for the generous invitation to pen a forward for the Spring 2025 issue. The invitation is particularly meaningful as I observe my first anniversary as the law school's Dean, and as the University of Baltimore and the School of Law celebrate 100 years of academic excellence.<sup>1</sup>

As we commemorate our centennial anniversary, we reflect on the origins of our institution, celebrate our present, and prepare for our future. During my first year as Dean, I learned that the University of Baltimore and the School of Law have been at the forefront of recognizing the transformative power of a legal education.<sup>2</sup> We take pride in continuing to offer an accessible education to our city, state, region, and neighbors beyond since our inception in 1925.<sup>3</sup>

In the University of Baltimore's 1925 brochure, which, at the time, included just a School of Law and a School of Business and Government, the institution was self-described as one "for the education of employed men and women."<sup>4</sup> The brochure quoted President Calvin Coolidge's 1924 address to the National Education Association for the proposition that "the existence of

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\* Dean Lavonda N. Reed is the Dean of the University of Baltimore School of Law. Dean Reed previously served as Dean at the Georgia State University College of Law and as an Associate Provost and Professor at Syracuse University. Her professional work has focused on affordability, academic excellence and achievement, belonging, and active engagement of alumni. Dean Reed is the first female dean at the University of Baltimore Law, and she hopes to continue distinguishing our law school with academic programming, including clinics and co-curriculars.

<sup>1</sup> Staci Zaretsky, *Law School Hires First Woman Dean in Its Nearly 100-Year History*, ABOVE THE L. (Mar. 26, 2024, 1:13 PM), <https://abovethelaw.com/2024/03/law-school-hires-its-first-woman-dean-in-nearly-100-years/>; Ed Gunts, *University of Baltimore to Celebrate 100<sup>th</sup> Anniversary with "Rock the Block" Party on Saturday*, BALT. FISHBOWL (Apr. 11, 2025), [baltimorefishbowl.com/stories/university-of-baltimore-to-celebrate-100th-anniversary-with-rock-the-block-party-on-saturday/](http://baltimorefishbowl.com/stories/university-of-baltimore-to-celebrate-100th-anniversary-with-rock-the-block-party-on-saturday/).

<sup>2</sup> See James F. Schneider, *A Brief History of the University of Baltimore, Our School*, 6 U. BALT. L.F. 27, 27–28 (1976).

<sup>3</sup> *Id.*

<sup>4</sup> THE UNIV. OF BALT., *THE UNIVERSITY OF BALTIMORE: IN THE HEART OF THE CITY* 1 (1925).

the republic depends on adult education.”<sup>5</sup> President Coolidge went on to say that “one of the chief rights of an American citizen is the right to an education.”<sup>6</sup> Regarding legal education specifically, the University’s founders continued:

The study of law has long been recognized as a broad liberalizing form of education. It trains the analytical faculties and develops habits of exactness and dispatch. Related as it is to current questions and affairs, it gives the student an insight into matters of public policy and procedure. In effect, it makes for personal growth and leadership as well as for the stability of government and the maintenance of order.<sup>7</sup>

While universities and law schools have evolved during the last century, the University of Baltimore’s ideals and principles remain as true today as they were in 1925. Our 2025 vision statement states that:

We educate students to become exceptional and principled lawyers; to contribute to local, national and international discourse about the law and legal institutions; and to promote efforts to achieve justice in local, national, and international communities.

As an urban law school, we value diversity, academic excellence, and public service, and seek to improve the legal system and the quality of people’s lives. The School of Law prepares its students to assume leadership roles in the public and private sectors in the City of Baltimore, throughout the state of Maryland, across the United States, and around the world.<sup>8</sup>

Since our inception, we have stayed true to our founders’ vision, offering students and future generations pathways for social mobility. However, law school admissions and the practice of law itself have seen many changes since 1925, forcing our institutions to not only adapt but also step up. First-generation law students make up 86% of this year’s 1L class.<sup>9</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* (quoting Calvin Coolidge, President of the United States, Address at the Convention of the National Education Association (July 4, 1924)).

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *School of Law Mission Statement*, UNIV. OF BALT., <https://www.ubalt.edu/law/about/mission-statement.cfm> (last visited May 17, 2025).

<sup>9</sup> Statistics based on author’s administrative knowledge as Dean of the University of Baltimore School of Law.

Coming from four-year institutions across the globe and having studied in a wide range of disciplines and worked, in many cases, long careers in other sectors, our students contribute positively to our school's unique intellectual life.

Interest in attending law school is at its highest level in a long time, as evidenced by the large number of LSAT takers and law school applicants.<sup>10</sup> We do not necessarily know what is motivating people to consider law school and a career in law. Yet a passing understanding of the challenges facing our country brings into focus why someone might be drawn to law school at this moment in history—what is the rule of law, will people have autonomy over their bodies, will democracy survive, etc. Law schools are not just institutions that prepare individuals to practice law. Law schools serve as models for the profession and society at large. They demonstrate the value we place on civic education and civility. At the University of Baltimore, we educate students to become ethical lawyers and leaders that are prepared to meet the moment and help the country address its most challenging issues and conflicts.

Our vibrant community of scholars and students strive to address these problems by advancing justice. Whether addressing school absenteeism, advocating for criminal justice reform, ascending to the bench, working in the legislative branch, supporting veterans, representing large and small businesses, representing immigrants, or seeking justice for the wrongfully convicted, our students are at the forefront of these efforts. Most students aspire to become practicing attorneys after graduation. It is my vision for this school that we will continue offering a broad curriculum and introducing instruction aligning with our students' aspirations. Our recent intense focus on curricular reforms aims to provide an education relevant to society and the world in which our students will practice while also balancing education in legal doctrine, issue-spotting, legal analysis, and critical thinking in an interdisciplinary context. In both small and large lectures, we remain committed to academic rigor, career mentoring, and developing skills.

Due to our emphasis on practical skills, we cultivate leaders.<sup>11</sup> Roughly one-third of the judges in the state are graduates of our school.<sup>12</sup> The School of Law has even produced prominent state legislators.<sup>13</sup> As Dean, my

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<sup>10</sup> See Susan Krinsky, *It's Early Days, but the 2025 Application Cycle Is off to a Robust Start*, LSAC (Oct. 15, 2022), <https://www.lsac.org/blog/its-early-days-2025-application-cycle-robust-start>.

<sup>11</sup> See *infra* notes 13–14 and accompanying text.

<sup>12</sup> See *A Tradition of Legal Excellence Since 1925*, UNIV. OF BALT., <https://www.ubalt.edu/law/about/get-to-know-us/history-of-the-law-school> (last visited May 17, 2025).

<sup>13</sup> For example, criminal justice reform champion Senator Jill P. Carter graduated from the University of Baltimore School of Law. See Nick Alexopoulos, *It's My City: 1988 Grad*

hope is that the University of Baltimore School of Law will be a place where alumni can return time and time again for their own professional growth and development at networking events and leadership programming, such as our recently launched and well-received Lawyers as Leaders series.<sup>14</sup> We will strive to help foster leadership skills in our students by increasing the number of partnerships we have with firms, courts, businesses, government, and nonprofits. And we will continue to forge other new partnerships and opportunities for our students, Maryland, and neighbors beyond.

While the law faces many challenges in its current climate, higher education in general faces undue skepticism. The jobs of deans, provosts, presidents, faculty, and other staff and administrators are more challenging than at any other time in modern history. Uncertainty and doubt exists around the value of a college education and an advanced degree, what is taught, what is not taught, who teaches, declining enrollments, competition from abroad, demographic cliffs, campus safety, student mental health, belonging and accessibility, finances, the federal government's retreat from supporting scientific and other scholarly research, rising expenses and tuition, reputation, philanthropy and alumni relations, and debates about academic freedom and free speech on campus. That notwithstanding, education is highly beneficial not only for our students' goals but also their social mobility. According to the Social Security Administration, college graduates and those with graduate degrees out-earn those without.<sup>15</sup> Men with bachelor's degrees earn approximately \$900,000 more in median lifetime earnings than high school graduates.<sup>16</sup> Women with bachelor's degrees earn \$630,000 more.<sup>17</sup> Men with graduate degrees earn \$1.5 million more in median lifetime earnings than high school graduates.<sup>18</sup> Women with graduate degrees earn \$1.1 million more.<sup>19</sup>

In legal academia, scholars are asking hard questions and thinking critically about the growing wealth gap, widening gaps in educational attainment, the erosion of constitutional rights, and voting rights, among other issues. They are responding to threats to the protection and welfare of

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*Works for Change Through Political Career*, LOY. MAG., <https://www.loyola.edu/explore/magazine/stories/2016/its-my-city.html> (last visited May 17, 2025).

<sup>14</sup> See *'Lawyers as Leaders' Series Gathers Alumni for Professional Growth*, UNIV. OF BALT. SCH. OF L. MAG., <https://blogs.ubalt.edu/lawmag/lawyers-as-leaders-series-gathers-alumni-for-professional-growth/> (last visited May 17, 2025).

<sup>15</sup> *Education and Lifetime Earnings*, SOC. SEC. ADMIN. (Nov. 2015), <https://www.ssa.gov/policy/docs/research-summaries/education-earnings.html>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

children, immigrants, access to representation, and access to justice. Our faculty envision and are energized to help fill these knowledge gaps. Similarly, our law students are energized to help through their research and participation in law journals, such as *Law Forum*.

In the next era, we will remain true to our founders' vision of developing strong lawyers who will serve communities throughout Maryland.<sup>20</sup> Thank you, and congratulations to the University of Baltimore for 100 years of offering an impactful and transformative education.

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<sup>20</sup> Our visit statement reads as: We educate our students to become members of the legal profession who are exceptionally well prepared to serve clients, promote justice, and become leaders in a variety of disciplines. Using innovative teaching techniques, live-client experiential opportunities, simulation courses and externships, we help our students to: develop knowledge of substantive and procedural law and theory in an array of contexts and legal systems; acquire legal analysis, research, writing and communication skills so that they can effectively analyze and resolve client and societal problems; and adhere to the highest professional and ethical standards. VISION STATEMENT, UNIV. OF BALT. SCHOOL OF L. (2020), <https://www.ubalt.edu/law/about/strategic-plan.cfm> (click School of Law's Mission and Vision Statement).

## ARTICLE

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### ABUSE OF DISCRETION UNDER MARYLAND RULE 5-702

By: Derek Stikeleather\*

#### I. INTRODUCTION

In the first three years after its landmark decision in *Rochkind v. Stevenson*, the Supreme Court of Maryland handed down four decisions construing the *Daubert/Rochkind* standard<sup>1</sup> for admissibility of expert testimony, specifically whether an expert’s challenged opinion had a sufficient factual basis under subsection 3 of Maryland Rule 5-702.<sup>2</sup> Each case addressed whether the challenged trial court’s opinion had an impermissible analytical gap between the expert’s methodology and conclusion.<sup>3</sup> A surprising trend is the relatively high number of appellate reversals for abuse of discretion by the trial court, and the frequent disagreements among the appellate courts—even the judges themselves—on how to apply the abuse of discretion standard. Despite the familiar mantra that “it is still the rare case in which a Maryland trial court’s exercise of

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\* **Derek Stikeleather** chairs the Appellate Practice Group at Goodell DeVries. He practices primarily in appellate advocacy and complex litigation, often as national appellate counsel for clients responding to nuclear verdicts. Derek has vast experience in commercial disputes and defending medical malpractice, product liability, and class action claims. Derek has a robust Maryland practice. He helped the Goodell DeVries team that persuaded the Supreme Court of Maryland, in 2020, to formally adopt the *Daubert* standard for expert testimony in all state-court civil and criminal proceedings and retire the *Frye-Reed* test. As an editor of the Maryland Appellate Blog and co-Chair of the MSBA’s Appellate Practice Committee, Derek continues to publish regularly on Maryland courts’ application of the *Daubert* standard under Rule 5-702. Derek is also a member of the Cole-Davidson Inn of Court, Maryland’s only appellate Inn of Court.

<sup>1</sup> “The *Daubert* factors provide guidance on how to determine if scientific reasoning is, indeed, sound, or a scientific theory adequately justifies an expert’s conclusion.” *Rochkind v. Stevenson*, 471 Md. 1, 33 (2020). In *Rochkind*, the Supreme Court of Maryland adopted the *Daubert* factors to its interpretation of MD. RULE 5-702, thereby eliminating the *Frye-Reed* standard and “provid[ing] a simpler, more straightforward analysis of expert testimony.” *Id.* at 37.

<sup>2</sup> *State v. Matthews*, 479 Md. 278 (2022); *Abruquah v. State*, 483 Md. 637 (2023); *Oglesby v. Balt. Sch. Assocs.*, 484 Md. 296 (2023); *Katz, Abosch, Windesheim, Gershman & Freedman, P.A. v. Parkway Neuroscience and Spine Institute, LLC*, 485 Md. 335 (2023); see discussion *infra* Part II.

<sup>3</sup> See discussion *infra* Part II.

discretion to admit or deny expert testimony will be overturned,”<sup>4</sup> it has not seemed rare at all—at least so far.<sup>5</sup>

Maryland Supreme Court Opinions	Trial court: Is opinion admissible under Rule 5-702(3)?	Appellate Court: Did trial judge abuse discretion?	Supreme Court: Did trial judge abuse discretion?
<i>KatzAbosch</i> (Aug. 2023)	No, remand, then No	Yes	Maybe, remand, then No
<i>Oglesby</i> (July 2023)	No	No	Yes (7-0)
<i>Abruquah</i> (June 2023)	Yes	Bypass petition	Yes (4-3)
<i>Matthews</i> (2022)	Yes	Yes	No (6-1)

Figure 1<sup>6</sup>

## II. Daubert Litigation

### A. State v. Matthews

The *Matthews* case involved the FBI’s use of a technique called “reverse projection photogrammetry” to determine a person’s height from a photograph or surveillance image.<sup>7</sup> Minutes after a late-night murder, surveillance video captured images of a man with an indiscernible face walking away from the murder scene and carrying an apparent shotgun—the murder weapon.<sup>8</sup> At Mr. Matthews’s murder trial, an FBI expert took the stand and used a still-frame image from the video to estimate the man’s height at 5’8” with an 0.67” plus/minus.<sup>9</sup> That same witness had earlier conceded a three-inch plus/minus, that she could not see.<sup>10</sup> The Appellate Court of

<sup>4</sup> *Matthews*, 479 Md. 278, 306 (first quoting *Rochkind v. Stevenson*, 471 Md. 1, 10 (2020); and then quoting *Roy v. Dackman*, 445 Md. 23, 38–39 (2015)).

<sup>5</sup> See Derek Stikeleather, *2023 and the Summer of Daubert*, MD. APP. BLOG tbl.1 (Sept. 7, 2023),

<https://mdappblog.com/2023/09/07/2023-and-the-summer-of-daubert/>.

<sup>6</sup> *Id.*

<sup>7</sup> *Matthews*, 479 Md. 278, 285 (internal quotation marks omitted).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

Maryland held that this created too much uncertainty to be helpful to the jury's deliberation and, instead, offered speculative, misleading expert testimony.<sup>11</sup> Applying the abuse of discretion standard, the appellate court rejected the testimony as inadmissible as a matter of law.<sup>12</sup>

The Supreme Court of Maryland saw *Matthews* differently, characterizing the testimony as not inadmissible *per se* because the underlying technique was reliable and the FBI expert conceded the uncertainties in her case-specific opinion.<sup>13</sup> The Court emphasized that there was “no dispute in this case concerning the reliability of [the expert’s] methodology,” reverse projection photogrammetry.<sup>14</sup> Because the expert “explained on direct examination that several other factors, including the unevenness of the ground and the distance of the camera from the subject, could add to the degree of uncertainty in a way she could not calculate,” the trial court had the discretion to allow it—or presumably, to exclude it.<sup>15</sup>

The Court distinguished the “uncertainty inherent in an expert’s methodology and uncertainty that applies to an expert’s conclusions following the application of a reliable methodology.”<sup>16</sup> An unreliable methodology would produce an inadmissible conclusion virtually every time; nevertheless, an opinion “is generally less problematic” when an expert applies a reliable technique “to an adequate supply of data, but in reporting her results, states that she is unable to quantify a specific degree of uncertainty/margin of error.”<sup>17</sup>

#### B. *Abruquah v. State*

The Supreme Court of Maryland’s *Abruquah* decision presented the inverse of the *Matthews* situation.<sup>18</sup> The Court held that firearms-identification testimony admitted by the trial court, based on a well-established and rigorous methodology, was inadmissible as a matter of law because of the high degree of certainty that the expert expressed to jurors.<sup>19</sup> At trial, the State’s expert firearms examiner testified that a bullet from the scene not only matched sample bullets fired from defendant Mr. *Abruquah*’s gun but also had been fired from his gun.<sup>20</sup>

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<sup>11</sup> *Id.* at 286, 304–05.

<sup>12</sup> *Id.* at 304.

<sup>13</sup> *Matthews*, 479 Md. 278, 314.

<sup>14</sup> *Id.* at 315.

<sup>15</sup> *Id.* at 301.

<sup>16</sup> *Id.* at 315.

<sup>17</sup> *Id.*

<sup>18</sup> See *Abruquah v. State*, 483 Md. 637, 648 (2023).

<sup>19</sup> *Id.* at 696–97.

<sup>20</sup> *Id.* at 696.

For the Court's narrow 4-3 Majority, that expert testimony was too much.<sup>21</sup> The Court concluded that "the examiner should not have been permitted to offer the unqualified opinion that the crime scene bullets were fired from Mr. Abruquah's gun."<sup>22</sup> It reasoned that the firearms-identification methodology can reliably show a bullet's consistency with a specific gun but not an "unqualified conclusion that such bullets were fired from a particular firearm."<sup>23</sup> Thus, the expert could have told jurors that he believed that the bullet *probably* came from the defendant's gun. He even might have been allowed to testify that the bullet *almost certainly* came from the defendant's gun. However, the unqualified testimony that the bullet was from the defendant's gun was inadmissible.<sup>24</sup>

To the dissenting Justices, such thin slicing of the admissibility of opinion testimony seemed incompatible with *Rochkind's* deferential abuse of discretion standard of review.<sup>25</sup> The Majority recognized that a reviewing court should not reverse simply because it would not have made the same ruling, and that there is an abuse of discretion when admitting "expert evidence where there is an analytical gap between the type of evidence the methodology can reliably support and the evidence offered."<sup>26</sup> Nevertheless, the dissenting Justices struggled to see the Majority's opinion as anything other than reversal simply because the appellate judges would not have made the same ruling as the trial judge.<sup>27</sup>

Seeming only to affirm the dissenting Justices' criticisms, footnote 5 in the *Abruquah* Majority opinion described the traditional articulation of the abuse of discretion standard as "somewhat unfair" without changing the standard:

This Court has frequently described an abuse of discretion as occurring when "no reasonable person would take the view adopted by the circuit court" or when a decision is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." [citations] In our view, the application

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<sup>21</sup> See *id.*; see also Derek Stikeleather, *Abruquah v. State Debates Abuse of Discretion Under Rule 5-702*, MD. APP. BLOG (June 29, 2023), <https://mdappblog.com/2023/06/29/abruquah-v-state-debates-abuse-of-discretion-under-rule-5-702/>.

<sup>22</sup> *Abruquah*, 483 Md. 637, 648.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 652.

<sup>26</sup> *Id.*

<sup>27</sup> See *Abruquah*, 483 Md. at 710 (Hotten, J., dissenting).

of those descriptions to a trial court's application of a newly adopted standard, such as that adopted by the *Rochkind* Court as applicable to the admissibility of expert testimony, is somewhat unfair. In this case, in the absence of additional case law from this Court implementing the newly adopted standard, the circuit court acted deliberately and thoughtfully in approaching, analyzing, and resolving the question before it. This Court's majority has come to a different conclusion concerning the outer bounds of what is acceptable expert evidence in this area.<sup>28</sup>

Footnote 5's juxtaposition of the apparently unfair "beyond the fringe of what the court deems minimally acceptable" with the apparently fair "outer bounds of what is acceptable" plays with semantics and tone but does not change the standard.<sup>29</sup> Requiring expert testimony to be "acceptable" or "minimally acceptable" is synonymous.<sup>30</sup> Likewise, there is no difference between requiring testimony not to exceed "the fringe" of acceptability as opposed to the "outer bounds" of acceptability.<sup>31</sup> While footnote 5 shows some unease, it does not change the abuse of discretion standard in any meaningful way.<sup>32</sup>

More startling was the Majority's holding that the trial court had to decide admissibility "in the absence of additional case law from this Court implementing the newly adopted standard."<sup>33</sup> While *Daubert* was "newly adopted" in Maryland and "this Court" has not created a large body of *Daubert* case law, *Daubert* preceded *Abruquah* by three decades.<sup>34</sup> There is a plethora of *Daubert* case law to guide trial courts, including cases on firearms-identification testimony.<sup>35</sup>

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<sup>28</sup> *Id.* at 652 n.5.

<sup>29</sup> *Id.* at 710 (internal quotation marks omitted).

<sup>30</sup> *Id.* (internal quotation marks omitted).

<sup>31</sup> *Id.* (internal quotation marks omitted).

<sup>32</sup> *Id.*

<sup>33</sup> *Abruquah*, 483 Md. at 652 n.5.

<sup>34</sup> *Id.*; see generally *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

<sup>35</sup> See *Abruquah*, 483 Md. at 713 (Gould, J., dissenting) ("To the contrary, there is no shortage of federal cases applying the *Daubert* factors[.]"). Likewise, several states have applied the *Daubert* abuse of discretion standard. *E.g.*, *Bunting v. Jamieson*, 984 P.2d 467 (Wyo. 1999); *Craddock v. Watson*, 475 S.E.2d 62 (W. Va 1996); *USGen New England, Inc. v. Town of Rockingham*, 862 A.2d 269, 271 (Vt. 2004); *Utah v. Schultz*, 58 P.3d 879 (Ut. 2002); *Texas v. Stovall*, 140 S.W.3d 712 (Tex. App. 2004); *Tennessee v. Stevens*, 78 S.W.3d 817 (Tenn. 2002); *South Dakota v. Machmuller*, 630 N.W.2d 495 (S.D. 2001); *DiPetrillo v. Dow Chem. Co.*, 729 A.2d 677 (R.I. 1999); *Christian v. Gray*, 65 P.3d 591 (Okla. 2003); *Lewis v. Alfa Laval Separation, Inc.*, 714 N.E.2d 426 (Ohio 1998); *Howerton v. Arai Helmet, Ltd.*, 597 S.E.2d 674 (2004), *superseded by statute*, N.C. GEN. STAT. ANN. § 8C-1, Rule 702 (West 2025); *New Mexico v. Paiz*, 149 P.3d 579 (N.M. 2006); *New*

The Majority’s decision thus invites confusion. The wisdom of adopting *Daubert* under *Rochkind* and ending two decades of “jurisprudential drift” was the legal clarity that it provided in the already complex and nuanced world of assessing the reliability and admissibility of expert testimony.<sup>36</sup> The *Rochkind* decision did not wipe the slate clean for a new generation of Maryland judges to re-invent Rule 5-702.<sup>37</sup> Rather, adopting *Daubert* gave Maryland a tried-and-true approach to expert admissibility that saves trial judges from having to make these important decisions “in the absence of additional caselaw.”<sup>38</sup> Fortunately, subsequent decisions applying *Rochkind* have returned to long-accepted articulations of the abuse of

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Jersey v. Olenowski, 304 A.3d 598 (N.J. 2023); New Hampshire v. Hungerford, 697 A.2d 916 (N.H. 1997); Nevada v. Repinec, 130 Nev. 1234 (2014); Nebraska v. Hill, 851 N.W.2d 670 (Neb. 2014); Montanna v. Bieber, 170 P.3d 444 (Mont. 2007); Missouri v. Addie, 655 S.W.3d 456 (Mo. Ct. App. 2022); Mississippi Transp. Comm’n v. McLemore, 863 So. 2d 31 (Miss. 2003); Danhoff v. Fahim, 15 N.W.3d 262 (Mich. 2024); Massachusetts v. Davis, 168 N.E.3d 294 (Mass. 2021); Maine v. MacDonald, 718 A.2d 195 (Me. 1998); LaBauve v. Louisiana Med. Mut. Ins. Co., 347 So. 3d 724 (La. 2022); Miller v. Eldridge, 146 S.W.3d 909 (Ky. 2004); Kansas v. Aguirre, 485 P.3d 576 (Kan. 2021); Iowa v. More, 880 N.W.2d 487 (Iowa 2016); Indiana v. West, 755 N.E.2d 173 (Ind. 2001); Idaho v. Trevino, 980 P.2d 552 (Idaho 1999); *In re Doe*, 981 P.2d 723 (Haw. Ct. App. 1999); Butler v. Union Carbide Corp., 712 S.E.2d 537 (Ga. Ct. App. 2011); Florida v. Miller, 379 So. 3d 1109, 1122 (Fla. 2024), *cert. denied sub nom.* Florida v. Miller, 145 S. Ct. 241 (2024); Pettus v. United States, 37 A.3d 213 (D.C. 2012); Gen. Motors Corp. v. Grenier, 981 A.2d 531 (Del. 2009); Connecticut v. Kirsch, 820 A.2d 236, 244 (Conn. 2003); Smith v. Belle Bonfils Mem’l Blood Ctr., 976 P.2d 344 (Colo. Ct. App. 1998); California v. Johnson, 23 Cal. Rptr. 2d 703 (Cal. Ct. App. 1993), McCullon v. Arkansas, 679 S.W.3d 358 (2023); Logerquist v. McVey, 1 P.3d 113, 124 (Ariz. 2000) ; Alaska v. Sharpe, 435 P.3d 887 (Alaska 2019); *Ex parte* George, 370 So. 3d 591 (Ala. 2021).

<sup>36</sup> *Rochkind v. Stevenson*, 471 Md. 1, 26 (2020).

<sup>37</sup> In *Rochkind*, the Supreme Court of Maryland acknowledged that adopting *Daubert* did not eliminate considering whether the expert relied upon generally accepted scientific principles:

*Frye* centered on whether scientific principles or discoveries were generally accepted . . . . Yet, using acceptance as the only measure of reliability presents a conundrum: a generally accepted methodology may produce ‘bad science’ and be admitted, while a methodology not yet accepted may be excluded, even if it produces ‘good science.’ General acceptance remains an important consideration in the reliability analysis, but it cannot remain the sole consideration.

*Id.* at 30 (citation omitted).

<sup>38</sup> *Abruquah*, 483 Md. at 712–13 (Gould, J., dissenting).

discretion standard,<sup>39</sup> thereby leaving *Abruquah* alone on its facts to create a rule against unqualified firearms.<sup>40</sup>

### C. *Oglesby v. Baltimore Schools Associates*

While the Supreme Court of Maryland's *Abruquah* decision narrowly found admitted testimony inadmissible as a matter of law,<sup>41</sup> the *Oglesby* decision unanimously found excluded testimony admissible as a matter of law.<sup>42</sup> There, the Court reversed the trial court's exclusion of expert testimony that lead-paint exposure at the defendant's property caused the plaintiff's injuries, including IQ loss.<sup>43</sup> In doing so, it also reversed the appellate court's decision that the trial court had acted within its broad discretion to exclude the opinions.<sup>44</sup> The unanimous Court held not only that the trial court had erroneously applied Rule 5-702 but that the excluded causation opinions—except those on IQ loss—were admissible as a matter of law.<sup>45</sup> It remanded for the trial court to decide admissibility of the IQ-loss opinions under correct application of Rule 5-702.<sup>46</sup>

For the *Oglesby* Court, the fundamental problem with the trial court's exclusion of expert testimony was its impermissible resolution of several disputed facts that supported the expert's opinion.<sup>47</sup> The problem was especially glaring because the trial court stated that it was resolving disputed factual issues that "normally could be presented to a jury."<sup>48</sup> The Court found that the trial court "did not explain what it meant, [or] identify what the incorrect information" and factual issues were.<sup>49</sup> The Court also emphasized that experts can rely on disputed facts that have a sufficient factual basis.<sup>50</sup> Further, although disputed, "there was more than an adequate supply of data and information" to support the excluded opinions.<sup>51</sup>

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<sup>39</sup> See, e.g., *Oglesby v. Balt. Sch. Assocs.*, 484 Md. 296 (2023); *Katz, Abosch, Windesheim, Gershman & Freedman, P.A., v. Parkway Neuroscience and Spine Institute, LLC.*, 485 Md. 335 (2023).

<sup>40</sup> See *Abruquah*, 483 Md. at 696.

<sup>41</sup> *Id.* at 695.

<sup>42</sup> *Oglesby*, 484 Md. at 305.

<sup>43</sup> *Id.* at 305–06.

<sup>44</sup> *Id.* at 305.

<sup>45</sup> *Id.* at 361–62.

<sup>46</sup> *Id.* at 362.

<sup>47</sup> *Oglesby*, 484 Md. at 304–05.

<sup>48</sup> *Id.* at 305 (internal quotation marks omitted).

<sup>49</sup> *Id.* at 331.

<sup>50</sup> *Id.* at 333.

<sup>51</sup> *Id.* at 340.

D. Katz, Abosch, Windesheim, Gershman & Freedman, P.A. v. Parkway Neuroscience & Spine Inst., LLC. (KatzAbosch)

The prior opinions set the stage for the Supreme Court of Maryland’s August 2023 *KatzAbosch* decision, where the Court addressed, for the third time in three months, the appropriate level of deference that appellate courts must show to trial judges making Rule 5-702 *Rochkind* decisions.<sup>52</sup> While the trial court had excluded the expert, the Appellate Court of Maryland reversed, finding the excluded opinions admissible as a matter of law.<sup>53</sup> The Supreme Court of Maryland vacated the appellate court’s decision and, while retaining its jurisdiction, remanded to the trial court to analyze admissibility without considering one of the factors it had originally weighed.<sup>54</sup> In doing so, it emphasized that the “case centers on the primacy—and boundaries—of methodological reliability in the *Daubert-Rochkind* analysis.”<sup>55</sup> A year later, after the trial court excluded the opinions again, the Court affirmed the exclusion.<sup>56</sup>

The *KatzAbosch* case involved a medical practice’s allegations of accounting malpractice that purportedly prompted a mass exodus of its members.<sup>57</sup> The medical practice proffered an accounting expert to use “the widely accepted ‘before-and-after’ method to” support its lost-profits claim.<sup>58</sup> While the trial court properly rejected the expert’s inputs as unreliable under *Rochkind*, its critique of the experts’ normalizing adjustments was improper, requiring the trial court to explain whether the opinions remained inadmissible without considering the normalizing adjustments.<sup>59</sup>

The *KatzAbosch* Court focused on the line that separates an expert’s reviewable methodology from the expert’s presumably unreviewable data.<sup>60</sup> It rejected a rigid approach, holding that “whether an expert’s methodology is sufficiently reliable to admit the expert’s testimony at trial will sometimes require a trial court to consider data and assumptions that the expert has employed in deciding threshold points relating to the methodology.”<sup>61</sup>

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<sup>52</sup> See generally Katz, Abosch, Windesheim, Gershman & Freedman, P.A. v. Parkway Neuroscience & Spine Inst., LLC., 485 Md. 335 (2023).

<sup>53</sup> *Id.* at 344.

<sup>54</sup> *Id.* at 345.

<sup>55</sup> *Id.* at 368.

<sup>56</sup> Katz, Abosch, Windesheim, Gershman & Freedman, P.A. v. Parkway Neuroscience & Spine Inst., LLC, 487 Md. 632, 635 (2024).

<sup>57</sup> *KatzAbosch*, 485 Md. at 343.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 345.

<sup>60</sup> *Id.* at 369.

<sup>61</sup> *Id.* at 376.

*KatzAbosch* also revealed an emerging pattern of judicial uncertainty in post-*Rochkind* decisions both applying Rule 5-702 at trial and in reviewing such decision for abuse of discretion. The Supreme Court of Maryland had reversed three decisions by the Appellate Court of Maryland applying the abuse of discretion standard, only doing so unanimously once.<sup>62</sup> This prompted Justice Booth to draft a concurrence, joined by Justice Gould, in *KatzAbosch*.<sup>63</sup> Within, Justice Booth suggested that the Court “reformulate the definition of our abuse of discretion standard in the context of appellate review of expert witness testimony admissibility determinations.”<sup>64</sup>

Justice Booth did not suggest departing from abuse of discretion, rather articulating “an abuse of discretion standard that is in line with the federal courts’ formulation and that reflects this Court’s current practice.”<sup>65</sup> She explained that, by adopting the *Daubert* standard “in full,” Maryland necessarily adopted “the federal courts’ application of the abuse of discretion standard.”<sup>66</sup>

The concurrence explained that Maryland has used the common formulation that “an abuse of discretion occurs when no reasonable person would take the view adopted by the circuit court or when a decision is well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable.”<sup>67</sup> However, the concurrence also argued that the deferential standard is context-sensitive.<sup>68</sup> An abuse of discretion review under *Daubert* “involves a more searching and careful examination of the records, data, studies, testimony, and trial court’s analysis of the same.”<sup>69</sup> After presenting several federal circuits’ articulation of the relevant standards, the concurrence concludes with its own proposed standard of review for Rule 5-702 rulings.<sup>70</sup> It urges the Court to clarify that a trial court abuses its discretion when it (1) applies the wrong law, (2) follows the wrong procedure, (3) bases its decision on clearly erroneous facts, (4) commits a clear error of judgment, or (5) abdicates its gatekeeping role altogether.<sup>71</sup>

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<sup>62</sup> *KatzAbosch*, 485 Md. at 385.

<sup>63</sup> *See id.* at 385 (Booth, J., concurring) (citing *State v. Matthews*, 479 Md. 278 (2022); *Abruquah v. State*, 483 Md. 637 (2023); *Oglesby v. Balt. Sch. Assocs.*, 484 Md. 296 (2023)).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 387.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 391 (internal quotation marks omitted).

<sup>68</sup> *KatzAbosch*, 485 Md. at 398.

<sup>69</sup> *Id.* at 400.

<sup>70</sup> *See id.* at 401–04 (referencing decisions by the First, Seventh, Tenth, and Eleventh Circuits).

<sup>71</sup> *Id.* at 406 (internal quotation marks and citations omitted).

### III. Conclusion

Adopting *Daubert* further clarified Maryland Rule 5-702 by keeping unreliable opinion testimony from jurors. Maryland courts and practitioners must now bear in mind that *Rochkind* did not wipe the slate clean. *Daubert* has existed for over thirty years, and federal and state courts nationwide have effectively applied its abuse of discretion standard. Maryland courts are no exception, having applied *Daubert* principles long before the *Rochkind* decision.<sup>72</sup> While the *Daubert* inquiry is often complex and fact-intensive, its gatekeeping role remains central to giving all parties a fair trial in civil and criminal cases.<sup>73</sup>

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<sup>72</sup> See, e.g., *Blackwell v. Wyeth*, 408 Md. 575 (2009).

<sup>73</sup> See Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV. 217, 219–24 (2006).

## ARTICLE

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### APPELLATE REVIEW OF *DAUBERT* RULINGS

By: Steven M. Klepper\*

The Supreme Court of Maryland adopted the federal *Daubert* standard for admission of expert testimony in 2020.<sup>1</sup> Given that *Daubert* rulings are discretionary, the abuse-of-discretion standard governs appellate review of expert testimony.<sup>2</sup> During the summer of 2023, the Supreme Court of Maryland issued three opinions holding that trial judges abused their discretion—at least in part—when they admitted or excluded expert testimony.<sup>3</sup> In the last of the three cases, Justice Brynja Booth authored a concurring opinion noting how the Court was applying less deference than in other discretionary contexts, and she urged her colleagues to clarify the nature of review.<sup>4</sup>

This article posits that *Daubert* errors fall into two main categories: procedural and substantive. Procedural errors occur when a trial court misunderstands an aspect of the *Daubert* framework.<sup>5</sup> In effect, the trial judge has misread Maryland Rule 5-702, which governs expert testimony.<sup>6</sup> A misreading of an evidentiary rule is a legal error that is reviewed de novo, meaning without deference.<sup>7</sup> Substantive error occurs when a trial judge follows the *Daubert* framework but reaches a result to which an appellate

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\* **Steven M. Klepper** chairs the appellate practice group at Kramon & Graham, P.A. He co-edits PAUL M. SANDLER, ANDREW D. LEVY & STEVEN M. KLEPPER, APPELLATE PRACTICE FOR THE MARYLAND LAWYER: STATE AND FEDERAL (6th ed. 2023). Steve founded the Maryland Appellate Blog in 2013 and has since served as the editor-in-chief. He co-founded the Cole-Davidson American Inn of Court and is its President-Elect. The Maryland State Bar Association’s Section of Litigation named him Litigator of the Year in 2024.

<sup>1</sup> *Rochkind v. Stevenson*, 471 Md. 1, 38 (2020) (“[W]e adopt the *Daubert* standard in Maryland because we find those factors persuasive in interpreting MARYLAND RULE 5-702.”).

<sup>2</sup> *State v. Matthews*, 479 Md. 278, 305 (2022).

<sup>3</sup> *Katz, Abosch, Windesheim, Gershman & Freedman, P.A. v. Parkway Neuroscience & Spine Inst., LLC*, 485 Md. 335, 384 (2023); *Oglesby v. Balt. Sch. Assocs.*, 484 Md. 296, 361–62 (2023); *Abruquah v. State*, 483 Md. 637, 698 (2023); see *infra* Part II. Although this article draws on my research and briefs from representing the *KatzAbosch* petitioners, I speak only for myself and not for any client or my firm.

<sup>4</sup> *KatzAbosch*, 485 Md. at 387 (Booth, J., concurring).

<sup>5</sup> See *infra* Section III.A.

<sup>6</sup> *Id.*; see also Harvey Brown, *Procedural Issues Under Daubert*, 36 HOUS. L. REV. 743, 1134 (1999).

<sup>7</sup> *Young v. State*, 234 Md. App. 720, 731 (2017).

courts cannot defer because either the trial judge has abused their<sup>8</sup> discretion in the traditional sense or the Supreme Court of Maryland has decided to draw a boundary circumscribing all trial judges' discretion.<sup>9</sup> Such vocabulary not only accurately describes the nature of judicial review but also reduces friction between trial judges and appellate courts.

## I. MARYLAND'S ADOPTION OF *DAUBERT*

### A. *The Pre-2020 Frye-Reed Regime*

From 1978 to 2020, Maryland courts applied the *Frye-Reed* standard for the admission of expert testimony.<sup>10</sup> Its name derived from the 1923 D.C. Circuit decision in *Frye v. United States*,<sup>11</sup> and the 1978 Supreme Court of Maryland decision in *Reed v. State*.<sup>12</sup> The standard required that “the basis of [an expert’s] opinion must be shown to be generally accepted as reliable within the . . . relevant scientific community.”<sup>13</sup>

Maryland’s *Frye-Reed* standard was the subject of “jurisprudential drift”<sup>14</sup> after the 1993 Supreme Court of the United States decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>15</sup> The *Daubert* Court held that “the *Frye* test was superseded by the adoption of the Federal Rules of Evidence” in 1975.<sup>16</sup> Rule 702 of the Federal Rules of Evidence, as originally adopted, provided: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or

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<sup>8</sup> I use the singular “they” as a pronoun encompassing all genders. The capitalized word “Court” refers to the Supreme Court of Maryland, and “Appellate Court” refers to the Appellate Court of Maryland. Effective December 14, 2022, the Court of Appeals of Maryland was renamed the Supreme Court of Maryland, and the Court of Special Appeals was renamed the Appellate Court of Maryland. Like those courts, I use the current names retroactively, but I use the title “Justice” only for jurists who held that title during active service after the 2022 amendment took effect. See *A Conversation with The Honorable Chief Justice Matthew J. Fader, Supreme Court of Maryland*, in PAUL M. SANDLER, ANDREW D. LEVY & STEVEN M. KLEPPER, *APPELLATE PRACTICE FOR THE MARYLAND LAWYER: STATE AND FEDERAL* 23, 24–25 (6th ed. 2023).

<sup>9</sup> See *infra* Section III.B.

<sup>10</sup> *Rochkind v. Stevenson*, 471 Md. 1, 4 (2020).

<sup>11</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

<sup>12</sup> *Reed v. State*, 283 Md. 374 (1978).

<sup>13</sup> *Rochkind*, 471 Md. at 4 (quoting *Reed*, 283 Md. at 381).

<sup>14</sup> *Id.* at 5 (quoting *Savage v. State*, 455 Md. 138, 187 (Adkins, J., concurring)).

<sup>15</sup> See generally *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

<sup>16</sup> *Id.* at 587; see also *Act to Establish Rules of Evidence*, Pub. L. No. 93–595, 88 Stat. 1926 (1975).

otherwise.”<sup>17</sup> The *Daubert* Court held that the “austere [general acceptance] standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials.”<sup>18</sup>

In place of *Frye*’s standard, the *Daubert* decision “provided a list of flexible factors to help courts determine the reliability of expert testimony.”<sup>19</sup> While “[a] supermajority of states followed the Supreme Court’s lead and replaced their respective *Frye* standards with the *Daubert* standard[,]” Maryland did not.<sup>20</sup>

Although Maryland did not adopt the *Daubert* standard, the “*Frye-Reed* standard announced in 1978 slowly morphed into a ‘*Frye-Reed Plus*’ standard, implicitly and explicitly relying on and adopting several *Daubert* principles.”<sup>21</sup> In 1994, one year after the *Daubert* decision, the Supreme Court of Maryland adopted Maryland Rule 5-702, which provided:

Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.<sup>22</sup>

When adopting Rule 5-702, the Court “blessed a Committee Note that stated that Rule 5-702 was not intended to overrule *Reed* or other cases adopting the *Frye* standard, and that the ‘required scientific foundation for the admission of novel scientific techniques or principles is left to development through case law.’”<sup>23</sup>

Nevertheless, Maryland incorporated several key *Daubert* principles through case law.<sup>24</sup> For example, the 2009 decision in *Blackwell v. Wyeth* affirmed the exclusion of expert testimony about the supposed “relationship

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<sup>17</sup> *Daubert*, 509 U.S. at 588 (quoting FED. R. EVID. 702 (1975) (amended 2000)).

<sup>18</sup> *Id.* at 589.

<sup>19</sup> *Rochkind v. Stevenson*, 471 Md. 1, 5 (2020).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 21 (quoting MD. RULE 5-702 (1994) (amended 2021)).

<sup>23</sup> *Id.* at 21–22 (quoting MD. RULE 5-702 advisory committee’s note to 1994 amendment) (citing *Burrall v. State*, 352 Md. 707, 738 (1999)).

<sup>24</sup> See generally *Blackwell v. Wyeth*, 408 Md. 575 (2009); see also *Savage v. State*, 455 Md. 138 (2017).

between thimerosal and autism[.]”<sup>25</sup> holding that a “court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.”<sup>26</sup> To avoid “an analytical gap[.]” the *Blackwell* decision required both a generally accepted methodology *and* analysis.<sup>27</sup>

The *Blackwell* decision applied three appellate-review standards to the trial judge’s evidentiary rulings. First, the clear error review to the trial judge’s factual findings on the factual predicates for the expert’s testimony.<sup>28</sup> Second, the Court applied de novo review to the *Frye-Reed* determination “that neither the genetic susceptibility theory nor the tests used to determine if [plaintiffs’ son’s] autism was due to genetic susceptibility were generally accepted in the relevant scientific field.”<sup>29</sup> Finally, the Court applied the abuse-of-discretion review to the Rule 5-702, finding that the experts’ “fields of expertise were not relevant to the specific bodies of science that purport to maintain generally acceptable scientific methods and analyses related to autism and its causes.”<sup>30</sup>

In an influential 2017 concurrence in *Savage v. State*, Judge Sally Adkins urged the outright adoption of the *Daubert* standard in place of *Frye-Reed*.<sup>31</sup> She observed that under *Blackwell*’s “analytical gap” holding, “a trial court may have to analyze the reliability of an expert’s methodology twice—once under *Frye-Reed* and again under Maryland Rule 5-702(3).”<sup>32</sup> Instead, “adopting the *Daubert* approach and confining our evaluation of scientific expert testimony to the requirements of Rule 5-702 would eliminate this repetition.”<sup>33</sup>

### B. *The Rochkind Decision’s Embrace of Daubert*

In 2020, after Judge Adkins retired, the Court accepted her invitation to adopt the *Daubert* standard.<sup>34</sup> The appeal in *Rochkind v. Stevenson* addressed a judgment against a landlord for a child’s alleged injuries from exposure to lead paint.<sup>35</sup> After the Appellate Court rejected the landlord’s challenges to the plaintiff’s expert’s testimony on causation, the Supreme

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<sup>25</sup> *Blackwell*, 408 Md. at 604.

<sup>26</sup> *Id.* at 606 (internal citations omitted).

<sup>27</sup> *Id.* at 608 (“Generally, accepted methodology, therefore, must be coupled with generally accepted analysis in order to avoid the pitfalls of an ‘analytical gap.’”).

<sup>28</sup> *Id.* at 611.

<sup>29</sup> *Id.* at 611–12.

<sup>30</sup> *Id.* at 630.

<sup>31</sup> *Savage v. State*, 455 Md. 138, 184–85 (2017) (Adkins, J., concurring).

<sup>32</sup> *Id.* at 184.

<sup>33</sup> *Id.*

<sup>34</sup> *Rochkind v. Stevenson*, 471 Md. 1, 30 (2020).

<sup>35</sup> *See id.* at 5–10.

Court of Maryland granted the landlord's petition for a writ of certiorari to consider whether to adopt the *Daubert* standard.<sup>36</sup> Crediting Judge Adkins for "blaz[ing] the trail," Judge Joseph Getty's opinion for the Court "implement[ed] a single standard by which courts evaluate all expert testimony: *Daubert*."<sup>37</sup> In doing so, the *Rochkind* decision aligned Maryland with "the supermajority of sister states and the federal courts[.]"<sup>38</sup>

Quoting at length a federal decision by Judge Paul Grimm of the U.S. District Court of Maryland, *Rochkind* held that under "the parties and the trial court are forced to reckon with the factors that really do determine whether the evidence is reliable, relevant and 'fits' the case at issue."<sup>39</sup> *Frye-Reed*'s primary "shortcoming" was "that it excused the court from even having to try to understand the evidence at issue."<sup>40</sup> Under *Frye-Reed*, a "court 'only had to assure itself that among the people involved in the field, the technique was acceptable as reliable.'"<sup>41</sup>

The Court gave a non-exhaustive list of ten factors—five from the original *Daubert* opinion and five from later authority—for interpreting and applying Rule 5-702:

- (1) whether a theory or technique can be (and has been) tested;
- (2) whether a theory or technique has been subjected to peer review and publication;
- (3) whether a particular scientific technique has a known or potential rate of error;
- (4) the existence and maintenance of standards and controls; .
- . .
- (5) whether a theory or technique is generally accepted[;] . . .
- (6) whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying;
- (7) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;
- (8) whether the expert has adequately accounted for obvious alternative explanations;

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<sup>36</sup> *Id.* at 10.

<sup>37</sup> *Id.* at 26, 30.

<sup>38</sup> *Id.* at 30.

<sup>39</sup> *Id.* at 31 (quoting *United States v. Horn*, 185 F. Supp. 2d 530, 553 (D. Md. 2002)).

<sup>40</sup> *Rochkind*, 471 Md. at 31 (quoting *Horn*, 185 F. Supp. at 553).

<sup>41</sup> *Id.* at 31–32 (quoting *Horn*, 185 F. Supp. at 553).

- (9) whether the expert is being as careful as [they] would be in [their] regular professional work outside [their] paid litigation consulting; and
- (10) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.<sup>42</sup>

Turning to the standard of appellate review, *Rochkind* held that the shift to *Daubert* would confine all appellate review of the exclusion and admission of expert testimony to an abuse of discretion standard, leaving behind the “separate, and potentially outcome determinative, standards of review—de novo for *Frye-Reed* and abuse of discretion for Rule 5-702[.]”<sup>43</sup>

The majority in *Rochkind* was slim, with a notable split between judges who had served as trial judges under the *Frye-Reed* regime and judges who had not.<sup>44</sup> The four-member majority was appointed to the court directly

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<sup>42</sup> *Id.* at 35–36 (quoting FED. R. EVID. 702 advisory committee’s note to 2000 amendment) (pronouns modified).

<sup>43</sup> *Id.* at 37 (emphasis omitted).

<sup>44</sup> Judge Robert McDonald, Justice Brynja Booth, and Justice Jonathan Biran joined Chief Judge Joseph Getty’s majority opinion, whereas Justice Michele Hotten and Judge Clayton Greene joined Justice Shirley Watts’s dissent. *Compare Rochkind*, 471 Md. at 4, with *Rochkind*, 471 Md. at 39 (Watts, J., dissenting). Judges serving on Maryland’s highest court are now referred to as Justice because of the Court of Appeals’ transformation into the Supreme Court of Maryland in 2022. Ali Mahdi, *Election Day was a “Namechanger”*: *Voters Successfully Rename Maryland’s Appellate Courts*, U. BALT. L. F. BLOG (Nov. 13, 2022), <https://ublawforum.com/2022/11/13/election-day-was-a-namechanger-voters-successfully-rename-marylands-appellate-courts/>.

from private practice or government service, without serving as trial judges.<sup>45</sup> All three dissenters were former trial judges in Maryland.<sup>46</sup>

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<sup>45</sup> Chief Judge Joseph Getty was a dedicated public servant in Maryland before he was appointed to the Maryland Court of Appeals on June 27, 2016. *See Appointments by Governor, 1996–2004*, MD. MANUAL ON-LINE (July 31, 2024), <https://msa.maryland.gov/msa/mdmanual/29ap/html/apappoint.html>. Chief Judge Getty served as the Governor’s Chief Legislative Officer directly before his appointment. *Joseph M. Getty*, MD. MANUAL ON-LINE (Nov. 6, 2024), <https://msa.maryland.gov/msa/mdmanual/29ap/former/html/msa12229.html>. He also represented Marylanders in the General Assembly’s House of Delegates—1995 to 2003—and Senate—2011 to 2015. *Id.*

Justice Jonathan Biran was appointed to the Maryland Court of Appeals on December 6, 2019. *See Appointments by Governor, 1996–2004*, MD. MANUAL ON-LINE (July 31, 2024), <https://msa.maryland.gov/msa/mdmanual/29ap/html/apappoint.html>. Before Justice Biran was a shareholder at Baker Donelson—2018 to 2019—and a partner at Rifkin Weiner Livingston LLC—2018—and Biran Kelly LLC—2013 to 2017—Justice Biran was an Assistant U.S. Attorney for the District of Connecticut—2000 to 2006—and District of Maryland—2006 to 2013. *Jonathon Biran*, MD. MANUAL ON-LINE (Apr. 11, 2025), <https://msa.maryland.gov/msa/mdmanual/29ap/html/msa18245.html>.

Justice Brynja Booth was appointed to the Maryland Court of Appeals on March 12, 2019. *See Appointments by Governor, 1996–2004*, MD. MANUAL ON-LINE (July 31, 2024), <https://msa.maryland.gov/msa/mdmanual/29ap/html/apappoint.html>. Before Justice Booth founded and practiced at Booth, Booth, Cropper & Marriner—2015 to 2019—she practiced at Cowdrey, Thompson & Karsten, P.C.—1997 to 2015. *Brynja McDivitt Booth*, MD. MANUAL ON-LINE (Oct. 16, 2024), <https://msa.maryland.gov/msa/mdmanual/29ap/html/msa18104.html>.

Judge Robert McDonald was appointed to the Maryland Court of Appeals on January 24, 2012. *See Appointments by Governor, 1996–2004*, MD. MANUAL ON-LINE (July 31, 2024), <https://msa.maryland.gov/msa/mdmanual/29ap/html/apappoint.html>. Judge McDonald was an associate at Foley, Hoag & Eliot—1978 to 1979—prior to serving as an Assistant U.S. Attorney for the District of Maryland—1980 to 1988—and working for Maryland’s Office of Attorney General—1989 to 2012. *Robert N. McDonald*, MD. MANUAL ON-LINE (Nov. 6, 2024), <https://msa.maryland.gov/msa/mdmanual/29ap/former/html/msa11507.html>.

<sup>46</sup> Judge Clayton Greene, Jr. was appointed to the Maryland Court of Appeals on January 22, 2004. *See Appointments by Governor, 1996–2004*, MD. MANUAL ON-LINE (July 31, 2024), <https://msa.maryland.gov/msa/mdmanual/29ap/html/apappoint.html>. Judge Greene was an assistant county solicitor—1977 to 1978—prior to serving as an Assistant Public Defender—1978 to 1985—and Deputy Public Defender for Anne Arundel County—1985 to 1988. *Clayton Greene, Jr.*, MD. MANUAL ON-LINE (Oct. 4, 2024), <https://msa.maryland.gov/msa/mdmanual/29ap/former/html/msa12365.html>. Judge Greene was then appointed to the state bench in 1990 as an Administrative Judge in the District Court of Maryland, District 7, Anne Arundel County and to the Circuit Court for Anne Arundel County before serving on the Maryland Court of Appeals. *Id.*

Justice Michele D. Hotten was appointed to the Maryland Court of Appeals on December 1, 2015. *See Appointments by Governor, 1996–2004*, MD. MANUAL ON-LINE (July 31,

C. *The First Post-Rochkind Decisions*

Remanding for the trial court to apply the *Daubert* standard to the causation expert's testimony, the *Rochkind* Court held that its decision also applied to "any other cases that are pending on direct appeal when this opinion is filed, where the relevant question has been preserved for appellate review."<sup>47</sup>

The first post-*Rochkind* case involving an expert ruling, *Frankel v. Deane*, only tangentially addressed the *Daubert* standard.<sup>48</sup> Four months before *Rochkind*, the trial court held a *Frye-Reed* hearing in a medical malpractice case.<sup>49</sup> There, the court excluded the plaintiff's expert, resulting in the entry of summary judgment, because the opinion was "based primarily on his examination of Plaintiff almost two years after the fact, and on the Plaintiff's shaky, uncertain self-reporting to him . . . without him having reviewed the professionally detailed notes and records" of the treating physicians.<sup>50</sup> Justice Steven Gould's opinion for the Court held that the trial court exceeded its Rule 5-702 role because the treating physicians' notes "were disputed in multiple material respects by their patient," and the "conflicting evidence on these issues teed up a classic credibility contest for

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2024), <https://msa.maryland.gov/msa/mdmanual/29ap/html/apappoint.html>. Justice Hotten started as an Assistant State's Attorney for Prince George's County and then worked as associate at Farrington, Smallwood, Wells & Wyrough—1989 to 1992—before working as a solo practitioner—1992 to 1994—while serving in several part-time roles. *Michele D. Hotten*, MD. MANUAL ON-LINE (July 8, 2024), <https://msa.maryland.gov/msa/mdmanual/29ap/former/html/msa12366.html>. Thereafter, Justice Watts was appointed as an Associate Judge for the District Court of Maryland, District 5, Prince George's County in 1994, the Circuit Court for Prince George's County in 1995, and the Maryland Court of Special Appeals in 2010 before serving on the Maryland Court of Appeals. *Id.*

Justice Shirley M. Watts was appointed to the Maryland Court of Appeals on July 3, 2013. *See Appointments by Governor, 1996–2004*, MD. MANUAL ON-LINE (July 31, 2024), <https://msa.maryland.gov/msa/mdmanual/29ap/html/apappoint.html>. Justice Watts began as an Assistant State's Attorney—1984 to 1988—before becoming an Assistant Federal Public Defender—1990 to 1994—and a Supervisory Assistant Federal Public Defender in the District of Maryland. *Shirley M. Watts*, MD. MANUAL ON-LINE (Oct. 16, 2024), <https://msa.maryland.gov/msa/mdmanual/29ap/html/msa13752.html>. After working for the Social Security Administration in California and Pennsylvania, Justice Watts was appointed to the Circuit Court of Baltimore City in 2002 and the Court of Special Appeals in 2011 before serving on the Maryland Court of Appeals. *Id.*

<sup>47</sup> *Rochkind v. Stevenson*, 471 Md. 1, 38–39 (2020) (quoting *Kazadi v. State*, 467 Md. 1, 47 (2020)) (internal quotation marks omitted).

<sup>48</sup> *See generally Frankel v. Deane*, 480 Md. 682 (2022).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 696.

the jury—not the court—to resolve.”<sup>51</sup> Remanding for a *Daubert* hearing, the Court further held that in “light of the nature and extent of the factual and credibility findings made by the trial judge that granted summary judgment and to avoid any *appearance* of partiality going forward, this case should be assigned to a different judge for all further proceedings.”<sup>52</sup> Justice Shirley Watts, who authored the *Rochkind* dissent, dissented in part in *Frankel*.<sup>53</sup> She agreed that the trial court erred but believed that a *Daubert* hearing was unnecessary because the Court’s decision resolved all challenges the defendants had preserved for review.<sup>54</sup>

The appeal in *State v. Matthews* was “the first opportunity for [the Court] to address, post-*Rochkind*, whether a trial court erred in deciding the admissibility of expert testimony.”<sup>55</sup> In a murder trial, the circuit court admitted testimony from a Federal Bureau of Investigation (“FBI”) scientist who was part of a team that used reverse projection photogrammetry to estimate a suspected shooter’s probable height, “plus or minus two-thirds of an inch,” from a home surveillance video.<sup>56</sup> The FBI’s report identified several variables that could cause “the degree of uncertainty in this measurement [to] be significantly greater.”<sup>57</sup> At the pretrial *Daubert* hearing, the FBI scientist noted that those variables included “the subject to camera distance, the resolution of the imagery, the unevenness of the landscape, and the body position of the subject.”<sup>58</sup> The FBI scientist testified: “I don’t have a scientific way of quantifying how those dimensions had an effect on my measurement and consequently I wanted in an abundance of caution to mention them.”<sup>59</sup> The Appellate Court of Maryland held that the trial court abused its discretion in admitting the testimony because the FBI failed to analyze the effect of the immeasurable variables, yielding an unreliable, deficient height calculation.<sup>60</sup>

Holding that the trial court acted within its broad discretion in admitting the testimony, the Supreme Court of Maryland began its analysis by reciting the general test for abuse of discretion.<sup>61</sup> Reversal requires that “the trial court’s decision must be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court

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<sup>51</sup> *Id.* at 704.

<sup>52</sup> *Id.* at 714–15.

<sup>53</sup> *Id.* at 715–16 (Watts, J. dissenting).

<sup>54</sup> *Frankel*, 480 Md. at 715–16.

<sup>55</sup> *State v. Matthews*, 479 Md. 278, 284 (2022).

<sup>56</sup> *Id.* at 285.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 292.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 304 (citing *Matthews v. State*, 249 Md. App. 509, 543–44 (2021)).

<sup>61</sup> *Matthews*, 479 Md. at 305.

deems minimally acceptable.”<sup>62</sup> There was “no dispute that [the] methodology was reliable[,]” and there was no “analytical gap in her proffered testimony.”<sup>63</sup> Thus, “[t]he unknown degree of uncertainty concerning the accuracy of [the] height estimate went to the weight the jury should give to the expert testimony, not to its admissibility.”<sup>64</sup>

The Court stressed that “it is the rare case in which a Maryland trial court’s exercise of discretion to admit or deny expert testimony will be overturned[,]” and that *Matthews* was “not one of those cases.”<sup>65</sup> Again dissenting, Justice Watts would have reversed the admission of the FBI scientist’s expert testimony.<sup>66</sup> As to the “rare case” language in the majority’s opinion, Justice Watts noted that whether “this prediction will prove to be accurate remains to be seen.”<sup>67</sup>

## II. THREE “RARE CASES” OF ABUSES OF DISCRETION IN ONE TERM

In the fourteen months after *Matthews*, the Supreme Court of Maryland decided three important *Daubert* appeals.<sup>68</sup> Straining the “rare case” prediction, the Court held in all three cases that the trial court abused its discretion at least in part.<sup>69</sup>

### A. *The Abruquah Decision (Firearm Identification)*

In *Abruquah v. State*, the Supreme Court of Maryland held that the trial court abused its discretion by allowing a ballistics expert to offer an unqualified opinion tracing bullets to a specific firearm.<sup>70</sup> The Court explained that “[f]irearms identification, a subset of toolmark identification, is ‘the practice of investigating whether a bullet, cartridge case or other ammunition component or fragment can be traced to a particular suspect weapon.’”<sup>71</sup> In *Abruquah*, the police recovered two guns, including a Taurus

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<sup>62</sup> *Id.* (internal citations omitted).

<sup>63</sup> *Id.* at 313.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 286, 306 (“Post-*Rochkind*, it is still the rare case in which a Maryland trial court’s exercise of discretion to admit or deny expert testimony will be overturned.”).

<sup>66</sup> *Id.* at 327 (Watts, J., dissenting).

<sup>67</sup> *Matthews*, 479 Md. at 327 (Watts, J., dissenting).

<sup>68</sup> *Katz, Abosch, Windesheim, Gershman & Freedman, P.A. v. Parkway Neuroscience & Spine Inst., LLC*, 485 Md. 335, 384 (2023); *Oglesby v. Balt. Sch. Assocs.*, 484 Md. 296, 361–62 (2023); *Abruquah v. State*, 483 Md. 637, 698 (2023).

<sup>69</sup> *KatzAbosch*, 485 Md. at 384; *Oglesby*, 484 Md. at 361–62; *Abruquah*, 483 Md. at 698.

<sup>70</sup> *Abruquah*, 483 Md. 637, 648.

<sup>71</sup> *Id.* at 647–48 (quoting *Fleming v. State*, 194 Md. App. 76, 100–01 (2010)).

.38 Special, from a murder suspect's home.<sup>72</sup> Over objection, the trial court allowed a county police firearms examiner, Scott McVeigh, to testify that the Taurus revolver had fired the "four bullets and one bullet fragment recovered from the crime scene . . . ." <sup>73</sup> The trial in *Abruquah* took place before *Rochkind* but was remanded for reconsideration under the *Daubert* standard.<sup>74</sup> Ultimately, the trial court held an evidentiary hearing and again found the testimony admissible under *Rochkind*'s ten factors.<sup>75</sup>

The Court granted review, before the Appellate Court of Maryland heard the appeal, "to address whether the firearms identification methodology . . . is sufficiently reliable to allow a firearms examiner, without any qualification, to identify a specific firearm as the source of a questioned bullet or cartridge case found at a crime scene."<sup>76</sup> By a four-to-three majority, the Court, in an opinion by Chief Justice Matthew Fader, reversed the trial court's *Daubert* ruling.<sup>77</sup> The Association of Firearm and Tool Mark Examiners' Theory of Identification ("AFTE Theory") was long "accepted by law enforcement organizations and courts without significant challenge," but "the advent of *Daubert*, work exposing the unreliability of other previously accepted forensic techniques, and recent reports questioning the foundations underlying firearms identification have led to greater skepticism."<sup>78</sup> In a 2009 report, the National Research Council of the National Academies of Science "criticized the AFTE Theory," based on "lacking specificity in its protocols; producing results that are not shown to be accurate, repeatable, and reproducible; lacking databases and imaging that could improve the method; having deficiencies in proficiency training; and requiring examiners to offer opinions based on their own experiences without articulated standards."<sup>79</sup> Similarly, a 2016 report by the President's Council of Advisors on Science and Technology "described the AFTE Theory as a 'circular' method that lacks 'foundational validity' because appropriate studies had not confirmed its accuracy, repeatability, and

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<sup>72</sup> *Id.* at 649.

<sup>73</sup> *Id.* at 651.

<sup>74</sup> *Id.*

<sup>75</sup> *Abruquah*, 483 Md. at 651.

<sup>76</sup> *Id.* at 652.

<sup>77</sup> *Id.* at 698.

<sup>78</sup> *Id.* at 662.

<sup>79</sup> *Id.* at 663–64.

reproducibility.”<sup>80</sup> Following these reports, courts, including Maryland federal courts, began restricting AFTE Theory testimony.<sup>81</sup>

The Court’s opinion noted that Judge Grimm, from whom the court had quoted extensively in *Rochkind*,<sup>82</sup> made a 2018 oral ruling involving the same ballistics expert, Scott McVeigh.<sup>83</sup> Judge Grimm, surveying the known flaws in firearms identification, permitted Mr. McVeigh to testify “only ‘that the marks that were produced by the . . . cartridges are consistent with the marks that were found on the’ recovered firearm” but “precluded him from offering any opinion that the cartridges ‘were fired by the same gun’ or expressing ‘any confidence level’ in his opinion.”<sup>84</sup> Other courts have further limited the scope of firearm identification testimony due to the uncertainty.<sup>85</sup>

Consistent with these persuasive authorities, the *Abruquah* Court held that “the methodology of firearms identification presented to the circuit court did not provide a reliable basis for Mr. McVeigh’s unqualified opinion that four bullets and one bullet fragment found at the crime scene in this case were fired from [the] Taurus revolver.”<sup>86</sup> The Court identified “an analytical gap between the type of opinion firearms identification can reliably support and the opinion Mr. McVeigh offered.”<sup>87</sup>

Justice Michele Hotten penned one of two dissenting opinions in *Abruquah*.<sup>88</sup> She noted that the trial court’s decision to allow Mr.

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<sup>80</sup> *Id.* at 665 (quoting EXECUTIVE OFFICE OF THE PRESIDENT, PRESIDENT’S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY, REPORT TO THE PRESIDENT, FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS 60, 104–05 (2016), [https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast\\_forensic\\_science\\_report\\_final.pdf](https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf) [<https://perma.cc/3QWJ-2DG>]).

<sup>81</sup> *Abruquah*, 483 Md. at 678–79 (citing *United States v. Willock*, 696 F. Supp. 2d 536, 572, 574 (D. Md. 2010); *United States v. Taylor*, 663 F. Supp. 2d 1170, 1180 (D.N.M. 2009); *United States v. Glynn*, 578 F. Supp. 2d 567, 574–75 (S.D.N.Y. 2008); *Gardner v. United States*, 140 A.3d 1172, 1183 (D.C. 2016); *Commonwealth v. Pytou Heang*, 942 N.E.2d 927, 938 (Mass. 2011)).

<sup>82</sup> *Rochkind v. Stevenson*, 471 Md. 1, 31, 38 (2020) (quoting *Horn*, 185 F. Supp. 2d at 553–55).

<sup>83</sup> *Abruquah*, 483 Md. at 679.

<sup>84</sup> *Id.* (alteration in original) (quoting Tr. Mot. Hg., *United States v. Medley*, No. PWG-17-242, 119 (D. Md. Apr. 24, 2018), [ecf.mdd.uscourts.gov/doc1/09319506173](http://ecf.mdd.uscourts.gov/doc1/09319506173)).

<sup>85</sup> *Id.* (citing *United States v. Adams*, 444 F. Supp. 3d 1248, 1256, 1261, 1267 (D. Or. 2020); *United States v. Shipp*, 422 F. Supp. 3d 762, 783 (E.D.N.Y. 2019); *Williams v. United States*, 210 A.3d 734, 744 (D.C. 2019)).

<sup>86</sup> *Id.* at 696.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 699 (Hotten, J., dissenting).

McVeigh’s testimony aligned with *Rochkind*’s procedure.<sup>89</sup> Justice Hotten asserted that the majority appeared “to conflate the role of the trial judge as gatekeepers, with the evaluation of the science or the expert opinion that is presented for consideration of its admissibility by the judge.”<sup>90</sup> Joining in that dissent was Justice Angela Eaves, who was elevated to the Court in 2022 after serving as a trial judge for twenty-two years.<sup>91</sup>

Justice Gould issued a separate dissent asserting that the Majority had abandoned the abuse-of-discretion standard:

[T]he Majority simply disagrees with the trial court’s application of the *Daubert* factors and its interpretation of the evidence—a classic de novo review. If the abuse of discretion standard is not appropriate here, then we should reconsider whether that standard is appropriate for reviewing *Daubert* decisions. But we do not serve well the parties and trial judges who apply our decisions if we inconsistently apply the standards of review to a trial court’s discretionary ruling.<sup>92</sup>

#### B. *The Oglesby Decision (Lead Paint)*

Unlike *Abruquah*, the Supreme Court of Maryland was unanimous in *Oglesby v. Baltimore School Associates*.<sup>93</sup> Justice Watts authored the *Oglesby* opinion after dissenting in *Rochkind*, *Frankel*, and *Matthews*, and joining the *Abruquah* majority.<sup>94</sup>

*Oglesby* addressed the admissibility of expert testimony from a pediatrician, Dr. Steven Caplan, in a case alleging injury from childhood exposure to lead paint.<sup>95</sup> There, Dr. Caplan’s expert testimony provided that plaintiff’s “likely exposure to lead at the [defendant’s] property was a

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<sup>89</sup> *Abruquah*, 483 Md. at 709.

<sup>90</sup> *Id.* at 710.

<sup>91</sup> Justice Angela M. Eaves began her judicial career in 2000 when she became an Associate Judge for the District Court of Maryland, District 9, Hartford County. *Angela M. Eaves*, MD. MANUAL ON-LINE (Dec. 3, 2024), <https://msa.maryland.gov/msa/mdmanual/29ap/html/msa13120.html>. In 2007, Justice Eaves became an Associate Judge for the Hartford County Circuit Court. *Id.* From 2015 to 2022, Justice Eaves served as the Hartford County Circuit Court Administrative Judge. *Id.* With over two decades of experience, Justice Eaves was appointed to Court of Appeals on February 17, 2022. *See Appointments by Governor, 1996–2004*, MD. MANUAL ON-LINE (July 31, 2024), <https://msa.maryland.gov/msa/mdmanual/29ap/html/apappoint.html>.

<sup>92</sup> *Abruquah*, 483 Md. at 713 (Gould, J., dissenting).

<sup>93</sup> *Oglesby v. Balt. Sch. Assocs.*, 484 Md. 296, 296 (2023).

<sup>94</sup> *Id.* at 302.

<sup>95</sup> *Id.* at 303.

significant contributing factor to bringing about [plaintiff’s] cognitive deficiencies and impairments . . . and to a loss of approximately 3 to 4 IQ points.”<sup>96</sup> The trial court had held a *Frye-Reed* hearing in 2020 shortly before *Rochkind* was decided.<sup>97</sup> In a difficult-to-follow series of oral rulings, the trial court found that Dr. Caplan’s opinion lacked a sufficient factual basis to be reliable.<sup>98</sup> The Appellate Court of Maryland affirmed, holding that “the disputed nature of the evidence regarding the presence of lead in [the apartment], the disputed nature of the evidence regarding [plaintiff’s] exposure to peeling paint, and the disputed nature of the evidence regarding any injury suffered as a result” led to its decision.<sup>99</sup>

Reversing, the Supreme Court of Maryland held that the plaintiff had “produced more than sufficient evidence that lead was present in the building . . . , that she was exposed to lead-based paint at the property, and that the property was a source of her elevated [blood lead levels]’s opinions.”<sup>100</sup> The Court held that “[c]ausation in lead-based paint cases may be proven by showing that the defendant’s negligence was a ‘substantial factor’ in causing the plaintiff’s injury.”<sup>101</sup> Notably, the substantial-factor test did not require Dr. Caplan to rule out exposure at other properties.<sup>102</sup> Credibility of contested testimony about lead-paint exposure at other properties was “a matter for the trier of fact to determine, not the circuit court in ruling on the motion to preclude.”<sup>103</sup> The Court held that “given the large quantity of data that he had available and reviewed and the nature of the challenge to the admissibility of his testimony, a remand for further proceedings as to Dr. Caplan’s opinion that [plaintiff’s] exposure to lead at the property was a substantial contributing factor to her injuries (other than IQ loss) is not warranted.”<sup>104</sup> In other words, no *Rochkind* hearing was necessary on this aspect of Dr. Caplan’s testimony because it would have been an abuse of discretion for the trial court to sustain the defendant’s objection.

Still, remand was necessary for a *Daubert* hearing on Dr. Caplan’s testimony about plaintiff’s IQ loss.<sup>105</sup> Dr. Caplan relied on two studies, and under established law, an expert could rely on one of them to “offer an

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<sup>96</sup> *Id.* at 304.

<sup>97</sup> *Id.* at 319.

<sup>98</sup> *Id.* at 319–23.

<sup>99</sup> *Oglesby*, 484 Md. at 324 (quoting *Oglesby v. Balt. Sch. Assocs.*, No. CSA-REG-0130-2021, 2022 WL 3211044, at \*8 (App. Ct. Md. Aug. 9, 2022)).

<sup>100</sup> *Id.* at 333–34.

<sup>101</sup> *Id.* at 334.

<sup>102</sup> *Id.* at 341.

<sup>103</sup> *Id.* at 343.

<sup>104</sup> *Id.* at 347.

<sup>105</sup> *Oglesby*, 484 Md. at 358.

opinion that exposure to lead resulted in a specific loss of IQ points.”<sup>106</sup> But “neither Dr. Caplan’s report nor his deposition testimony fully explains the basis for his calculations under either study.”<sup>107</sup> A *Daubert* hearing was appropriate “to assess Dr. Caplan’s use of the studies and the reliability of his methodology” on that issue.<sup>108</sup> Like *Frankel*, the Court concluded that “in light of the findings made by the trial judge in ruling on the motions, this case should be assigned to a different trial judge for all further proceedings.”<sup>109</sup>

### C. *The KatzAbosch Decision (Lost Profits)*

The appeal in *Katz, Abosch, Windesheim, Gershman & Freedman, P.A. v. Parkway Neuroscience & Spine Institute, LLC*, produced four opinions: Justice Biran’s opinion for the Court, a concurring opinion by Justice Booth, a partial dissent by Justice Gould, and a dissent by Justice Watts.<sup>110</sup>

A medical practice sued an accounting firm for alleged malpractice.<sup>111</sup> Without reaching the merits of the allegations of accounting malpractice, the trial court excluded the medical practice’s lost profits expert, Megan Cardell, leading to summary judgment for lack of proof of the essential element of damages.<sup>112</sup> After the Appellate Court of Maryland reversed the *Daubert* ruling, the Supreme Court granted certiorari.<sup>113</sup>

The Court began by observing that it had “asked judges to engage with the science without playing amateur scientist, and . . . promised the deference appropriate to courts administering a flexible approach to analyzing the admissibility of expert testimony.”<sup>114</sup> Holding that the trial court’s analysis mostly fell within its discretion, the Court explained that “the choice or calculation of the inputs to a methodology can be a part of the methodology itself,” rejecting “an unduly rigid dividing line between ‘data’ and ‘methodology’ that binds courts to admit methodologically questionable analyses cloaked as data.”<sup>115</sup> The Court found the trial court’s *Daubert-Rochkind* analysis proper to “the extent the trial court considered

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<sup>106</sup> *Id.* at 357.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 358.

<sup>109</sup> *Id.* at 362.

<sup>110</sup> *Katz, Abosch, Windesheim, Gershman & Freedman, P.A. v. Parkway Neuroscience & Spine Institute, LLC*, 485 Md. 335 (2023).

<sup>111</sup> *Id.* at 342–43.

<sup>112</sup> *Id.* at 343.

<sup>113</sup> *Id.* at 344.

<sup>114</sup> *Id.* at 342.

<sup>115</sup> *Id.* at 345.

how [] Cardell’s choice of data, assumptions, and other inputs affected the reliability of her methodology[.]”<sup>116</sup>

Even so, the Court held that the trial court exceeded its discretion in one respect. Shortly before the *Daubert* hearing, Cardell amended her lost-profits analysis to make “normalizing adjustments[.]”<sup>117</sup> The Court noted that while “the information that led to these adjustments had long been available to her, [] Cardell explained that she looked again at the numbers ahead of the *Daubert-Rochkind* hearing and identified a payment that looked like it belonged to a different year.”<sup>118</sup> The trial court had erroneously viewed Cardell’s “updates, which the court discussed in the context of *Daubert-Rochkind* factors three (known or potential rate of error) and 10 (whether the field of expertise is known to reach reliable results for the projected type of expert opinion), as implicating the reliability of her methodology.”<sup>119</sup> Then, the trial court “was troubled by the timing of [] Cardell’s updates—without new information and ‘for fully subjective reasons’—which, the [trial] court believed, reflected negatively on her methodology.”<sup>120</sup>

The Court instead held “there was new information of a sort: [] Cardell noticed something she had not noticed before on first examination.”<sup>121</sup> Drawing an analogy to a more familiar Rule 5-702 area of expertise, the Court noted that Cardell “sought clarification and revised her opinion, just as a doctor might order a biopsy and diagnose a patient with skin cancer if the doctor had missed a mole upon first examination of the patient.”<sup>122</sup> A doctor suddenly “[c]atching something peculiar the second time around neither undermines the adequacy of the data (the patient’s skin) nor the court’s understanding of the expert’s methodology (examining the patient’s skin for disease indicators).”<sup>123</sup> “At most,” the Court held, Cardell’s revisions “went to the care with which she applied her methodology, which is a matter to be explored on cross-examination before the jury (if [] Cardell’s testimony is otherwise found to be sufficiently reliable).”<sup>124</sup>

In a disposition different from any of its prior *Daubert* cases, the Court ordered “a limited remand to the circuit court under Maryland Rule 8-604(d)(1) so that the trial court may decide to admit or exclude [] Cardell’s

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<sup>116</sup> *KatzAbosch*, 485 Md. at 345.

<sup>117</sup> *Id.* at 350.

<sup>118</sup> *Id.* at 353.

<sup>119</sup> *Id.* at 381.

<sup>120</sup> *Id.* at 381.

<sup>121</sup> *KatzAbosch*, 485 Md. at 381.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 382.

testimony without consideration of her [pre-hearing] normalizing adjustments as reflecting on the reliability of [ ] Cardell’s methodology.”<sup>125</sup> Rather than vacate the judgment, the Court decided to remand and “retain jurisdiction,” which permitted the Court to “issue an appropriate Order” after the trial court reached a decision.<sup>126</sup>

Two justices disagreed with that disposition. Justice Gould agreed “that [ ] Cardell’s updated calculations and her reasons for them do not go to the reliability of her methodology, but are instead grist for the cross-examination mill.”<sup>127</sup> Nevertheless, Justice Gould thought it unnecessary to “remand for the trial court to reconsider its analysis,” because “Cardell’s methodology is so fundamentally flawed as to constitute ‘the rare case’ in which a trial court’s *admission* of expert testimony would have been an abuse of discretion.”<sup>128</sup> Likening Cardell’s opinion to “a lost profits analysis of a gas station [that] failed to account for changes in the wholesale and retail prices of gasoline,” Justice Gould believed “Cardell’s failure to make any attempt to account for . . . confounding variables requires the exclusion of her testimony.”<sup>129</sup> Taking a diametrically opposite view, Justice Watts dissented in full, believing that “in assessing the reliability of [Cardell’s] methodology, the circuit court abused its discretion by determining that choices of data and other inputs rendered her methodology unreliable.”<sup>130</sup>

Joining in the Court’s opinion, Justice Booth penned a concurrence that, as a prominent *Daubert* commentator noted, “might prove the most influential and enduring.”<sup>131</sup> Justice Booth wrote “to respond to the Majority’s invitation to ‘reflect on [the] flexibility and deference’ due to courts analyzing the admissibility of expert testimony.”<sup>132</sup> She addressed

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<sup>125</sup> *Id.* at 383.

<sup>126</sup> *Id.* at 384.

<sup>127</sup> *KatzAbosch*, 485 Md. at 407 (Gould, J., concurring in part and dissenting in part).

<sup>128</sup> *Id.* at 407–08.

<sup>129</sup> *Id.* at 411.

<sup>130</sup> *Id.* at 412 (Watts, J., dissenting).

<sup>131</sup> Derek Stikeleather, *2023 and the Summer of Daubert*, MD. APPELLATE BLOG (Sept. 7, 2023), <https://mdappblog.com/2023/09/07/2023-and-the-summer-of-daubert/>. The Justices have cited Mr. Stikeleather three times in two *Daubert* cases. See *State v. Matthews*, 479 Md. 278, 284 n.1 (2022) (citing Derek Stikeleather, *It’s Official: Maryland Accepts Daubert as Controlling Law for Admitting Expert Testimony*, MD. APPELLATE BLOG (Aug. 31, 2020), <https://mdappblog.com/2020/08/31/its-official-maryland-accepts-daubert-as-controlling-law-for-admitting-expert-testimony/> [perma.cc/A342-NSSL]), and *Rochkind v. Stevenson*, 471 Md. 1, 47 (Watts, J., dissenting) (citing Derek Stikeleather, *The End of Frye-Reed*, MD. APPELLATE BLOG, (Oct. 5, 2017), <https://mdappblog.com/2017/10/05/the-end-of-frye-reed/> [https://perma.cc/62YQ-K7BV], and Derek Stikeleather, *Update: The End of Frye-Reed Draws Closer*, MD. APPELLATE BLOG (May 1, 2018), <https://mdappblog.com/2018/05/01/update-the-end-of-frye-reed-draws-closer/> [https://perma.cc/YC5U-JQD2]).

<sup>132</sup> *KatzAbosch*, 485 Md. at 385 (Booth, J., concurring).

how the Court’s “post-*Rochkind* batting average” did not align with its prediction in *Matthews* that reversal would be only in the “rare case:”<sup>133</sup>

I was one of the members of this Court who voted in *Rochkind* to adopt the *Daubert* standard. I joined the majority opinions written by my colleagues in *Matthews*, *Abruquah*, *Oglesby*, and the instant case, and I agree with our analysis in each of them. That said, with some time to reflect on the Court’s application of the abuse of discretion standard in the context of appellate review of a trial court’s decision to admit or deny expert testimony in its consideration and application of the *Daubert-Rochkind* factors, I have some unease about our recitation of our traditional abuse of discretion formulation, which we developed and apply in other contexts. I observe that this formulation appears to be inconsistent with the abuse of discretion standard employed by the federal courts in the *Daubert* context, as well as the careful and searching examination that this Court is conducting in reviewing these cases . . . . I believe that when this Court applies abuse of discretion when reviewing expert witness admissibility determinations, we should articulate an abuse of discretion standard that is in line with the federal courts’ formulation and that reflects this Court’s current practice. When we adopted the *Daubert* standard, we adopted it in full. That necessarily includes the federal courts’ application of the abuse of discretion standard.<sup>134</sup>

Although “the abuse of discretion standard is typically considered to be the most deferential,” the standard “has been described as ‘famously slippery,’ and has been understood to have different meanings and applications in different contexts.”<sup>135</sup> One Justice “wrote that ‘the variety of subjects left to discretionary decision requires caution in synthesizing abuse of discretion cases.’”<sup>136</sup> Second Circuit Judge Henry J. Friendly observed that “appellate courts ‘must carefully scrutinize the nature of the trial court’s determination and decide whether that court’s superior opportunities of observation or other reasons of policy require greater deference than

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<sup>133</sup> *Id.* at 386.

<sup>134</sup> *Id.* at 387.

<sup>135</sup> *Id.* at 398 (quoting *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 168 n.4 (2d Cir. 2001)).

<sup>136</sup> *Id.* at 399 (quoting *Calderon v. Thompson*, 523 U.S. 538, 567 (1998) (Souter, J. dissenting)).

would be accorded to its formulations of law or its application of law to the facts.”<sup>137</sup>

Justice Booth cited commentary collecting “examples of federal circuit courts conducting ‘searching’ reviews of admissibility determinations in the expert witness context” that resembled de novo review.<sup>138</sup> Such scrutiny “feels out of sync with the even more deferential approach that we take when reviewing other types of discretionary decisions by trial courts and our ‘no reasonable person’ and ‘well removed from the center mark’ articulation of the standard.”<sup>139</sup>

Justice Booth quoted extensively from a Tenth Circuit decision holding that an appellate court will “review de novo the question of whether the [trial] court applied the proper standard and actually performed its gatekeeper role in the first instance,” and only “then review the trial court’s actual application of the standard in deciding whether to admit or exclude an expert’s testimony for abuse of discretion.”<sup>140</sup> When an opponent objects to admissibility of an expert’s testimony, the trial “court must adequately demonstrate by *specific findings on the record* that it has performed its duty as gatekeeper.”<sup>141</sup> Such specific findings are necessary to ensure the trial “court carefully and meticulously reviewed the proffered scientific evidence or simply made an off-the-cuff decision to admit the expert testimony. In the absence of such findings, we must conclude that the court abused its discretion in admitting such testimony.”<sup>142</sup>

Similarly, the “Seventh Circuit describes a ‘two-step standard of review in cases challenging a [trial] court’s admission or exclusion of the testimony of an expert.’”<sup>143</sup> De novo review governs whether the trial court properly applied the *Daubert* framework, and, if so, abuse-of-discretion review governs the ultimate ruling on admissibility.<sup>144</sup> Or, as the Eleventh Circuit summarized, an “abuse of discretion can occur where the [trial] court applies the wrong law, follows the wrong procedure, bases its decision on clearly erroneous facts, or commits a clear error in judgment.”<sup>145</sup>

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<sup>137</sup> *Id.* at 399 (quoting Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 784 (1982)).

<sup>138</sup> *KatzAbosch*, 485 Md. at 401 (citing David F. Herr & Morgan L. Holcomb, *Opinion and Expert Testimony in Federal and State Courts*, AM. L. INST. AM. BAR ASS’N 629, 642 (2007); Michael J. Saks, *et al.*, *Annotated Reference Manual on Scientific Evidence* Second 23 (West 2004)).

<sup>139</sup> *Id.* at 401.

<sup>140</sup> *Id.* at 402 (quoting *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003)).

<sup>141</sup> *Id.* at 403 (quoting *Dodge*, 328 F.3d at 1223).

<sup>142</sup> *Id.* (quoting *Dodge*, 328 F.3d at 1223).

<sup>143</sup> *Id.* (quoting *C.W. ex rel. Wood v. Textron, Inc.*, 807 F.3d 827, 835 (7th Cir. 2015)).

<sup>144</sup> *KatzAbosch*, 485 Md. at 403 (citing *C.W.*, 807 F.3d at 835).

<sup>145</sup> *Id.* at 404 (quoting *United States v. Brown*, 415 F.3d 1257, 1266 (11th Cir. 2005)).

On limited remand in *KatzAbosch*, the trial court issued a new opinion that “removed from any consideration Cardell’s June 2021 normalization,” and again excluded the testimony, which it still viewed “as speculative and containing unreliable and *ipse dixit* ‘judgment calls.’”<sup>146</sup> In its continuing exercise of jurisdiction, the Court ordered the Appellate Court to affirm the trial court’s judgment.<sup>147</sup>

### III. CATEGORIES OF *DAUBERT* ERROR

Justice Booth’s concurrence hinted at a problem I encountered when briefing *KatzAbosch*. Few appellate decisions and secondary sources have wrestled with the abuse-of-discretion standard in the *Daubert* context, and how that standard differs from other discretionary contexts.

Surveying the grounds for reversal or vacatur in the *Abruquah-Oglesby-KatzAbosch* trilogy, appellate review of *Daubert* rulings is not significantly different from other discretionary rulings. *Oglesby* and *KatzAbosch* found errors in the interpretation of Rule 5-702, which now includes the *Daubert* factors.<sup>148</sup> Such interpretive issues are always subject to de novo review.<sup>149</sup> *Abruquah* adopted a new boundary on trial courts’ discretion, similar to decisions setting new boundaries on trial judges’ discretion in questioning prospective jurors.<sup>150</sup> The authority to set boundaries on discretion derives from the Court’s plenary constitutional rulemaking power, and its statutory certiorari power to promote uniformity in rules of decision.<sup>151</sup> In boundary-setting cases, the trial court’s exercise of discretion does not constrain the Court’s power.

#### A. Procedural Error

When legal error affects the framework, it is more accurate to say that the circuit court made a threshold procedural error subject to de novo review, not that there has been an abuse of discretion. Although evidentiary rulings are reviewed for abuse of discretion generally, the interpretation of the rules of evidence remains a legal question reviewed de novo.<sup>152</sup>

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<sup>146</sup> *Katz, Abosch, Windesheim, Gershman & Freedman, P.A. v. Parkway Neuroscience & Spine Inst., LLC*, 487 Md. 632, 634 (2024).

<sup>147</sup> *Id.* at 635.

<sup>148</sup> See discussion *infra* Section III.A.

<sup>149</sup> *Young v. State*, 234 Md. App. 720, 731 (2017).

<sup>150</sup> See discussion *infra* Section III.B.

<sup>151</sup> See discussion *infra* Section III.B.

<sup>152</sup> *Williams v. State*, 457 Md. 551, 562 (2018).

“There is a difference . . . between *how* a trial court makes its decision and *what* decision it makes.”<sup>153</sup> For example, when a statute makes a fee award discretionary, the “standard that a trial court applies in evaluating whether to award attorneys’ fees and costs is a legal decision,” so only “the conclusion that the court arrives at after applying that standard to the facts of the particular case is an exercise of discretion.”<sup>154</sup> Thus, whether the trial court has applied proper or improper factors is “a question of law” reviewed “without deference to the trial court.”<sup>155</sup> Or, when a trial court imposes a criminal sentence, its broad discretion does not allow it to consider improper factors.<sup>156</sup> Similarly, when making a discretionary decision on a motion for discovery sanctions, “the trial judge is required to consider every aspect of the case and then choose the most appropriate remedy.”<sup>157</sup>

*Oglesby* involved two threshold legal errors. First, the trial court misunderstood the directive in Rule 5-702 that “the court shall determine . . . whether a sufficient factual basis exists to support the expert testimony.”<sup>158</sup> This provision does not authorize a trial court to resolve fact witnesses’ credibility, which is the jury’s province.<sup>159</sup> Second, to the extent the trial court agreed with the landlord’s argument that the expert failed to rule out alternative sources of exposure to lead paint,<sup>160</sup> it misinterpreted the rule’s requirement that “the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue.”<sup>161</sup> The “substantial factor” test for lead-paint injury does not require the jury to rule out other potential sources.<sup>162</sup>

The partial error in *KatzAbosch* was also a misreading of Rule 5-702. The *Daubert* factors are part of “interpreting Rule 5-702.”<sup>163</sup> Although the *Daubert* factors are flexible, the trial court misinterpreted them in finding that the expert’s updates, without new information, “reflected negatively on her methodology.”<sup>164</sup> An expert can and should update their

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<sup>153</sup> *Ocean City, Md., Chamber of Com., Inc. v. Barufaldi*, 434 Md. 381, 391 (2013).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 391.

<sup>156</sup> *Jackson v. State*, 364 Md. 192, 208 (2001).

<sup>157</sup> *Hart v. Miller*, 65 Md. App. 620, 626 (1985).

<sup>158</sup> MD. RULE 5-702(3).

<sup>159</sup> *Oglesby*, 484 Md. at 343.

<sup>160</sup> *Id.* at 308 n.8.

<sup>161</sup> MD. RULE 5-702.

<sup>162</sup> *Oglesby*, 484 Md. at 341.

<sup>163</sup> *Rochkind*, 471 Md. at 35.

<sup>164</sup> *KatzAbosch*, 485 Md. at 381.

opinion if they realize they missed something.<sup>165</sup> Such a change is grist for cross-examination, not *Daubert* “gatekeeping.”<sup>166</sup>

Ultimately, as part of its procedural obligations, a trial court *must* explain its decision in sufficient detail to show that it exercised discretion and enable meaningful appellate review.<sup>167</sup>

### B. *Substantive Error*

When a trial court properly adheres to the *Daubert* framework, substantive review is deferential. Reversal is appropriate in two main categories. The first is “when all proper and no improper factors are assessed, but the [trial] court makes a serious mistake in weighing them.”<sup>168</sup> The second is when the Supreme Court of Maryland, exercising its discretionary power to set uniform rules of decision, draws boundaries on trial courts’ *Daubert* discretion.

*Abruquah* fell into the latter category, setting a new boundary on discretion rather than finding an abuse of discretion in the traditional sense. In a footnote, the Court observed it “has frequently described an abuse of discretion as occurring when ‘no reasonable person would take the view adopted by the circuit court’ or when a decision is ‘well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable.’”<sup>169</sup> But the Court thought it “somewhat unfair” to apply “those descriptions to a trial court’s application of a newly adopted standard.”<sup>170</sup> The “circuit court acted deliberately and thoughtfully in approaching, analyzing, and resolving the question before it,” but the “Court’s majority has come to a different conclusion concerning the outer bounds of what is acceptable expert evidence in this area.”<sup>171</sup>

Although the *Abruquah* dissenters saw this “unfair” language as proof the Court was overstepping its appellate role,<sup>172</sup> the Court’s holding is best understood as an exercise of its statutory and constitutional authority to set uniform rules of procedure. This function draws on the Court’s constitutional power to adopt and amend rules of practice and procedure—

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 382.

<sup>167</sup> *Id.* at 406–07 (Booth, J., concurring).

<sup>168</sup> *KatzAbosch*, 485 Md. at 401–02 (Booth, J., concurring) (quoting *Lawes v. CSA Architects & Engineers, LLP*, 963 F.3d 72, 90 (1st Cir. 2020)).

<sup>169</sup> *Abruquah v. State*, 483 Md. 637, 652 n.5 (2023) (quoting *State v. Matthews*, 479 Md. 278, 305 (2022)).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 710 (Hotten, J., dissenting); *Id.* at 712–13 (Gould, J., dissenting).

including the rules of evidence.<sup>173</sup> The function also draws on the Court’s discretionary certiorari power to promote statewide uniformity.<sup>174</sup> Even before 1966, when Maryland had no intermediate appellate court and the Court heard appeals from the circuit courts by right,<sup>175</sup> the Court had discretionary certiorari jurisdiction to “secure uniformity of decision” when the circuit courts heard appeals in misdemeanor cases despite no further appeal by right existing.<sup>176</sup> This uniformity-of-decision language is absent from the statute granting the Court certiorari power to review cases decided by—or pending in—the Appellate Court when “desirable and in the public interest.”<sup>177</sup> Still, “divided opinions in the same circuit court or between circuit courts in Maryland” remain grounds to exercise that discretion.<sup>178</sup> As the Supreme Court of United States has explained, the modern writ of certiorari helps avoid “unfortunate confusion in respect to the rules of . . . decision.”<sup>179</sup>

Implicit in abuse-of-discretion review is that “[s]ome inconsistency is inevitable,” as different trial courts could reach different conclusions on the same record.<sup>180</sup> When adopting *Daubert*, the Court determined that a “marginal amount of inconsistency” was an acceptable cost in moving away from *Frye-Reed*.<sup>181</sup>

In the same vein, the Court has discretion to decide when—in its judgment—the costs of inconsistency outweigh the benefits of broad discretion, and it therefore becomes necessary to security uniformity of decision. *Rochkind* was not the Court’s most controversial 2020 change affecting trial judges’ discretion under the Maryland Rules. That distinction belongs to *Kazadi v. State*,<sup>182</sup> in which the Court’s four-to-three majority reversed a 1964 precedent holding it “inappropriate” to ask prospective jurors whether they could follow instructions about the presumption of innocence in criminal cases.<sup>183</sup> Rule 4-312 grants trial judges discretion

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<sup>173</sup> MD. CONST. art. IV, § 18(a).

<sup>174</sup> MD. CODE ANN., CTS. & JUD. PROC. § 12-203 (West).

<sup>175</sup> See *Mahai v. State*, 474 Md. 648, 675 (2021).

<sup>176</sup> 1937 Md. Laws Ch. 238 (codified at MD. CODE ANN., CTS. & JUD. PROC. § 12-305(1) (West)).

<sup>177</sup> MD. CODE ANN., CTS. & JUD. PROC. § 12-203.

<sup>178</sup> Brynja M. Booth, *Petitions for Certiorari—View From the Bench*, in PAUL M. SANDLER, ANDREW D. LEVY & STEVEN M. KLEPPER, APPELLATE PRACTICE FOR THE MARYLAND LAWYER: STATE AND FEDERAL 321, 326 (6th ed. 2023).

<sup>179</sup> *Forsyth v. City of Hammond*, 166 U.S. 506, 512 (1897).

<sup>180</sup> *Rochkind v. Stevenson*, 471 Md. 1, 34 (2020) (quoting *Motorola Inc. v. Murray*, 147 A.3d 751, 756 (D.C. 2016)).

<sup>181</sup> *Id.*

<sup>182</sup> *Kazadi v. State*, 467 Md. 1, 46 (2020).

<sup>183</sup> *Twining v. State*, 234 Md. 97, 100 (1964).

over what questions they ask prospective jurors.<sup>184</sup> In *Kazadi*, the Court noted that the Maryland State Bar Association’s Special Committee on Voir Dire had “recommended asking during *voir dire* whether any prospective jurors cannot honor the presumption of innocence, and noted that, though ‘not required,’ that *voir dire* question is ‘widely used.’”<sup>185</sup> Making such questions “mandatory on request,” the Court sought to “ensure . . . that all defendants—not just ones whose trials are presided over by circuit court judges who chose to exercise the discretion to grant requests to ask such *voir dire* questions,” could “move to strike prospective jurors for cause on the ground of an unwillingness or inability to adhere to these fundamental rights.”<sup>186</sup>

Similarly, amid the controversy over ballistics testimony, *Abruquah* ensures that the limits on such evidence—with great power to persuade jurors—will not depend on the fortuity of which trial judge happens to hear a case. The risk of inconsistency was even higher in *Abruquah*, because many gun-related prosecutions can be brought in federal court.<sup>187</sup> Because of *Daubert* rulings from Maryland federal judges that have limited ballistics testimony,<sup>188</sup> the inconsistency would risk the rights of a Maryland defendant turning on whether state or federal prosecutors brought charges.

As the dissenting opinions in *Abruquah* show, such boundary-setting often will require the Court to wade into controversy and expose the justices to criticism that they are playing “amateur scientists.”<sup>189</sup> Whenever a certiorari court resolves a division of authority in any area of law, it is taking sides after reasonable minds have differed and has decided that the benefits of uniformity outweigh the risk it might be taking the wrong side. That risk was mitigated in *Abruquah*, however, because the Court was relying on thorough *Daubert* rulings by Judge Grimm, a highly regarded judge.<sup>190</sup> It would be hard to go wrong following the lead of a jurist with

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<sup>184</sup> MD. RULE 4-312(e)(1) (“If the judge conducts the examination, the judge may permit the parties to supplement the examination by further inquiry or may submit to the jurors additional questions proposed by the parties.”).

<sup>185</sup> *Kazadi*, 467 Md. at 42 (quoting MARYLAND STATE BAR ASS’N, MODEL JURY SELECTION QUESTIONS FOR CRIMINAL & CIVIL TRIALS xv (2018)).

<sup>186</sup> *Id.* at 46.

<sup>187</sup> *See, e.g.*, 18 U.S.C. § 922.

<sup>188</sup> *See Abruquah v. State*, 483 Md. 637, 678–79 (2023).

<sup>189</sup> *Id.* at 702 (Hotten, J., dissenting); *id.* at 753 (Gould, J., dissenting).

<sup>190</sup> *Abruquah*, 483 Md. at 679 (Hotten, J., dissenting). From 2009 to 2015, Judge Paul Grimm sat on the Advisory Committee for the Federal Rules of Civil Procedure and chaired the discovery subcommittee. *Paul Grimm*, DUKE L. <https://law.duke.edu/fac/grimm> (last visited Apr. 25, 2025). Judge Grimm also taught evidence at both law schools in Maryland and lectured on technology and evidence throughout the country before retiring to serve as Director of the Bolch Judicial Institute. *Id.*

Judge Grimm’s expertise when the Court exercises its power to secure uniformity throughout Maryland trial courts.

Such a survey of persuasive authority, to decide the best rule for Maryland on a recurring question, is a legal question of the sort the Court decides *de novo*.<sup>191</sup> Maryland’s constitution and laws give the Court considerable discretion in both when and how it imposes uniformity in the rules of decision.<sup>192</sup> For example, when determining whether to alter discretionary voir dire questioning, the Court can either address a proposal made through the Standing Committee on Rules of Practice and Procedure<sup>193</sup> or it can exercise certiorari review when a litigant’s appeal presents a vehicle to decide the question.<sup>194</sup> Each path has its advantages and disadvantages; but the Court’s authority is no less broad on certiorari review than when it considers rule amendments.<sup>195</sup> Similarly, upon the release of the 2009 and 2016 reports cited in *Abruquah*, the Court could have considered Rule 5-702 amendments that, perhaps through committee notes, embraced *Daubert* and directed trial courts to place careful limitations on techniques like the AFTE Theory.<sup>196</sup> Instead, the Court waited for a case showing how the AFTE Theory affected an individual defendant’s rights and followed persuasive authority to draw a boundary.<sup>197</sup> Hearing this question in an individual case did not undermine the Court’s plenary authority to write such boundaries into Rule 5-702 through case law.

A recent rule change may prove particularly valuable when litigants ask the Court to draw new boundaries on *Daubert* discretion. Most of the Appellate Court’s opinions are unreported, and until 2023, it was forbidden to cite such unreported opinions as precedential or even as persuasive.<sup>198</sup> Under an amendment to Rule 1-104, an “unreported opinion issued on or after July 1, 2023 may be cited for its persuasive value only if no reported

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<sup>191</sup> See *Lloyd v. Niceta*, 485 Md. 422, 440 (2023).

<sup>192</sup> MD. CONST. art. IV, § 18(a).

<sup>193</sup> See MD. CODE ANN., CTS. & JUD. PROC. § 13-301 (West 2025).

<sup>194</sup> See *Pearson v. State*, 437 Md. 350, 371 (2014) (Harrell, J., concurring); *Curtin v. State*, 393 Md. 593, 618 (2006) (Bell, C.J., dissenting).

<sup>195</sup> MD. CODE ANN., CTS. & JUD. PROC. § 12-203 (“If the Supreme Court of Maryland finds that review . . . is desirable and in the public interest, the Supreme Court of Maryland shall require by writ of certiorari that the case be certified to it for review and determination.”). MD. CONST. art. IV, § 18(a) (“The Supreme Court of Maryland . . . shall adopt rules and regulations concerning the practice and procedure in and the administration of . . . the [ ] courts of this State, which shall have the force of law until rescinded, changed or modified by the Supreme Court of Maryland or otherwise by law.”).

<sup>196</sup> *Abruquah v. State*, 483 Md. 637, 663–64 (2023).

<sup>197</sup> *Id.* at 679.

<sup>198</sup> MD. RULE 1-104(a)(2)(A); see RULES ORDER, SUPREME COURT OF MARYLAND 9–10 (Apr. 21, 2023), .

authority adequately addresses an issue before the court.”<sup>199</sup> The 2023 amendment also clarified that unreported decisions from federal courts and other states “may be cited as persuasive authority if the jurisdiction in which the opinion was issued would permit it to be cited as persuasive authority or as precedent.”<sup>200</sup> These changes increase the range of persuasive authority trial courts may consult on *Daubert* rulings; these cases should aid in developing a robust body of rulings in Maryland. When the Appellate Court decides a *Daubert* appeal in an unreported opinion, the Court may decide it is not yet “desirable and in the public interest” to exercise its certiorari power to weigh in on the issue.<sup>201</sup> When the Court denies a petition for certiorari from an unreported opinion, it will signal to the circuit courts they remain free to reach different conclusions in exercising *Daubert* discretion. And when the Court is satisfied that the law is sufficiently developed inside or outside Maryland, or that the issue is otherwise too important for trial judges to reach divergent conclusions, it may issue certiorari to decide the boundaries of trial courts’ *Daubert* discretion.

Outside of such boundary-setting cases, review is much closer to the traditional abuse-of-discretion formulation. It may be somewhat more searching than in other contexts—like sentencing. For example, the Court held in *Oglesby* that, putting aside the trial court’s impermissible credibility determinations, the expert’s substantial-factor opinion had a manifestly sufficient factual basis, and the trial court lacked discretion to find otherwise.<sup>202</sup> Therefore, remand was unwarranted on that issue, but the trial court still had discretion as to the expert’s further opinion on the plaintiff’s IQ loss.<sup>203</sup>

Still, when the trial court has considered all relevant factors and no irrelevant factors, reversal should indeed be the rare case.

### C. *Harmless Error*

No survey of appellate review is complete without a discussion of harmless error. The Court explained in *Abruquah* that the “harmless error doctrine is grounded in the notion that a defendant has the right to a fair trial, but not a perfect one.”<sup>204</sup> In a criminal case, for “an appellate court to

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<sup>199</sup> MD. RULE 1-104(a)(2)(B). The exception is that an “unreported *per curiam* opinion may not be cited as persuasive authority.” *Id.*

<sup>200</sup> MD. RULE 1-104(b).

<sup>201</sup> MD. CODE ANN., CTS. & JUD. PROC. § 12-203 (West 2025).

<sup>202</sup> *Oglesby v. Balt. Sch. Assocs.*, 484 Md. 296, 333–34 (2023).

<sup>203</sup> *Id.* at 347.

<sup>204</sup> *Abruquah v. State*, 483 Md. 637, 697 (2023) (quoting *State v. Jordan*, 480 Md. 490, 505 (2022)).

conclude that the admission of expert testimony was harmless, the State must show ‘beyond a reasonable doubt, that the error in no way influenced the verdict.’”<sup>205</sup> The Court held that the State failed to meet this burden in *Abruquah*.<sup>206</sup> Although the circumstantial evidence of guilt was strong, the ballistics expert’s testimony was the only direct evidence.<sup>207</sup> By contrast, a civil appellant bears the burden of showing that an error was prejudicial to the outcome.<sup>208</sup>

*KatzAbosch* recognized a similar concept: an appellate court may conclude that an error in a *Daubert* analysis does not require a remand if the error did not affect the overall analysis.<sup>209</sup> In ordering a partial remand, the Court was careful to not “suggest that, in every case where an appellate court concludes that part of a trial court’s *Daubert* ruling was based on proper factors and another part was not, a limited remand to the trial court is necessary.”<sup>210</sup> The Court predicted that “in many cases, it will be clear from the record whether the trial court would have admitted or excluded the expert testimony without consideration of a factor that is later determined to have been improper on appeal.”<sup>211</sup> It encouraged “trial courts to make such matters explicit on the record when possible.”<sup>212</sup> Thus, it was only in a footnote in *KatzAbosch* that held that the trial court “also erred when it stated that [the] lost-profit calculations would not be helpful to the jury,” because the trial court was also clear that “its finding with respect to helpfulness was a ‘very, very slight factor’ in its decision to exclude [the] testimony.”<sup>213</sup> It appears that, had the “very, very slight factor” been the only error, no remand would have been necessary for the Court to affirm.<sup>214</sup>

#### IV. THE BENEFITS OF AVOIDING UNNECESSARY “ABUSE OF DISCRETION” HOLDINGS

It is no secret that the *Daubert* transition has led to some tension between trial and appellate courts. The three *Rochkind* dissenters all served as trial judges under the *Frye-Reed* regime.<sup>215</sup> To be sure, trial judges are

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<sup>205</sup> *Id.* (quoting *Dionas v. State*, 436 Md. 97, 108 (2013)).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Miller v. Mathias*, 428 Md. 419, 446 (2012).

<sup>209</sup> *Katz, Abosch, Windesheim, Gershman & Freedman, P.A. v. Parkway Neuroscience & Spine Inst., LLC*, 485 Md. 335, 384 n.18 (2023).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 382 n.16.

<sup>214</sup> *Id.*

<sup>215</sup> *Supra* note 45.

not monolithic, and some have welcomed *Daubert*. Judge Adkins, who championed adopting *Daubert*, was a former trial judge.<sup>216</sup> At minimum—as *Rochkind* recognized in another quote from Judge Grimm—the shift to *Daubert* made trial judges’ jobs harder in the short term:

[J]udges, lawyers and expert witnesses will have to learn to be comfortable refocusing their thinking about the building blocks of what truly makes evidence that is beyond the knowledge and experience of lay persons useful to them in resolving disputes. The beneficiaries of this new approach will be the jurors that have to decide increasingly complex cases. *Daubert*, *Kumho Tire*, and now Rule 702 have given us our marching orders, and it is up to the participants in the litigation process to get in step.<sup>217</sup>

The Court alluded to these tensions in *Abruquah* when it noted it was “somewhat unfair” to say “no reasonable person would take the view adopted by the circuit court” or that the decision was “well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable,” when the trial court was applying the new standard of review.<sup>218</sup>

It is not just “somewhat unfair,” but unnecessary, for an appellate court to say a trial court abused its discretion when a decision turns on threshold procedural error or when the Court sets a new boundary on discretion. When legal error infects a discretionary decision, one way to phrase the reversal is that “a failure to consider the proper legal standard in reaching a decision [, which] constitutes an abuse of discretion.”<sup>219</sup> Stated differently, however, is that the “standard that a trial court applies . . . is a legal decision,”<sup>220</sup> which is subject to *de novo* review,<sup>221</sup> and that only “the conclusion that the court arrives at after applying that standard to the facts of the particular case is an exercise of discretion.”<sup>222</sup>

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<sup>216</sup> *Supra* notes 29–31.

<sup>217</sup> *Rochkind v. Stevenson*, 471 Md. 1, 38 (2020) (quoting *United States v. Horn*, 185 F. Supp. 2d 530, 554–55 (D. Md. 2002)).

<sup>218</sup> *Abruquah v. State*, 483 Md. 637, 652 n.5 (2023) (quoting *State v. Matthews*, 479 Md. 278, 305 (2022)).

<sup>219</sup> *Wilson-X v. Dep’t of Hum. Res.*, 403 Md. 667, 675 (2008) (quoting *Pasteur v. Skevofilax*, 396 Md. 405, 433 (2007)).

<sup>220</sup> *Ocean City, Md., Chamber of Com., Inc. v. Barufaldi*, 434 Md. 381, 391 (2013).

<sup>221</sup> See *C.W. ex rel. Wood v. Textron, Inc.*, 807 F.3d 827, 835 (7th Cir. 2015) (interpreting Fed. R. Evid. 702).

<sup>222</sup> *Barufaldi*, 434 Md. at 391.

Trial judges take great pride and care in their work, and they are doing their best to “get in step” with *Daubert-Rochkind*.<sup>223</sup> It may seem like a step backward to say portions of the *Daubert* analysis are subject to de novo review, after *Rochkind* touted that instead “of maintaining two separate, and potentially outcome determinative, standards of review—*de novo* for *Frye-Reed* and abuse of discretion for Rule 5-702—all expert testimony is reviewed under the abuse of discretion standard.”<sup>224</sup> But interpreting any rule of evidence is a legal question reviewed de novo.<sup>225</sup> When it is unnecessary to say a trial court abused its discretion—with its somewhat harsh connotations—there is reason for a reviewing court to avoid such language.

## V. CONCLUSION

It is both possible and beneficial to harmonize the Supreme Court of Maryland’s decisions in *Matthews*, *Abruquah*, *Oglesby*, and *KatzAbosch*, and to distill a nuanced standard of *Daubert* review. As with any evidentiary ruling, an appellate court reviews de novo whether the trial court’s ruling reflected a legally correct interpretation of the applicable rule. Rule 5-702, which incorporates the *Daubert* framework, is no different. If the trial court follows the correct procedure, abuse-of-discretion review governs the trial court’s weighing of the *Daubert* factors. At that stage of the inquiry, it indeed should be a rare case in which the appellate court finds a substantive error so serious as to fall outside the trial court’s broad discretion. Still, that discretion is subject to the Supreme Court of Maryland’s power to set the outer bounds of discretion, particularly when the Court determines that the interest in uniform rules of decision outweighs the policy of deference to the trial court’s discretion. Just as trial courts should be clear in their *Daubert* findings, appellate courts should be clear as to the nature of review when vacating or reversing a *Daubert* ruling.

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<sup>223</sup> *Rochkind v. Stevenson*, 471 Md. 1, 38 (2020) (quoting *United States v. Horn*, 185 F. Supp. 2d 530, 554–55 (D. Md. 2002)).

<sup>224</sup> *Id.* at 37.

<sup>225</sup> *Williams v. State*, 457 Md. 551, 562 (2018).

## ARTICLE

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### **ABSOLUTE IMMUNITY CORRUPTS ABSOLUTELY: A CALL TO ALLOW FOR PROSECUTORIAL LIABILITY IN CASES OF GROSS NEGLIGENCE AND MALICE**

**By: Kristen M. Mack & Cary J. Hansel\***

#### **I. INTRODUCTION**

Absolute immunity from civil liability eliminates any consequence for misconduct that falls short of a crime.<sup>1</sup> Such immunity is not necessary to protect anyone from frivolous claims, as court rules and case law already perform this function.<sup>2</sup> Instead, cloaking prosecutors with absolute immunity precludes righteous claims against prosecutors for wrongdoing. In application, absolute immunity from civil liability permits prosecutors to knowingly partake in tortious conduct with impunity.

#### **II. MARYLAND PROSECUTORS & IMMUNITY**

The greater the power of the individual wielding the immunity, the more likely the immunity is subject to devastating abuse.<sup>3</sup> There are few officials holding more sway over the lives of Marylanders than Maryland State's Attorneys.<sup>4</sup> These prosecutors decide which crimes are prosecuted, who is prosecuted, and what sentences are sought.<sup>5</sup>

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\* Authors **Kristen M. Mack and Cary J. Hansel** are civil rights lawyers with the firm of Hansel Law, PC. Interested readers are invited to learn more about them and their practices at [www.hansellaw.com](http://www.hansellaw.com).

<sup>1</sup> “Absolute immunity is ‘[a] complete exemption from civil liability, usu[ally] afforded to officials while performing particularly important functions, such as a representative enacting legislation and a judge presiding over a lawsuit.’” *State v. Rovin*, 472 Md. 317, 327 (2021) (citing *Black’s Law Dictionary*).

<sup>2</sup> *See generally* MD. RULE 1-341(a) (describing the court’s authority to dismiss frivolous claims).

<sup>3</sup> Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America*, 53 MD. L. REV. 271, 292–93 (1994) (“Prosecutors enjoy unparalleled power in our society. Traditionally, this power has manifested itself most clearly in the prosecutor’s decision whether to bring charges . . . . Concurrent with this power . . . there exists the great potential for abuse.”).

<sup>4</sup> *See generally* *Rovin*, 472 Md. 317 (2021) (explaining prosecutorial immunity); *see generally* MD. CODE ANN., STATE GOV’T § 12-105 (West 2024) (stating that state personnel are immune from liability).

<sup>5</sup> *See* MD. CODE ANN., CRIM. PROC. §§ 14-106–14-111 (West 2008) (describing the duties of Maryland state prosecutors, including investigating, and filing cases).

Maryland prosecutors have used their power to make Maryland the nation's leader in incarcerating the highest percentage of Black people in the country, at seventy-one percent, which is more than *twice* the national average.<sup>6</sup> The choices made by Maryland prosecutors have also resulted in Maryland leading the nation in sentencing “young Black men to the longest prison terms, at a rate twenty-five percent higher than the next nearest state—Mississippi.”<sup>7</sup>

On average, Maryland prosecutors prosecute and seek incarceration for four and a half innocent people every three years.<sup>8</sup> The National Registry of Exonerations currently lists fifty-four convicted Marylanders who were later exonerated between 1989 and 2025—an average of one and a half false convictions every year over a thirty-six-year period.<sup>9</sup> Of those exonerated during this period, forty-one cases involved official misconduct, and fifteen included false or misleading forensic evidence by prosecutors.<sup>10</sup> These factors are not mutually exclusive either. One man's case was mired by both official misconduct and false or misleading forensic evidence, resulting in him spending thirty-two years in prison.<sup>11</sup>

Yet, Maryland prosecutors receive absolute civil immunity for any misconduct they commit within their prosecutorial roles.<sup>12</sup> This includes—but is not limited to—coercing witnesses, prosecuting someone in bad faith, using evidence that was illegally obtained, relying on false or misleading evidence, failing to disclose exculpatory evidence, and knowingly offering perjured testimony.<sup>13</sup> In short, under Maryland's current prosecutorial immunity framework, a prosecutor may knowingly prosecute and incarcerate—potentially for life—an innocent person using false evidence

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<sup>6</sup> ASHLEY NELLIS & CELESTE BARRY, A MATTER OF LIFE, THE SENTENCING PROJECT (2025), <https://www.sentencingproject.org/app/uploads/2025/01/A-Matter-of-Life-The-Scope-and-Impact-of-Life-and-Long-Term-Imprisonment-in-the-United-States.pdf>; see also Yanet Amanuel, *Let's Believe in the Power of People to Change*, ACLU MD. (March 28, 2024), <https://www.aclu-md.org/en/news/lets-believe-power-people-change>.

<sup>7</sup> Amanuel, *supra* note 6; see also NELLIS & BARRY, *supra* note 6.

<sup>8</sup> See *infra* note 9 (showing that Maryland has exonerated 54 individuals since 1989, about 2 individuals per year).

<sup>9</sup> See *Exonerations—States, Maryland*, THE NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View=%7BB8342AE7-6520-4A32-8A06-4B326208BAF8%7D&FilterField1=State&FilterValue1=Maryland> (last visited May 5, 2025).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Gill v. Ripley, 352 Md. 754, 769 (1999) (quoting Buckley v. Fitzsimmons, 509 U.S. 259, 494 (1993)).

<sup>13</sup> ABSOLUTE IMMUNITY FOR PROSECUTORS, THE NAT'L POLICE ACCOUNTABILITY PROJECT (2020), <https://www.nlg-npap.org/wp-content/uploads/2020/07/Absolute-Immunity-Fact-Sheet-vF.pdf>.

without any civil recourse—no matter how clear the evidence is—for the innocent person.

Despite its sweeping impact, prosecutorial immunity was created *not* by our elected representatives through a legislative process involving the people, but by fiat of the courts.<sup>14</sup> In *Ambrose v. Gersh*, the Court discussed dicta from a 1962 case which appeared to recognize prosecutorial immunity, but declined to decide whether the immunity of Maryland prosecutors had been previously recognized.<sup>15</sup> Regardless of whether the “dicta” from 1962 was sufficient, by 1997, Maryland courts undoubtedly adopted common law prosecutorial immunity in *Simms v. Constantine*.<sup>16</sup>

What is remarkable about this history is the very recent vintage of prosecutorial immunity in Maryland. Maryland has maintained its own common law since 1776, but the earliest dicta suggesting that Maryland prosecutors might enjoy immunity did not arise for nearly one hundred years.<sup>17</sup> The issue remained unsettled until 121 years after the nation’s birth.<sup>18</sup> Consequently, there can be no rational argument that prosecutorial immunity existed in Maryland when it was founded. Indeed, when our country declared its independence, Maryland adopted a state constitution, providing in Article 5 that:

[T]he Inhabitants of Maryland are entitled to the Common Law of England . . . as existed on the Fourth day of July, seventeen hundred and seventy-six . . . except such as . . . may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State.<sup>19</sup>

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<sup>14</sup> See *Prosecutorial Immunity*, INST. FOR JUST., <https://ij.org/issues/project-on-immunity-and-accountability/immunity-forprosecutorial-conduct/> (last visited Jan. 10, 2025).

<sup>15</sup> *Ambrose v. Gersh*, 46 Md. App. 71, 75 (1980), *aff’d*, 291 Md. 188 (1981).

<sup>16</sup> *Simms v. Constantine*, 113 Md. App. 291, 304 (1997) (“What emerges from . . . the extensive case law emanating from the Supreme Court of the United States on the subject of the immunity . . . albeit not . . . binding authority in Maryland, is nonetheless [] highly persuasive . . .”).

<sup>17</sup> MD. DECL. OF RTS. art. 5(a)(1) (“That the Inhabitants of Maryland are entitled to the Common Law of England . . . as existed on the Fourth day of July, seventeen hundred and seventy-six . . .”).

<sup>18</sup> See William Brock, *The Idiosyncrasies of Imbler: Absolute Immunity for Prosecutors Makes Absolutely No Sense*, B.U. (Jan. 26, 2024), <https://sites.bu.edu/dome/2024/01/26/the-idiosyncrasies-of-imbler-absolute-immunity-forprosecutors-makes-absolutely-no-sense/>.

<sup>19</sup> MD. DECL. OF RTS. art. 5(a)(1).

But there was no prosecutorial immunity—let alone absolute immunity—under English common law.<sup>20</sup> In fact, there were no public prosecutors in 1776 England.<sup>21</sup> At the time, private victims prosecuted criminal cases.<sup>22</sup> That practice persisted for over one hundred years until England established the Office of the Director of Public Prosecutions in 1879.<sup>23</sup>

Since its adoption long after the founding, Maryland courts have refined, but seldom limited, prosecutorial immunity.<sup>24</sup> Maryland's prosecutors "enjoy absolute immunity with respect to claims arising from their role in the judicial process," regardless of their motivation or intent.<sup>25</sup> Strikingly, immunity applies even when "a prosecutor act[s] with malice."<sup>26</sup> To fully appreciate the totality of this immunity, one must consider Maryland's extreme definition of malice as "'an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate,' the purpose being to deliberately and willfully injure the plaintiff."<sup>27</sup> To be clear, a Maryland prosecutor may not be held liable for acting with an "evil . . . motive influenced by hate" to "deliberately and willfully injure" someone.<sup>28</sup>

A brief example illustrates the extent of immunity and the brazenness with which it is sometimes wielded. One of the authors herein was trial and appellate counsel in *Prince George's Cnty. v. Longtin*.<sup>29</sup> Keith Longtin was falsely accused of murdering his wife by Prince George's County Police.<sup>30</sup> Among other misconduct, six different officers interrogated him without sleep or sufficient food over a 38-hour period.<sup>31</sup> At times during this ordeal, officers chained Mr. Longtin to the wall.<sup>32</sup> Mr. Longtin learned that his wife was murdered when officers showed him graphic crime scene pictures—

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<sup>20</sup> William Bock, *The Idiosyncrasies of Imbler: Absolute Immunity for Prosecutors Makes Absolutely No Sense* (Jan. 26, 2024), BOS. UNIV. SCH. OF L., <https://sites.bu.edu/dome/2024/01/26/the-idiosyncrasies-of-imbler-absolute-immunity-for-prosecutors-makes-absolutely-no-sense/>.

<sup>21</sup> See John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HISTORY 313, 315–17 (1973).

<sup>22</sup> See Bock *supra* note 20.

<sup>23</sup> Langbein, *supra* note 21.

<sup>24</sup> Gill v. Ripley, 352 Md. 754, 770 (1999).

<sup>25</sup> *Id.*; see State v. Rovin, 472 Md. 317, 346 (2021).

<sup>26</sup> Rovin, 472 Md. at 345–46; see also Gill, 352 Md. at 767.

<sup>27</sup> Hines v. French, 157 Md. App. 536, 562–63 (2004) (first quoting Shoemaker v. Smith, 353 Md. 143, 163 (1999); and then quoting Leese v. Balt. Cnty., 64 Md. App. 442, 480 (1985)).

<sup>28</sup> *Id.*

<sup>29</sup> See Prince George's Cnty. v. Longtin, 419 Md. 450, 499 (2011).

<sup>30</sup> *Keith Longtin Paid \$7.5 Million After Being Falsely Charged with His Wife's Murder*, JUST. DENIED, Summer 2012, at 5.

<sup>31</sup> *Id.*

<sup>32</sup> This information is known to the authors based on Cary Hansel's work as Mr. Longtin's attorney.

depicting his partially naked wife who had been raped and repeatedly cut and stabbed.<sup>33</sup> When he maintained his innocence despite these tactics, his final interrogator became fed up, walked down the hall to the Commissioner, and falsely claimed that Mr. Longtin had confessed.<sup>34</sup> Months later, after all his friends and family had read in the newspaper of the false police claim that he confessed to the rape and murder, DNA evidence cleared Mr. Longtin. But the police did nothing to advise prosecutors or seek his release from prison.<sup>35</sup>

At Mr. Longtin's civil trial, Prince George's County called an Assistant State's Attorney who attempted to take the blame for Mr. Longtin's unlawful incarceration by arguing that the decision not to release Mr. Longtin was hers.<sup>36</sup> It would not be a stretch of the imagination to suggest that the prosecutor did so securely with the knowledge that she was absolutely immune from civil liability. The defense, feeling so strongly about this strategy, sought to have the jury instructed that "[o]nly [t]he State's Attorney may terminate a prosecution of a charge and dismiss the charge by entering a *nolle prosequi* on the record in open court."<sup>37</sup> Fortunately, the instruction was not given, but only because it "is not a completely accurate description of how a prosecution may be terminated."<sup>38</sup> To its great credit, the Supreme Court of Maryland also recognized that, "[i]f police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him. They cannot hide behind the officials whom they have defrauded."<sup>39</sup>

Nevertheless, this anecdote illustrates the dangers and potential misuse of prosecutorial immunity. In *Longtin*, the prosecutor knew that she could take credit for the State's knowing confinement and continued incarceration of an innocent man even after irrefutable DNA proved his innocence. In twenty-five years as a civil rights lawyer, one of the authors has seen multiple instances of police attempting to shield their misconduct behind the prosecutor's immunity, including some unfortunately successful examples.

While Maryland courts have not been so blunt in granting prosecutors absolute immunity, the Supreme Court of the United States found that "[it is]

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<sup>33</sup> *Id.*

<sup>34</sup> *Keith Longtin Paid \$7.5 Million After Being Falsely Charged with His Wife's Murder*, *supra* note 30.

<sup>35</sup> *Id.*

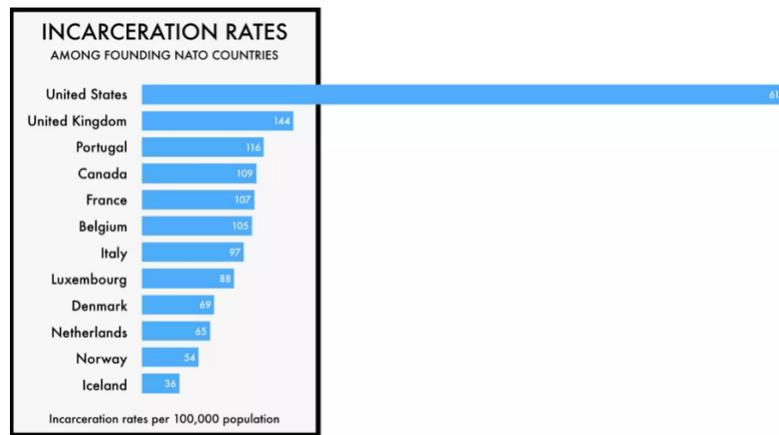
<sup>36</sup> *Id.*

<sup>37</sup> MD. RULE 4-247(a); Prince George's Cnty. Maryland v. Longtin, 190 Md. App. 97, 141 (2010), *aff'd sub nom* 419 Md. 450 (2011).

<sup>38</sup> *Longtin*, 190 Md. App. at 141.

<sup>39</sup> *Longtin*, 419 Md. at 499 n.30 (quoting Jones v. City of Chicago, 856 F.2d 985, 994 (7th Cir. 1988)).

better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.”<sup>40</sup> This brutal and extreme policy choice has no doubt contributed to the fact that the United States has the highest incarceration rate of any country in the world by far—outpacing the next highest NATO country, the United Kingdom, by 470 persons per 100,000 population.<sup>41</sup> The following chart from the Prison Policy Initiative is cause for concern:



Moreover, an October 2021 report from The Sentencing Project found that Black Americans are incarcerated at nearly five times the rate of white Americans.<sup>42</sup>

This begs the question: Is it better to “leave unredressed the wrongs done by dishonest officers” than to subject them to the same potential liability as everyone else?<sup>43</sup> After all, criminal defense lawyers, including public defenders, do not receive absolute immunity.<sup>44</sup> Those familiar with the criminal justice system are aware that public defenders receive as much or more of a criminal defendant’s ire as prosecutors.<sup>45</sup> If defense lawyers can

<sup>40</sup> *Imbler v. Pachtman*, 424 U.S. 409, 428 (1976) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

<sup>41</sup> See Emily Widra, *States of Incarceration: The Global Context 2024*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/global/2024.html>.

<sup>42</sup> Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENT’G PROJECT (Oct. 13, 2021), <https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-stateprisons-the-sentencing-project/>.

<sup>43</sup> *Imbler*, 424 U.S. at 428 (quoting *Gregoire*, 177 F. 2d at 581).

<sup>44</sup> *Tower v. Glover*, 467 U.S. 914, 921 (1984).

<sup>45</sup> John B. Mitchell, *In (Slightly Uncomfortable) Defense of ‘Triage’ by Public Defenders*, 39 VAL. U. L. REV. 925, 930 (2005); John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1216, 1227–29 (1994).

perform their jobs without immunity, why are prosecutors unable to do the same? More importantly, given the great power prosecutors have and the extreme trust society vests in them, why should “dishonest” prosecutors acting with an “evil . . . motive influenced by hate” to “deliberately and willfully injure” be categorically immune?<sup>46</sup>

Those who answer this question with the refrain that prosecutors do no such thing should logically have no objection to a standard permitting liability *if* prosecutors were to act in such a way. An exception of this magnitude would pose no harm to most prosecutors. Indeed, the vast majority of prosecutors are careful and honorable officers of the court who would likely have no objection to holding dishonest colleagues accountable for malicious acts.<sup>47</sup>

The United States Supreme Court’s dramatically framed concern about the “constant dread of retaliation” is unfounded. The threat of liability for malicious acts should not place anyone acting honorably in fear.<sup>48</sup> The Court itself even seemed to recognize this proposition, noting that absolute immunity protects only the “dishonest” prosecutor.<sup>49</sup> More importantly, the civil justice system in our country is widely viewed as a vehicle to encourage good conduct by discouraging the opposite.<sup>50</sup> Any prosecutor considering dishonest and malicious official conduct *should* fear the consequences of abusing their power, not be free therefrom.

But there is, after all, a middle ground between allowing the rare dishonest prosecutor to run amok and striking some hypothesized fear in the heart of the many good-natured civil servants in this role. Maryland courts can and should adopt a stringent standard for denying a prosecutor immunity and exposing them to liability.

### III. ADOPTING A NEW APPROACH TO PROSECUTORIAL IMMUNITY

Maryland law already recognizes a spectrum of culpability from negligence to gross negligence to intent to malice.<sup>51</sup> Negligence is a mere

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<sup>46</sup> See *Drug Fair of Md., Inc. v. Smith*, 263 Md. 341, 352 (1971).

<sup>47</sup> The authors wish to stress this point. Our colleagues in the 24 State’s Attorneys’ offices around the State are, in great measure, excellent people and devoted public servants doing important work with our gratitude. Our practice does, however, bring us into frequent contact with those whose conduct falls far short of these ideals, but would instead meet the high standards for liability proposed herein. While these problematic prosecutors are few in number, the same is not true for their victims, so the need for reform is great.

<sup>48</sup> *Imbler*, 424 U.S. at 428.

<sup>49</sup> *Id.*

<sup>50</sup> Jill W. Lens, *Tort Law’s Deterrent Effect and Procedural Due Process*, 50 TULSA L. REV. 115, 118 (2014).

<sup>51</sup> See *infra* notes 54 and 55.

accident arising most often from lack of care or diligence for which most Marylanders can be held liable.<sup>52</sup> Whereas “gross negligence is an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another and also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them.”<sup>53</sup> Intentional misconduct is done purposefully.<sup>54</sup> Malice requires intent coupled with an “evil or rancorous” motive.<sup>55</sup>

Maryland’s police officers, like State’s Attorneys,<sup>56</sup> are public officials involved in the prosecution of criminals.<sup>57</sup> Maryland’s high incarceration rate<sup>58</sup> implicitly suggests that police officers have no problem performing their duties while remaining personally liable for misconduct spanning from gross negligence to malice.<sup>59</sup> Moreover, police are typically better known to the arrestee as a result of having far more personal contact,<sup>60</sup> including through the use of force.<sup>61</sup> As a result, police should be far more likely to be the subject of lawsuits.<sup>62</sup> Yet the state’s police have not been so paralyzed at the thought of lawsuits for gross negligence or malice that they have been unable to do their jobs—quite the opposite has been demonstrated over the decades since the current liability scheme has been in place.<sup>63</sup> With decades of data demonstrating that public officials can successfully arrest and participate in the prosecution of defendants while bearing liability for gross negligence and malice, it is high time for the Maryland judiciary to reconsider absolute prosecutorial immunity.

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<sup>52</sup> *Barbre v. Pope*, 402 Md. 157, 164–65 (2007) (explaining that due to the Defendants lack of diligence he violated the Plaintiffs constitutional rights).

<sup>53</sup> *Barbre*, 402 Md. 157, 187 (quoting *Liscombe v. Potomac*, 303 Md. 619, 635 (1968)).

<sup>54</sup> *Id.* at 182.

<sup>55</sup> *Id.* at 182.

<sup>56</sup> MD. CODE ANN., CRIM. PROC. §§ 14-106–14-111 (West 2008) (describing the duties of Maryland state prosecutors, including investigating, and filing cases); *see also* MD. CONST. art. V, § 3.

<sup>57</sup> MD. CODE ANN., CRIM. PROC. § 2-102(b)(1) (West 2025).

<sup>58</sup> *Maryland Profile*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/profiles/MD.html> (last visited May 2, 2025); *see also* NELLIS & BARRY, *supra* note 6.

<sup>59</sup> *See* MD. CODE ANN., CTS. & JUD. PROC. § 5-522(a)(4).

<sup>60</sup> CRIM. PROC. § 2-102(b)(1).

<sup>61</sup> *Mapping Police Violence, Maryland*, POLICE DATA, <https://policedata.org/report/md/statewide/uof> (last visited May 2, 2025) (providing data regarding reported uses of force instances in Maryland from 2017 to 2022, which occurred more than 25,000 times).

<sup>62</sup> *See, e.g., Prince George’s Cnty. Maryland v. Longtin*, 190 Md. App. 97, 141 (2010), *aff’d sub nom* 419 Md. 450 (2011).

<sup>63</sup> CTS. & JUD. PROC. § 5-522(b).

The good news is that prosecutorial immunity is purely judge-made law, meaning the courts can modify the scope of the immunity provided.<sup>64</sup> Moreover, Maryland's Constitution provides ample support for prosecutorial liability. After all, its drafters reminded us "[t]hat all persons invested with the Legislative or Executive powers of Government are the Trustees of the Public, and, as such, accountable for their conduct . . . ."<sup>65</sup>

Support for the abolition or modification of absolute prosecutorial immunity can be found in Article 19 of Maryland's Declaration of Rights. Article 19 provides that:

[E]very man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.<sup>66</sup>

The Supreme Court of Maryland detailed the relevant history of Article 19<sup>67</sup> in *Piselli v. 75th Street Medical*,<sup>68</sup> stating that:

Article 19 was part of the original Maryland Declaration of Rights adopted in 1776, although it was then designated as Article 17 of the Declaration of Rights. Except for one word, the wording today is identical to the 1776 wording. All of the original state constitutions adopted at the time of the Revolutionary War, except Virginia's and North Carolina's,

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<sup>64</sup> Gill v. Ripley, 352 Md. 754, 770 (1999).

<sup>65</sup> MD. DECL. OF RTS. art. 6.

<sup>66</sup> *Id.* at art. 19.

<sup>67</sup> For a more comprehensive review of the history and application of such clauses, see *Smothers v. Gresham Transfer, Inc.*, 332 Or. 83, 23 P.3d 333 (2001); Shannon M. Roesler, *The Kansas Remedy by Due Course of Law Provision: Defining a Right to a Remedy*, 47 KAN. L. REV. 655 (1999); Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279 (1995); David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197 (1992); David Schuman, *Oregon's Remedy Guarantee*, 65 OR. L. REV. 35 (1986); Hans A. Linde, *First Things First: Rediscovering The States' Bills of Rights*, 9 U. BAL. L. REV. 379, 385 (1980); RICHARD L. PERRY & JOHN C. COOPER, *SOURCES OF OUR LIBERTIES* 341–351 (1990); RAYMOND B. STRINGHAM, *MAGNA CARTA FOUNTAINHEAD OF FREEDOM* 54–57 (1966); SAMUEL E. THORNE ET AL., *THE GREAT CHARTER: FOUR ESSAYS ON THE MAGNA CARTA AND THE HISTORY OF OUR LIBERTY* 52–61 (1965); FAITH THOMPSON, *MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION, 1300-1629*, at 97–99, 364–365 (1948); see also CARL NICHOLAS EVERSTINE, *THE GENERAL ASSEMBLY OF MARYLAND, 1634-1776*, at 566 (1980).

<sup>68</sup> *Piselli v. 75th Street Med.*, 371 Md. 188, 204–205 (2002).

contained provisions like Article 19. While the United States Constitution contains no comparable provision, today the constitutions of 39 states have clauses similar to Article 19. These provisions, often referred to as ‘Remedy Clauses’ or ‘Open Courts Clauses’ or ‘Access to Courts Clauses,’ are based on Chapter 40 of the Magna Carta or, more particularly, Lord Coke’s interpretation of Chapter 40.<sup>69</sup>

The Supreme Court of Maryland has recognized that Article 19 “generally protects two interrelated rights: (1) a right to a remedy for an injury to one’s person or property; [and] (2) a right of access to the courts.”<sup>70</sup> Thus, Marylanders have a constitutional right to redress in the courts “[w]here a person clearly has a right to money or property under a statute or common law principle, and no statute specifically provides for a remedy, Article 19 guarantees a common law remedy to enforce the right.”<sup>71</sup> Moreover, “Article 19 ensures that rights belonging to Marylanders are not illegally or arbitrarily denied by the government.”<sup>72</sup> Accordingly, Article 19 permits only “*reasonable* restrictions upon traditional remedies or access to the courts.”<sup>73</sup> Article 19 also “precludes the Legislature from immunizing from suit both the government and the governmental official involved when the cause of action is based upon a violation of state constitutional rights.”<sup>74</sup>

In the *Piselli*<sup>75</sup> case, the Supreme Court of Maryland held that a statute of repose, running against a minor child during his or her period of minority and “barring an injured child’s medical malpractice claim before the child is able to bring an action[,] is an unreasonable restriction upon the child’s right to a remedy and access to the courts guaranteed by Article 19 of the Maryland Declaration of Rights.”<sup>76</sup>

The Supreme Court of Maryland has also held that:

Article 19 provides a measure of constitutional protection even for causes of action which are not based on constitutional

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<sup>69</sup> *Id.*

<sup>70</sup> *Piselli*, 371 Md. at 205.

<sup>71</sup> *Id.* at 206.

<sup>72</sup> *Doe v. Doe*, 358 Md. 113, 127 (2000) (internal quotation marks omitted).

<sup>73</sup> *Piselli*, 371 Md. at 206 (emphasis added).

<sup>74</sup> *Id.* at 207; *see* *Lee v. Cline*, 384 Md. 245, 262–64 (2004); *DiPino v. Davis*, 354 Md. 18, 50–51 (1999); *Ashton v. Brown*, 339 Md. 70, 105–06 (1995); *Ritchie v. Donnelly*, 324 Md. 344, 370–75 (1991); *Clea v. City of Balt.*, 312 Md. 662, 680–81 (1988); *Weyler v. Gibson*, 110 Md. 636, 653–54 (1909).

<sup>75</sup> *Piselli*, 371 Md. at 216.

<sup>76</sup> *Id.*

rights.<sup>77</sup> While Article 19 generally prohibits a grant of immunity to both the governmental official and the governmental entity which tortiously violates a plaintiff's state constitutional rights, the effect of Article 19 upon non-constitutional torts is somewhat more fluid. The test is one of reasonableness.<sup>78</sup>

The Court specifically stated that “[a] statutory restriction upon access to the courts violates Article 19 . . . if the restriction is unreasonable.”<sup>79</sup> Article 19, “generally prohibits unreasonable restrictions upon traditional remedies or access to the courts but allows the legislature, pursuant to its authority to change the common law or statutory provisions, to enact reasonable restrictions upon traditional remedies or access to the courts.”<sup>80</sup>

In *Lee v. Cline*, the Court ruled that “at least to the extent that the Maryland Tort Claims Act substitutes the liability of the State for the liability of the state employee committing a tort, the requirements of Article 19 are satisfied.”<sup>81</sup> However, the Court carefully noted that:

There is one issue regarding the impact of Article 19 upon Maryland Tort Claims Act immunity which has not been raised in this case, which is not likely presented by the facts of the case, and upon which we intimate no opinion. The Tort Claims Act, in § 12-104(a)(2) of the State Government Article, caps the State's liability at \$ 200,000, but the Act, in § 5-522(b) of the Courts and Judicial Proceedings Article, grants total immunity to state personnel for torts “for which the State or its units have waived immunity . . . even if the damages exceed the [monetary] limits of that waiver.” Whether Article 19 of the Declaration of Rights precludes the grant of immunity to state personnel, to the extent that damages exceed \$ 200,000, is an issue which has not previously been decided by the Court. As indicated above, we express no opinion on the issue.<sup>82</sup>

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<sup>77</sup> *Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604, 644 (2002); *see also* *Robinson v. Bunch*, 367 Md. 432, 444 (2002); *Doe*, 358 Md. at 128; *State v. Board of Education*, 346 Md. at 647; *Renko v. McLean*, 346 Md. 464, 484 (1997); *Johnson v. Maryland State Police*, 331 Md. 285, 297 (1993); *Murphy v. Edmonds*, 325 Md. 342, 365 (1992).

<sup>78</sup> *Lee*, 384 Md. at 264–266 (quoting *Murphy*, 325 Md. at 365).

<sup>79</sup> *Murphy*, 325 Md. at 365.

<sup>80</sup> *Lee*, 384 Md. at 264–266 (quoting *Johnson*, 331 Md. at 297).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 267 n.4.

The following principles stand out from the courts' various explanations of Article 19: Any restriction on access to the courts must be reasonable, and Article 19 prohibits immunizing both the government and the individual government employee, leaving a victim without remedies.<sup>83</sup> Furthermore, Article 19 prohibits precisely what Maryland's absolute prosecutorial immunity accomplishes in practice: denying any remedy to the wronged by immunizing *both* the prosecutor and the government.<sup>84</sup>

For all of the reasons above—and in concert with every person's inherent drive to see justice prevail when someone is wronged—it is not reasonable to fully immunize prosecutors acting with evil motives to intentionally harm people using the vast powers of their office.

Absolute prosecutorial immunity violates Article 19 of the Maryland Declaration of Rights. It is unconstitutional for the courts, decades after the founding, to have declared the victims of rogue prosecutors remediless because Article 19 guarantees a remedy and reasonable access to the courts.

Absolute prosecutorial immunity also violates the right to trial by jury. Thomas Jefferson described the right to trial by jury as “the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.”<sup>85</sup> The fundamental right to trial by jury is enshrined in the Declaration of Rights, which provides in Article 5: “The inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law.”<sup>86</sup> Article 23 of the Declaration of Rights likewise provides “[t]he right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of \$ 10,000, shall be inviolably preserved.”<sup>87</sup> Similarly, all Marylanders enjoy a right to access to the courts under Article 19 of the Declaration of Rights.<sup>88</sup> Those constitutional provisions combine to create a fundamental right to trial by jury in civil matters meeting jurisdictional limits, as it was preserved under the common law of England, which cannot be abrogated by the court. As demonstrated above, there was no prosecutorial immunity in English common law; consequently, the right to sue one who

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<sup>83</sup> *Id.*

<sup>84</sup> *See, e.g.,* *Parker v. State*, 337 Md. 271, 274–75 (1995) (discussing an analogous doctrine: judicial immunity). The Supreme Court of Maryland has not only recognized that judicial immunity bars a suit and “cannot form the basis of a recovery against the State . . . ,” *id.* at 286, but also that “absolute [judicial] immunity is needed to forestall endless collateral attacks on judgments through civil actions against the judges themselves,” *id.* at 287.

<sup>85</sup> *Lucky Ned Pepper's, Ltd. v. Columbia Park & Recreation Asso.*, 64 Md. App. 222, 225 (1985) (quoting Thomas Jefferson, *Letter to Thomas Paine* (1789)).

<sup>86</sup> MD. DECL. OF RTS. art. 5.

<sup>87</sup> MD. DECL. OF RTS. art. 23.

<sup>88</sup> MD. DECL. OF RTS. art. 19.

wrongly prosecuted the plaintiff for a crime existed.<sup>89</sup> As such, access to the courts and the right to a trial by jury as to such claims is guaranteed by our constitution.<sup>90</sup>

Finally, Maryland's courts should not have adopted absolute prosecutorial immunity but should have instead entrusted the matter to the legislature. Article 8 of the Declaration of Rights mandates a distinct separation of powers between the three branches of state government, providing: "[t]hat the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."<sup>91</sup> After all, it is the legislature's function to create the law, and the courts are trusted with its interpretation and application.<sup>92</sup> But here, the courts overstepped by creating an immunity, and an absolute one at that, which was not previously recognized in Maryland or imported via our Constitution from English common law.<sup>93</sup>

It is only through the adoption of any prosecutorial immunity by the legislative branch that Maryland may observe the constitutional mandate of separation of powers. After all, "the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government."<sup>94</sup> The public's right to be heard and to participate in the legislative process is denied when critical legislative functions, such as the grant of immunity, are performed by the courts with only the parties to a particular case before them.

Maryland's General Assembly is the traditional body to pass legislation regarding any immunities due to public officials, like prosecutors. Examples abound, but include the Local Government Tort Claims Act and the Maryland Tort Claims Act ("MTCA").<sup>95</sup> The MTCA grants state employees immunity for all but grossly negligent or malicious conduct and substitutes the State as the liable party for conduct not rising to these standards.<sup>96</sup> Section 5-522(b) of the Courts and Judicial Proceedings Article provides that:

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<sup>89</sup> MD. DECL. OF RTS. art. 5, 23, 19.

<sup>90</sup> *Id.*

<sup>91</sup> MD. DECL. OF RTS. art. 8.

<sup>92</sup> *Stearman v. State Farm Mut. Auto. Ins. Co.*, 381 Md. 436, 454 (2004) (interpreting the Maryland Constitution).

<sup>93</sup> Bock, *supra* note 20; Langbein, *supra* note 21.

<sup>94</sup> MD. DECL. OF RTS. art. 7; *see also* MD. DECL. OF RTS. art. 8.

<sup>95</sup> MD. CODE ANN., STATE GOV'T § 12-104-105 (West 2024).

<sup>96</sup> *Id.*; *see Cooper v. Rodriguez*, 443 Md. 680, 706–07 (2015); *see also* MD. CODE ANN., CTS. & JUD. PROC. § 5-522(b) (West 2025).

State personnel, as defined in § 12-101 of the State Government Article, are immune from suit in courts of the State and from liability in tort for a tortious act or omission that is within the scope of the public duties of the State personnel and is made without malice or gross negligence, and for which the State or its units have waived immunity under Title 12, Subtitle 1 of the State Government Article, even if the damages exceed the limits of that waiver.<sup>97</sup>

Prosecutors fall within the statute's definition of state personnel, so their acts within the scope of their public duties, and without malice or gross negligence, are shielded from liability by statute.

This is important to our analysis for two reasons. First, it demonstrates that the legislature has established ground rules for prosecutorial liability and that the judicial grant of absolute immunity should give way under the doctrine of separation of powers, as adopted in Maryland's Constitution.<sup>98</sup> Second, the existing statutory scheme permits the court to abolish absolute prosecutorial immunity without fear of any gap in protection for prosecutors who avoid gross negligence and malice.<sup>99</sup> The solutions proposed here are easy to implement, and the court may act with confidence that all but what the Supreme Court called "dishonest officers" will be protected.<sup>100</sup>

#### IV. CONCLUSION

John Adams hoped we would form "a government of laws, not of men," but absolute immunity robs us of recourse to the law, ceding significant portions of our government to the absolute whim of the immune.<sup>101</sup> It is long past time to reconsider this extreme approach in favor of a compromise permitting prosecutorial liability in instances of gross negligence or malice. This is the only way to make good on the constitutional promise that all Marylanders "for any injury done" shall have a "remedy" and "justice and right, freely without sale, fully without any denial."<sup>102</sup>

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<sup>97</sup> CTS. & JUD. PROC. § 5-522(b).

<sup>98</sup> MD. DECL. OF RTS. art. 8.

<sup>99</sup> *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 5-522(b).

<sup>100</sup> *Imbler v. Pachtman*, 424 U.S. 409, 428 (1976).

<sup>101</sup> AMANDA A. MATHEWS, "A GOVERNMENT OF LAWS AND NOT OF MEN": JOHN ADAMS, ATTORNEY, AND THE MASSACHUSETTS CONSTITUTION OF 1780, at 110 (Boston College 2008); *see also* MASS. CONST. pt. 1, art. XXX ("[T]o the end it may be a government of laws and not of men.").

<sup>102</sup> MD. DECL. OF RTS. art. 19 & art. 5.

## ARTICLE

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### INNOCENCE IS DIFFERENT: WHY VICTIM IMPACT STATEMENTS SHOULD BE INADMISSIBLE AT WRONGFUL CONVICTION HEARINGS

By: Colin Miller\*

#### I. INTRODUCTION

In 1986, Maryland's highest court issued a disastrous decision on victim impact statements ("VIS") that took the United States Supreme Court decades to remedy.<sup>1</sup> In the intervening years, it is likely that this opinion led to the imposition of the death penalty on several defendants who otherwise would have had their lives spared. Now, thirty-eight years later, the Supreme Court of Maryland has doubled down on this disaster by issuing *Syed v. Lee*, a second misguided opinion on victim impact statements, holding that the victim's brother, Mr. Lee, had a right to be physically present and address the merits of Mr. Syed's vacatur.<sup>2</sup> This error does not facilitate the execution of guilty defendants whose lives might otherwise have been spared. Instead, the ruling created a mechanism by which an innocent defendant could remain incarcerated or, in Adnan Syed's case, potentially return to prison despite the prosecution and defense agreeing that they were the victim of a wrongful conviction.<sup>3</sup> This article argues that the Supreme Court of Maryland should

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\* **Colin Miller** is a Professor of Law at the University of South Carolina School of Law and a Blog Editor for the EvidenceProf Blog, which can be found at:

<https://lawprofessors.typepad.com/evidenceprof/>.

<sup>1</sup> *Booth v. State*, 306 Md. 313, 331 (1986).

<sup>2</sup> *Syed v. Lee*, 488 Md. 537, 552 (2024).

<sup>3</sup> "[T]he parties have uncovered Brady violations and new information, all concerning the possible involvement of two alternative suspects. Additionally, the parties have identified significant reliability issues regarding the most critical pieces of evidence at trial." *Syed*, 488 Md. at 566. While the Supreme Court of Maryland did not order Mr. Syed's reincarceration, the court left the Baltimore City State's Attorney's Office to decide whether the remanded vacatur hearing would take place, leaving Adnan Syed's freedom in limbo. *Id.* at 629 n.48. The Baltimore City State's Attorney's Office ultimately withdrew the motion to vacate. Greg Ng, *Baltimore Judge Officially Imposes Reduced Sentence for Adnan Syed to Time Served, Probation*, WBALTV (Mar. 14, 2025, 5:10 PM), <https://www.wbaltv.com/article/adnan-syed-resentenced-time-served-probation/64187467#:~:text=Now%2043%2C%20Syed%20spent%20almost,committed%20as%20minors%20to%20seek>. Still, Mr. Syed's freedom solidified through a motion for reduction of sentence under the Juvenile Restoration Act, which reduced his sentence to time served. *Id.*; see also *Order Modifying Sentence, State v. Syed*, No. 199103042-46 (Balt. City Cir. Ct., Mar. 6, 2025).

overturn the *Syed* ruling to ensure that post-conviction hearings focus solely on the merits—namely evidence of the defendant’s innocence and constitutional violations.

## II. THE HISTORY OF VICTIM IMPACT STATEMENTS

### A. *The Origin of Victim Impact Statements*

Historically, there was no such thing as victim impact evidence.<sup>4</sup> As Justice John Paul Stevens of the United States Supreme Court observed in 2008, none of the classic works on the rules of evidence, including Wigmore’s treatise, make any reference to victim impact evidence.<sup>5</sup> Instead, victim impact evidence is a relatively recent phenomenon deriving from the 1970’s victims’ rights movement.<sup>6</sup> Proponents of this movement claimed that sentencing hearings focused too much on the defendant to the exclusion of the victim.<sup>7</sup> As such, the theory behind victim impact evidence is that it

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<sup>4</sup> See *Kelly v. California*, 555 U.S. 1020, 1020 n.2 (2008); see also JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (4th ed. 1961).

<sup>5</sup> *Kelly*, 555 U.S. at 1020 n.2 (internal citations omitted).

<sup>6</sup> *Id.*

<sup>7</sup> Several groups within the criminal justice system agreed that victims deserved “official recognition” during a prosecution but specifically posit fairness in giving victims a place in the sentencing process. See Philip A. Talbert, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 199–200 (1988). In response to the Victims’ Rights Movement, President Ronald Reagan issued Executive Order 12360, which:

- (1) called for a Task Force on Victims of Crime that would conduct a review of national, state, and local policies and programs affecting victims of crime;
- (2) requested the Task Force to work with the Cabinet Council on Legal Policy; and
- (3) requested the Task Force to advise the President and the Attorney General with respect to actions, which can be undertaken to improve efforts to assist and protect victims of crime.

Melissa Hook & Anne Seymour, *A Retrospective of the 1982 President’s Task Force on Victims of Crime: A Component of the Office for Victims of Crime Oral History Project*, OFF. JUST. PROGRAMS (Dec. 2004),

[https://web.archive.org/web/20241215151242/https://www.ncjrs.gov/ovc\\_archives/ncvrw/2005/pg4d.html](https://web.archive.org/web/20241215151242/https://www.ncjrs.gov/ovc_archives/ncvrw/2005/pg4d.html). At least one justice echoed this sentiment before the President’s Task Force. Frank Carrington & George Nicholson, *The Victims’ Movement: An Idea Whose Time Has Come*, 11 PEPP. L. REV. 1, 1 (1984) (“Somewhere along the way, the system began to serve lawyers and judges and defendants, treating the victim with institutionalized disinterest.”).

balances the scales of justice by providing “the jury with an idea of who the victim was and of the impact of his or her death on family and close friends.”<sup>8</sup>

Victim impact evidence typically materializes as Victim Impact Statements (“VIS”).<sup>9</sup> VIS have historically taken two forms. The first consists of the victim’s friends and family describing the emotional trauma they suffered from their loss and the personal characteristics of the victim.<sup>10</sup> The second involves the victim’s friends and family offering opinions and characterizations of the defendant’s crimes and the appropriate punishment.<sup>11</sup> The constitutionality of VIS, and the second form in particular, reached the Court of Appeals of Maryland<sup>12</sup> in 1986 in *Booth v. State*.<sup>13</sup>

### B. *Booth v. Maryland*

In *Booth*, John “Ace” Booth was convicted of murder and related crimes arising from his robbery of an elderly couple’s house.<sup>14</sup> At Mr. Booth’s capital sentencing hearing, the prosecution presented a VIS to the jury that provided two forms of victim impact evidence. The first statement “described the personal characteristics of the victims and the emotional impact of the crimes on the family.”<sup>15</sup> The second statement “set forth the family members’ opinions and characterizations of the crimes and the defendant.”<sup>16</sup>

As part of this second statement, the victims’ son “stated that his parents were ‘butchered like animals,’ and that he ‘doesn’t think anyone

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<sup>8</sup> *People v. Dykes*, 209 P.3d 1, 49 (Cal. 2009); *see also* Talbert, *supra* note 7, at 203 (“As Justice Scalia has remarked, ‘Many citizens have found one unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced . . . .’”).

<sup>9</sup> *Victim Impact Statements*, U.S. DEP’T JUST. DIV., <https://www.justice.gov/criminal/criminal-vns/victim-impact-statements> (Sept. 27, 2023).

<sup>10</sup> *See, e.g., State v. Rhoades*, 822 P.2d 960, 974 (Idaho 1990) (citing *Booth v. Maryland*, 482 U.S. 496 (1987)).

<sup>11</sup> *See id.*

<sup>12</sup> In 2022, the Maryland Court of Appeals renamed to the Supreme Court of Maryland, with judges serving on Maryland’s highest court now referred to as Justice. Ali Mahdi, *Election Day was a “Namechanger”*: Voters Successfully Rename Maryland’s Appellate Courts, U. BALT. L. F. BLOG (Nov. 13, 2022), <https://ublawforum.com/2022/11/13/election-day-was-a-namechanger-voters-successfully-rename-marylands-appellate-courts/>.

<sup>13</sup> *See generally Booth v. State*, 306 Md. 172 (1986).

<sup>14</sup> *Id.* at 181.

<sup>15</sup> *Booth*, 482 U.S. at 502.

<sup>16</sup> *Id.*

should be able to do something like that and get away with it.”<sup>17</sup> Moreover, the victims’ daughter provided that:

[She] could never forgive anyone for killing [her parents] that way. She can’t believe that anybody could do that to someone. The victims’ daughter state[d] that animals wouldn’t do this. [The perpetrators] didn’t have to kill because there was no one to stop them from looting . . . . The murders show the viciousness of the killers’ anger. She d[id]n’t feel that the people who did this could ever be rehabilitated and she d[id]n’t want them to be able to do this again or put another family through this.<sup>18</sup>

Ultimately, the jury returned a death sentence against Mr. Booth.<sup>19</sup>

On appeal, Mr. Booth claimed that the introduction of victim impact evidence violated his Eighth and Fourteenth Amendment rights by “inject[ing] an arbitrary factor into [his] capital sentencing proceeding.”<sup>20</sup> In response, the Court of Appeals of Maryland concluded that “[t]here is no *per se* constitutional defect in using a victim impact statement at a capital sentencing proceeding.”<sup>21</sup> Rather, “[t]he sentencing authority is not constitutionally restricted to considering only the operative facts in the commission of the crime, in addition to the circumstances of the perpetrator.”<sup>22</sup>

Applying this reasoning, the Court of Appeals of Maryland found no issue with the victim impact evidence.<sup>23</sup> Instead, the court characterized the evidence as “a relatively straightforward and factual description of the effects of these murders” on the victims’ family.<sup>24</sup> This framing of VIS left the *Booth* Court “satisfied that the sentence of death was not imposed in this case under the influence of passion, prejudice or any other arbitrary factor.”<sup>25</sup>

After granting *certiorari*, the United States Supreme Court issued a harsh rebuke to the Court of Appeals of Maryland in its 5-4 opinion in *Booth*

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<sup>17</sup> *Booth*, 306 Md. at 236.

<sup>18</sup> *Id.* at 238.

<sup>19</sup> *Id.* at 182.

<sup>20</sup> *Id.* at 222.

<sup>21</sup> *Id.* at 223.

<sup>22</sup> *Id.*

<sup>23</sup> *Booth*, 306 Md. at 223.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

*v. Maryland*.<sup>26</sup> In doing so, the Court addressed both parts of the VIS.<sup>27</sup> With regard to the statements about the victim's characteristics and the impact of their loss, the Court concluded that: (1) the victim's characteristics may be wholly unrelated to the blameworthiness of the defendant; (2) a life-or-death decision could turn on whether the victim had a loving and articulate family; and (3) such statements are not easily susceptible to rebuttal.<sup>28</sup>

Regarding the characterizations of the crimes the defendant had committed and the appropriate sentence, the Court found that "the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant."<sup>29</sup> This decision justified the Court's conclusion that "[t]he admission of these emotionally charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decision-making we require in capital cases."<sup>30</sup> Thereafter, the Court vacated the opinion by the Court of Appeals of Maryland, holding that the admission of a VIS at the sentencing stage of a capital case violates the Eighth Amendment.<sup>31</sup> Four years later, the United States Supreme Court would revisit this ruling in *Payne v. Tennessee*.<sup>32</sup>

### C. *Payne v. Tennessee*

In *Payne*, Pervis Payne was convicted of two counts of murder and related crimes based on the fatal stabbings of Charisse Christopher and her two-year-old daughter, Lacie.<sup>33</sup> At Mr. Payne's capital sentencing hearing, the prosecution presented the first form of VIS, but did not admit the second form.<sup>34</sup> The Supreme Court of the United States stressed this point when setting forth its opinion.<sup>35</sup> The Court acknowledged it held in *Booth* "that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment."<sup>36</sup> More succinctly, the *Booth* Court had rejected both forms of VIS. In *Payne*, because the second form of VIS was *not* introduced

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<sup>26</sup> *Booth v. Maryland*, 482 U.S.496, 501–02 (1987).

<sup>27</sup> *Id.* at 502.

<sup>28</sup> *Id.* at 504–06.

<sup>29</sup> *Id.* at 508.

<sup>30</sup> *Id.* at 508–09.

<sup>31</sup> *Id.* at 509.

<sup>32</sup> *See generally* *Payne v. Tenn.*, 501 U.S. 808 (1991).

<sup>33</sup> *Id.* at 811.

<sup>34</sup> *Id.* at 830 n.2.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

by the prosecution, the Court limited its scope of review of the *Booth* decision to the first form of VIS,<sup>37</sup> specifically “that evidence and argument relating to the victim and the impact of the victim’s death on the victim’s family are inadmissible at a capital sentencing hearing.”<sup>38</sup>

The Court overruled this portion of its *Booth* decision,<sup>39</sup> relying on the “potential for unfairness” when a court precludes victim impact evidence.<sup>40</sup> In particular, the Majority highlighted that the defense had similarly presented evidence of Mr. Payne’s character that could have caused the jury to spare his life:

Payne’s girlfriend that they met at church; that he was affectionate, caring, and kind to her children; that he was not an abuser of drugs or alcohol; and that it was inconsistent with his character to have committed the murders. Payne’s parents testified that he was a good son, and a clinical psychologist testified that Payne was an extremely polite prisoner and suffered from a low IQ.<sup>41</sup>

According to the Court, solely focusing on Mr. Payne’s character would unfairly deprive the jury of hearing about the victims’ unique character and the impact of their loss on friends and family.<sup>42</sup> Therefore, the Court reversed the portion of *Booth* holding that the Eighth Amendment *per se* precludes victim impact evidence regarding the personal characteristics of the victim and the emotional impact of the crimes on the victim’s friends and family.<sup>43</sup> The Court cautioned, however, that “[i]n the event that [victim impact] evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.”<sup>44</sup>

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<sup>37</sup> *See id.* (“No evidence of the . . . sort was presented at the trial in this case.”).

<sup>38</sup> *Payne*, 501 U.S. at 830 n.2.

<sup>39</sup> *Id.* at 825.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 826. Decades later, the State conceded that Payne could not be executed due to his intellectual disability, and a judge removed him from death row. *Prosecutors Concede Tennessee Man Cannot Be Executed*, EQUAL JUST. INITIATIVE (Nov. 19, 2021), <https://ej.org/news/prosecutors-concede-pervis-payne-cannot-be-executed/>. There are also many reasons to believe that Payne is innocent and was wrongfully convicted. *See, e.g.*, Daniele Selby, *8 Things You Need to Know About Pervis Payne*, INNOCENCE PROJECT (July 22, 2020), <https://innocenceproject.org/pervis-payne-wrongful-conviction-what-to-knowinnocent-tennessee/>.

<sup>42</sup> *See Payne*, 501 U.S. at 827.

<sup>43</sup> *See id.*

<sup>44</sup> *Id.* at 825.

D. *Characterizations of the Crime, the Defendant, and the Appropriate Sentence*

The *Payne* Court made crystal-clear that it had steered clear of reviewing the *Booth* holding that VIS in capital cases must exclude characterizations of the crime, the defendant, and the appropriate sentence.<sup>45</sup> And, indeed, some courts held that this prohibition remained after *Payne*, preventing the admission of such statements.<sup>46</sup> But, while the *Payne* Court definitively denied overruling this portion of *Booth*, other courts have found the opposite.<sup>47</sup> As a result, some courts allowed the admission of this form of VIS containing characterizations of the crime, the defendant, and the appropriate sentence.<sup>48</sup>

For example, the Supreme Court of Kansas admitted this form of VIS in *State v. Gideon*.<sup>49</sup> In *Gideon*, Donald Gideon was convicted of crimes connected to the murder of Stephanie Schmidt.<sup>50</sup> At Mr. Gideon's capital sentencing hearing, the Schmidt's family "made statements concerning how [the victim's] death had affected them and what they thought the penalty should be."<sup>51</sup> Specifically, the family members stated "that the defendant was a prior sex offender who should not have been released from prison, that the death penalty should be available, that what happened to [the victim] was like imposing the death penalty on her, and that the court should not permit the defendant to do the same thing to [another]." Similarly, in *Robison v. Maynard*, the Tenth Circuit held that *Payne* did not overrule this portion of *Booth*, concluding "that allowing any person to opine whether the death penalty should be invoked would interfere with the jury's performance of its duty to exercise the conscience of the community."<sup>52</sup> In finding these statements constitutional, the Tenth Circuit concluded that "the *Payne* Court did not set limits on the type of victim impact evidence which may be admissible."<sup>53</sup>

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<sup>45</sup> *Id.* at 830, n.2.

<sup>46</sup> For example, in *Robison v. Maynard*, the Tenth Circuit found that *Payne* did not overrule this portion of *Booth*, concluding "that allowing any person to opine whether the death penalty should be invoked would interfere with the jury's performance of its duty to exercise the conscience of the community." *Id.* at 1505.

<sup>47</sup> 1505.P.2d 850 (Kan. 1995); *Ledbetter v. State*, 933 P.2d 880 (Okla. Crim. App. 1997); *Bosse v. Oklahoma*, 360 P.3d 1203 (Okla. Crim. App. 2015).

<sup>48</sup> *Gideon*, 894 P.2d at 863–64; *Bosse*, 360 P.3d at 1239–40.

<sup>49</sup> *Gideon*, 894 P.2d 850.

<sup>50</sup> *Id.* at 594.

<sup>51</sup> *Id.* at 605.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 607.

Two years later, the Court of Criminal Appeals of Oklahoma reached a similar conclusion in *Ledbetter v. State*.<sup>54</sup> In *Ledbetter*, Andrew Ledbetter was convicted of the first-degree murder of his estranged wife.<sup>55</sup> At Mr. Ledbetter's sentencing hearing, the victim's brother made comments that "could be described as characterizations and opinions about the crime, the defendant and the appropriate punishment."<sup>56</sup> Specifically, he "described the murder as a 'selfish act'; related one child's opinion that his mother was 'butchered like an animal'; described the murder as 'brutal'; and recalled one child's memory that [Mr. Ledbetter] had threatened to kill the victim and 'somehow I knew in my heart he meant it.'"<sup>57</sup> The victim's brother also expressed his "belief the death penalty was a 'swift and just' punishment" for Mr. Ledbetter.<sup>58</sup>

In finding this VIS was constitutional, the court concluded that *Payne* expressly and implicitly overruled both parts of *Booth* despite the opinion merely overruling *Booth* in part.<sup>59</sup> Thus, regarding the VIS characterizing the crime, the defendant, and the appropriate sentence, the court held that, "in light of the discussion in *Payne*, whatever ban against this evidence there may be does not lie in the Eighth Amendment."<sup>60</sup> Oklahoma courts applied this precedent for over a decade, setting the stage for a decision by the Supreme Court of the United States.<sup>61</sup>

#### E. *Bosse v. Oklahoma*

In another capital case heard by the Oklahoma Court of Criminal Appeals, *Bosse v. State* affirmed a verdict where a VIS contained characterizations of the crime, the defendant, and the appropriate sentence.<sup>62</sup> Justice Gary Lumpkin, concurring in part, indicated that he did "not know how the United States Supreme Court could be clearer" when the *Payne* court unequivocally stated that it did not disturb *Booth*'s finding that the second form of VIS was unconstitutional.<sup>63</sup>

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<sup>54</sup> See *Ledbetter v. State*, 933 P.2d 880 (Okla. Crim. App. 1997).

<sup>55</sup> *Id.* at 884.

<sup>56</sup> *Id.* at 890.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 889.

<sup>60</sup> *Ledbetter*, 933 P.2d at 890.

<sup>61</sup> See *Payne*, 501 U.S. at 827.

<sup>62</sup> See *Bosse v. State*, 360 P.3d 1203, 1240 (Okla. Crim. App. 2015) (Lumpkin, V. P. J. concurring)

*vacated* 580 U.S. 1 (2016).

<sup>63</sup> *Id.* at 1240 (Lumpkin, J, concurring in part).

The United States Supreme Court granted certiorari in *Bosse v. State* and ultimately resolved the issue in 2015.<sup>64</sup> There, the Court held that the *Ledbetter* Court correctly concluded that *Payne* explicitly overruled only part of *Booth* and was “wrong to go further and conclude that *Payne* implicitly overruled *Booth* in its entirety.”<sup>65</sup> Simply put, the Court concluded that “[t]he Oklahoma Court of Criminal Appeals remained bound by *Booth*’s prohibition of the form of VIS containing characterizations and opinions from a victim’s family members about the crime, the defendant, and the appropriate sentence.<sup>66</sup> By expressly upholding the *Booth* holding that limited admission of VIS to only its first form, the Supreme Court of the United States might have saved countless lives.

F. *The Importance of Bosse Resurrecting Booth*

A study by Professors Ray Paternoster and Jerome Deise followed participants who watched a video of an actual capital sentencing hearing.<sup>67</sup> Some participants watched a version of the hearing that contained no victim impact evidence while other participants watched a version of the hearing that contained a VIS by the victim’s sister.<sup>68</sup> For the latter group, the hearing was approximately 3.5 hours, with 20 minutes devoted to the VIS.<sup>69</sup>

Notably, the sister’s VIS resembled the one in *Booth*.<sup>70</sup> In addition to speaking to her sister’s characteristics and the impact of her loss on the family, the sister also spoke “as to what the family would like to see as a punishment for the offender.”<sup>71</sup> Specifically, she stated that “[n]othing can change what he [the defendant] did, but he must face the consequences of his actions. This is why I ask you the jury for a just punishment for an unjustifiable death.”<sup>72</sup> Participants in the latter group who heard the sister’s VIS did just that, with 62.5 percent of participants indicating that they would impose a death sentence on the defendant if they were jurors.<sup>73</sup> In contrast, a mere 17.5 percent of the participants in the former group who did not see the

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<sup>64</sup> See *Bosse v. Oklahoma*, 580 U.S. 1 (2016).

<sup>65</sup> *Id.* at 3.

<sup>66</sup> *Id.*

<sup>67</sup> See Ray Paternoster & Jerome Deise, *A Heavy Thumb on the Scale: The Effect of Victim Impact Evidence on Capital Decision Making*, 49 CRIMINOLOGY 129 (2011). *Id.* at 143.

<sup>68</sup> *Id.* at 144.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Ray Paternoster & Jerome Deise, *supra* note 67, at 144.

<sup>73</sup> *Id.* at 153–54; 148–49.

VIS indicated that they would have imposed a death sentence if they were jurors.<sup>74</sup>

Through this study, Professors Paternoster and Deise discovered a significant “relationship between viewing the [VIS] and positive emotions toward the victim and the victim’s family as well as negative emotions toward the offender.”<sup>75</sup> Further, the professors determined that “both those who viewed [VIS] and those who actually imposed a death sentence were significantly more likely to think that a sentence of death ‘would help the victim’s family find closure or help them recover from their loss.’”<sup>76</sup> Thus, jurors imposed a death sentence “on the defendant consistent with the wishes of the family as implicitly or explicitly expressed in the victim impact statement.”<sup>77</sup>

It is therefore clear how the Court of Appeals of Maryland in *Booth v. State* could have contributed to any number of defendants receiving death, rather than life, sentences. As noted, the court found no issue with the admission of a VIS characterizing the crime, the defendant, and the appropriate sentence.<sup>78</sup> While the Supreme Court later reversed this holding in *Booth v. Maryland*, courts in states such as Kansas and Oklahoma found that the *Payne* Court overruled its entire prior opinion in *Booth*, thereby restoring the opinion by the Court of Appeals of Maryland deeming such statements admissible.<sup>79</sup> These courts allowed for the admission of this type of statement at capital sentencing hearings, making it nearly four times more likely that capital defendants in these jurisdiction received death sentences if the study reflects reality.<sup>80</sup> While the Supreme Court of the United States has now precluded the admission of such statements in capital cases, it has not ruled on their admissibility in other contexts, setting the state for the disastrous decision at the heart of this article.<sup>81</sup>

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<sup>74</sup> *Id.* at 149.

<sup>75</sup> *Id.* at 153.

<sup>76</sup> *Id.* at 154.

<sup>77</sup> Paternoster & Deise, *supra* note 67, at 153.

<sup>78</sup> *Booth*, 306 Md. at 223.

<sup>79</sup> *Payne*, 501 U.S. at 827; *see also Bosse*, 580 U.S. at 2; *Gideon*, 257 Kan. at 606.

<sup>80</sup> Paternoster & Deise, *supra* note 67, at 149.

<sup>81</sup> Carrie Mulholland, *Sentencing Criminals: The Constitutionality of Victim Impact Statements*, 60 MO. L. REV. 731, 742 (1995); *see discussion infra* Section III.

### III. INNOCENCE IS DIFFERENT: WHY VICTIM IMPACT STATEMENTS SHOULD BE INADMISSIBLE AT WRONGFUL CONVICTION HEARINGS

#### A. *Death Is Different: Victim Impact Statements in Other Contexts*

In the wake of *Bosse*, courts across the country noted that, in the context of victim impact evidence, “death is different” due to its severity and finality.<sup>82</sup> Therefore, the resurrected prohibition under *Booth v. Maryland* places limitations on VIS in only capital cases.<sup>83</sup> For example, in Maryland, in *Lopez v. State*, the Court of Appeals of Maryland specifically held that the old *Booth* limitation did not apply in a case where the prosecution sought a sentence of life imprisonment without the possibility of parole.<sup>84</sup> In reaching this conclusion, the court concluded that, in terms of severity, a sentence of life without parole pales compared to a death sentence.<sup>85</sup> Furthermore, Maryland courts have also held that *Booth* does not apply to VIS offered in other contexts, such as parole hearings and juvenile resentencing hearings. This issue of limited reach of the *Booth* holding pursuant to *Bosse* set the stage for the opinion of the Supreme Court of Maryland in *Syed v. Lee*.<sup>86</sup>

#### B. *Syed v. Lee and the Unprecedented Power Given to Victims’ Families at Wrongful Conviction Hearings*

In *Syed*, the prosecution filed a motion to vacate Adnan Syed’s convictions connected to the murder of Hae Min Lee.<sup>87</sup> This motion was based on the prosecution at Mr. Syed’s trial violating *Brady v. Maryland* by failing to disclose material exculpatory evidence to the defense.<sup>88</sup> Specifically, the motion set forth how the prosecution failed to disclose evidence that an alternate suspect with motive, means, and opportunity stated that he would kill Hae Min Lee and make her disappear.<sup>89</sup> Judge Melissa Phinn granted the motion, thereby vacating Mr. Syed’s convictions.<sup>90</sup>

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<sup>82</sup> *Serrano v. State*, 279 So.3d 296, 303 (Fla. App. 1st 2019).

<sup>83</sup> *See id.*

<sup>84</sup> *Lopez v. State*, 458 Md. 164, 195–96 (2018).

<sup>85</sup> *Id.* at 196 (quoting *Woods v. State*, 315 Md. 591, 606–07 (1989)).

<sup>86</sup> *See Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016); *see generally Syed v. Lee*, 488 Md. 537, (argued Aug. 30, 2024).

<sup>87</sup> *Id.* at 552, 322 A.3d at 586.

<sup>88</sup> *Id.* at 566, 322 A.3d at 595.

<sup>89</sup> *Id.* at 566-67, 322 A.3d at 595.

<sup>90</sup> *Id.* at 551, 574, 322 A.3d at 585, 599.

Thereafter, the Appellate Court of Maryland reversed this relief, and the Supreme Court of Maryland affirmed.<sup>91</sup>

Maryland's highest court held that Ms. Lee's brother received insufficient notice to be able to attend the hearing in person despite being able to attend virtually and address the court before both sides made their presentations in support of the motion to vacate.<sup>92</sup> Most notably, for purposes of this essay, the court also ruled that "the victim's right to be heard at a vacatur hearing includes the right to address the merits of the vacatur motion after the prosecutor and the defense have made their presentations in support of the motion."<sup>93</sup> The court further found that "[a]fter hearing the evidence adduced at the hearing, if the victim believes the State has not met its burden of proof . . . the victim must have the right to explain why the victim believes that to be the case and to ask the court to deny the motion." On the other hand, "[i]f, as happened here, the victim is only permitted to speak before the parties have concluded their presentations, the victim does not have the opportunity to fully address the merits of the motion."<sup>94</sup> The *Syed* Court concluded that having the victim's family speak first "undermines the victim's ability to have meaningful input into the court's decision-making process, thereby devaluing the victim's right to be heard."<sup>95</sup>

Just as it had done thirty-eight years ago, Maryland's highest court approved VIS that contain characterizations of the defendant, the crime, and the appropriate sentence.<sup>96</sup> One would expect that the victim impact statement at Syed's second hearing on a motion to vacate will include claims that (1) Syed is a violent criminal; (2) The crime was brutal while the undisclosed exculpatory evidence was not material given the evidence of guilt; and (3) Syed's conviction and life sentence should be sustained rather than reversed.

Justice Brynja Booth, in her dissent, concluded that the Majority had created a "right to be heard" at a wrongful conviction hearing on a motion to vacate "without any authority."<sup>97</sup> Justice Booth also added that this right that the Majority had created out of whole cloth "transcends anything that the

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<sup>91</sup> *Syed*, 488 Md. at 575, 628, 322 A.3d at 600, 632. It should also be noted that the Baltimore City State's Attorney's Office withdrew the previous administration's motion to vacate months later. Press Release, Baltimore City State's Attorney's Office, State's Att'y Announces Withdrawal of Motion to Vacate Judgement in Adnan Syed Case (Feb. 25, 2025), <https://www.stattorney.org/media-center/press-releases/3042-state-s-attorney-announces-withdrawal-of-motion-to-vacate-judgement-in-adnan-syed-case>.

<sup>92</sup> *Id.* at 629, 322 A.3d at 632.

<sup>93</sup> *Id.* at 613, 322 A.3d at 623.

<sup>94</sup> *Id.* at 613–14, 322 A.3d at 623.

<sup>95</sup> *Id.* at 614, 322 A.3d at 623.

<sup>96</sup> *Booth v. State*, 306 Md. 172, 223, 507 A.2d 1098, 1124 (1986).

<sup>97</sup> *Id.* at 710, 322 A.3d at 680 (Booth, J., dissenting).

General Assembly has enacted to date.”<sup>98</sup> She clarifies that, in other contexts with a “right to be heard,” that right is simply a “*right to address the court*,” “not a right to participate in the process.”<sup>99</sup> Finally, Justice Booth indicated that, “again without any authority,” the Majority gave a trump card to the victim’s family by allowing them a rebuttal after both the prosecution and defense have argued that the defendant was wrongfully convicted.<sup>100</sup>

C. *Innocence Is Different: Why Victim Impact Statements Should be Inadmissible or Circumscribed at Wrongful Conviction Hearings*

In *Syed*, by concluding that a VIS should be admissible at wrongful conviction hearings, the Supreme Court of Maryland has forgotten the purpose of victim impact evidence at the heart of its disastrous ruling thirty-four years ago.<sup>101</sup> In *Booth v. State*, the defendant had argued that victim impact evidence injected an arbitrary factor into his capital sentencing hearing.<sup>102</sup> Maryland’s highest court disagreed, finding that a focus on the defendant and the impact of their loss was a necessary counterbalance to character evidence about the defendant that could lead to a lighter sentence.<sup>103</sup> While the Supreme Court of the United States subsequently rebuked and reversed this ruling, the *Payne* Court explicitly only approved the first form of VIS.<sup>104</sup> Using the same logic in *Booth v. State* and by the victims’ rights movement of the late 1970’s, the *Payne* Court found it unfair to preclude the victim’s friends and family from counterbalancing character evidence presented by the defendant during a sentencing hearing in capital cases.<sup>105</sup>

Logically, the *Payne* holding extends to other non-capital contexts. For example, at a sentencing hearing, the judge or jury decides the sentence to impose on a defendant who has been found guilty, rather than addressing the question of whether there was a wrongful conviction. At such hearings, defendants present evidence of their good character to try to secure a lighter sentence, while victim impact evidence provides a counterbalance.<sup>106</sup>

Courts have also allowed victim impact evidence at parole hearings.<sup>107</sup> At a parole hearing, the focus is not on whether the defendant

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 710, 322 A.3d at 680–81.

<sup>101</sup> *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

<sup>102</sup> *Booth v. State*, 306 Md. 172, 222, 507 A.2d 1098, 1124 (1986).

<sup>103</sup> *Id.* at 223, 507 A.2d at 1124.

<sup>104</sup> *Payne v. Tennessee*, 501 U.S. 808, 824-26 (1991).

<sup>105</sup> *See id.*

<sup>106</sup> *See, e.g., Conyers v. State*, 354 Md. 132, 167–68, 729 A.2d 910, 929 (1999).

<sup>107</sup> *See discussion supra* Section III.B.

was wrongfully convicted.<sup>108</sup> Rather, the focus is on factors like whether the defendant has shown remorse or has been rehabilitated.<sup>109</sup> The defense presents evidence of such remorse and rehabilitation, making it reasonable for the VIS of the victim’s friends and family to rebut such evidence.<sup>110</sup>

Finally, courts have deemed victim impact evidence admissible at juvenile resentencing hearings, such as hearings after the Supreme Court of the United States deemed life without parole sentences for juveniles unconstitutional in *Miller v. Alabama*.<sup>111</sup> Again, the inquiry at such hearings is not whether the defendant was wrongfully convicted. Instead, the focus is on factors like the defendant’s mental and emotional maturity as an adult and as a youth when the crime was committed.<sup>112</sup> Once again, when the defense presents evidence of these elements that would support a lighter sentence, it is reasonable that the victim’s friends and family would be able to counter such evidence.

Nevertheless, the original *Booth* holding must extend to wrongful conviction hearings because “innocence is different” at these hearings. The focus of Mr. Syed’s wrongful conviction hearing on the State’s motion to vacate was indeed on whether he was wrongfully convicted.<sup>113</sup> Specifically, the hearing focused on whether the State violated *Brady v. Maryland* by withholding material evidence of his innocence.<sup>114</sup> Such a hearing is similar to hearings now conducted across the country based upon the work by Conviction Integrity Units (CIUs) in prosecutor’s offices reviewing prior convictions.<sup>115</sup> After “the dawn of the era of CIUs,” these bodies are now the primary mechanism through which wrongful convictions are overturned, either acting alone or in coordination with innocence organizations.<sup>116</sup>

Yet, the Supreme Court of Maryland’s ruling casts a pall over such proceedings in a way inconsistent with the purpose of victim impact evidence.<sup>117</sup> During Mr. Syed’s hearing, Judge Phinn did not make her ruling

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<sup>108</sup> U.S. PAROLE COMM’N, FREQUENTLY ASKED QUESTIONS (Aug. 23, 2023), <https://www.justice.gov/uspc/frequently-asked-questions>.

<sup>109</sup> Michael Proeve, *Addressing the Challenges of Remorse in the Criminal Justice System*, 30 PSYCHIATRY PSYCH. L. 68, 69–70 (2023).

<sup>110</sup> See, e.g., *Alexander v. U.S. Parole Com’n*, 514 F.3d 1083, 1091-92 (10<sup>th</sup> Cir. 2008).

<sup>111</sup> *Miller v. Ala.*, 567 U.S. 460 (2012).

<sup>112</sup> See, e.g., *State v. Comer*, 266 A.3d 374, 406-08 (N.J. 2022).

<sup>113</sup> See *Syed v. State*, 488 Md. 552 (2024).

<sup>114</sup> *Syed*, 488 Md. at 566.

<sup>115</sup> *Conviction Integrity Units*, NAT’L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx> (last visited Jan. 24, 2025).

<sup>116</sup> Colin Miller, *Rectifying Wrongful Convictions Through the Dormant Grand Jury Clause*, 90 GEO. WASH. L. REV. 927, 942–43 (2022).

<sup>117</sup> See *Booth v. State*, 306 Md. 172, 222 (1986).

based on Syed's character. After all, Judge Phinn could have concluded that Mr. Syed was of the highest moral character or lacking in any moral compass, and it would have made no difference to her ruling. Consequently, there was no necessary counterbalance for character evidence through victim impact evidence. Instead, Judge Phinn's only decision was whether the prosecution withheld evidence that was both material and exculpatory pursuant to the Due Process test under *Brady v. Maryland*.<sup>118</sup>

In turn, this relates to the second reason why "innocence is different." Judge Phinn was deciding whether Syed was wrongfully convicted, which would lead to his convictions being vacated and his presumption of innocence restored. In the other non-capital contexts mentioned above, it makes sense that there could be victim impact evidence and that it could include characterizations of the crime and the appropriate sentence. In those hearings, the judge or jury decides the fate of a defendant whose innocence is not in question: *Should a defendant convicted of aggravated battery receive a ten-year sentence or a fifteen-year sentence? Should a defendant convicted of voluntary manslaughter receive parole? Should a defendant who committed murder at age sixteen have her life sentence reduced?* In such matters, testimony by the victim and/or her friends and family about the brutality of the crime and what they feel is the appropriate punishment is reasonable.

In contrast, at a post-conviction hearing challenging the merits of a conviction, the focus is not on what should be done with the defendant if he is guilty. Instead, the question is whether a wrongful conviction tore away a defendant's presumption of innocence such that the court should restore it. In a post-conviction hearing, a VIS by the victim's family characterizing the crime and the appropriate sentence is arbitrary because it has no relevance to the question of whether the defendant was wrongfully convicted. Whether the crime was a brutal or a compassionate mercy killing, or whether the perpetrator deserved the death penalty or a twenty-year sentence, is irrelevant to the court's ultimate decision of whether the defendant was wrongfully convicted. Therefore, the only relevant aspect that the victim's family could address at Mr. Syed's wrongful conviction hearing is the legal question of whether there was a *Brady* violation, which falls far from the realm of victim impact evidence. Allowing the Lee family to provide a VIS effectively transformed them into a quasi-party, allowing the Lee's to argue that the State was wrong in arguing a violation of the defendant's constitutional rights.

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<sup>118</sup> 373 U.S. 83 (1963).

#### IV. CONCLUSION

The recent *Syed* opinion constitutes the Supreme Court of Maryland's second disastrous decision on victim impact statements after *Booth v. State* in 1986. The *Syed* holding affirmatively allows for the use of unfair and unduly prejudicial admission of VIS in post-conviction hearings where the defendant's character is not in issue. Ultimately, *Syed v. Lee* is far removed from even the most expansive understanding of victim impact evidence and must be overturned.

## COMMENT

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### CONTRITION CONFLICT: REMORSE AND INNOCENCE UNDER THE JUVENILE RESTORATION ACT

By: Jayna Peterson\*

#### I. INTRODUCTION

Asserting one's innocence or Constitutional rights and rehabilitating oneself are not mutually exclusive propositions. To hold otherwise is to present a youthful offender with a Hobson's choice—give up your post-conviction rights and 'accept responsibility' or you will not have the opportunity to demonstrate your rehabilitation and seek early release.<sup>1</sup>

Phillip Anthony Montague ("Montague") found himself in a "Hobson's choice"<sup>2</sup> when he faced the denial of his sentence reduction under the Juvenile Restoration Act ("JRA")<sup>3</sup> due to his claim of innocence.<sup>4</sup> In 1997, when Montague was only sixteen-years-old, he was convicted in Baltimore County of first-degree murder, attempted murder, first-degree assault, and

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\* **Jayna Peterson**: J.D. Candidate, May 2025, University of Baltimore School of Law; B.A.S., University of Michigan. First, I am deeply grateful to my friends and family for their unwavering support over the last three years. I also want to thank Professor Jaros for his valuable guidance during the development of this comment. Last and certainly not least, I would like to express my gratitude to my Volume 55 Law Forum staff. Your hard work and dedication brought this publication to life and made my tenure as Editor-in-Chief truly rewarding. Special recognition to Jessica Kweon and Emmett Hallameyer for not only being my sounding board but the best, most diligent Articles Editors I could have. Article last updated in May 2025.

<sup>1</sup> Ord. Granting Def. Motion for Reduction of Sentence Under the Incarceration Reduction Amend. Act at 10–11, *United States v. Wendell Poole*, 1999 FEL 7782 (D.C. Super. Ct. Dec. 11, 2019) (No. 7782-99) [hereinafter *Wendell Poole Order*].

<sup>2</sup> Referred to as having "no choice at all." *Hobson's Choice*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/Hobson%27s%20choice> (last visited Dec. 19, 2023).

<sup>3</sup> MD. CODE ANN., CRIM. PROC. § 8-110 (LexisNexis 2023).

<sup>4</sup> Brief for Appellant at 5, *Montague v. State*, No. 409, Sept. Term, 2024 WL 2746018 (Md. App. Ct. May 29, 2024) [hereinafter *Montague Appeal*] (citing to Order Denying Defendant's Motion for Reduction of Sentence Pursuant to the Juvenile Restoration Act at 7–8, *State of Md. v. Phillip Anthony Montague*, No. 03-K-97-00262 (Cir. Ct. for Balt. Cnty. Apr. 6, 2023) [hereinafter *Ballou-Watts Order*], *reprinted in id.* at App. 1–11), *cert. granted*, 489 Md. 155 (2024).

unlawful use of a handgun in the commission of a felony.<sup>5</sup> Montague was sentenced to life in prison plus twenty years.<sup>6</sup>

26 years later, Judge Ballou-Watts denied Montague's reduction, extensively addressing his maturity, rehabilitation, and fitness to reenter society.<sup>7</sup> Judge Ballou-Watts detailed some of the personal growth Montague had made while incarcerated but admonished him when he expressed concern for the victim's family rather than remorse for his actions.<sup>8</sup> Judge Ballou-Watts stated that the absence of remorse is "deeply troubling" because "a [d]efendant's willingness to accept responsibility for his crime is critical in determining whether he has been rehabilitated."<sup>9</sup> Judge Ballou-Watts was unmoved by Montague's expansive record of program participation and positive change while incarcerated.<sup>10</sup> While Judge Ballou-Watts acknowledged Montague's claim of innocence, it did not change her determination that his lack of remorse made him a danger to society.<sup>11</sup>

On one side of this Hobson's choice<sup>12</sup> is the incentive for innocent people to admit guilt in hopes of regaining freedom<sup>13</sup> and on the other side lies the defendant's decision to maintain their claim of innocence and risk continuing incarceration.<sup>14</sup> Montague's case illustrates this contrition conflict that many innocent juvenile lifers face; moreover, it demonstrates that inmates like Montague must bear the heavy burden of choosing whether to maintain their right to claim innocence or waive innocence in order to gain a sentence reduction.<sup>15</sup>

Before the JRA became law, many incarcerated individuals had little hope of returning home "because the Maryland Parole Commission appears to work outside its own criteria for granting parole and instead applies a

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<sup>5</sup> Montague Appeal, *supra* note 4, at 1–2.

<sup>6</sup> *Id.* at 1.

<sup>7</sup> Ballou-Watts Order, *supra* note 4, at 5.

<sup>8</sup> *Id.* at 7.

<sup>9</sup> *Id.* at 7–8.

<sup>10</sup> *Id.* at 4, 7 ("The Defendant has taken positive steps toward his education and skill development since his incarceration. He has also made behavioral changes. However, the Defendant committed a senseless murder of one victim and the attempted murder of a second victim").

<sup>11</sup> *Id.* at 5–8.

<sup>12</sup> See MERRIAM-WEBSTER, *supra* note 2.

<sup>13</sup> Daniel Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 497, 519 (2008) (expounding on the notion that an inmate's admission of guilt would be "disastrous" for his appeals).

<sup>14</sup> *Id.* at 497.

<sup>15</sup> See NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 4 (Samuel R. Gross & Barbara O'Brian eds., 2022), <https://exonerationregistry.org/sites/exonerationregistry.org/files/documents/Updated%20CP%20-%20Race%20Report%20Preview.pdf> (demonstrating that exoneration can take years, if not decades).

calculus that resists objective analysis,” which prolongs incarceration.<sup>16</sup> Individuals asserting innocence face comparable obstacles in obtaining exoneration and release from incarceration as both processes are marked by significant delays—more than a decade to achieve exoneration on average.<sup>17</sup> Montague faced similar hurdles, spending over a decade asserting his innocence.<sup>18</sup> Montague filed a Petition for Post-Conviction Relief, which was denied in 2011.<sup>19</sup> His subsequent appeal of the denial was also denied.<sup>20</sup> In April of 2023, Judge Ballou-Watts denied Montague’s JRA reduction.<sup>21</sup> Since the denial of relief under the JRA, Montague appealed to the Appellate Court of Maryland, which agreed with Judge Ballou-Watts’ determination in an unreported opinion.<sup>22</sup> Appealing that ruling, the Maryland Supreme Court heard oral arguments on the matter in February 2025.<sup>23</sup>

Ultimately, the conflict persists for Montague as he is forced to partake in continuous litigation and consider foregoing a viable avenue of relief simply because an assertion of innocence potentially precludes release under the JRA.<sup>24</sup> In analyzing this issue under the JRA, Section II reviews the history of remorse as a proxy for rehabilitation in sentence calculations, sentence reductions, and parole hearings.<sup>25</sup> Section II also evaluates certain factors within the JRA, considering their alignment with the legislature’s concerns regarding advancements in juvenile neuroscience and the objective of eliminating racial injustice.<sup>26</sup> Section III discusses why mandating or considering remorse for movants claiming innocence has detrimental consequences<sup>27</sup> and is an imprecise measure for resentencing purposes.<sup>28</sup> Lastly, Section IV proposes a legislative remedy that grants defendants

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<sup>16</sup> Margaret Martin Barry, *Opinion: No Place for Redemption in Maryland’s Criminal System*, MD. MATTERS (Dec. 30, 2020, 8:10 AM), <https://www.marylandmatters.org/2020/12/30/opinion-no-place-for-redemption-in-marylands-criminal-system/> (citing that chances of parole are “slim to none”).

<sup>17</sup> See NAT’L REGISTRY OF EXONERATIONS, *supra* note 15.

<sup>18</sup> Ballou-Watts Order, *supra* note 4, at 6.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 11.

<sup>22</sup> Montague v. State, No. 409, Sept. Term, 2024 WL 2746018 (Md. App. Ct. May 29, 2024), *cert. granted*, 489 Md. 155 (2024).

<sup>23</sup> See Rachel Konieczny, *MD Supreme Court Hears Arguments on Sentence Reductions Under Juvenile Restoration Act*, DAILY REC. (Feb. 6, 2025), <https://thedailyrecord.com/2025/02/06/md-supreme-court-hears-arguments-on-sentence-reductions-under-juvenile-restoration-act/> [https://archive.ph/vPj67].

<sup>24</sup> *Id.* (pointing to the fact that Montague faces continuous denials of relief under the JRA due to his innocence claims).

<sup>25</sup> See discussion *infra* Section II.A.1.

<sup>26</sup> See discussion *infra* Section II.A.2.

<sup>27</sup> See discussion *infra* Section III.A.1–III.A.2.

<sup>28</sup> See discussion *infra* Section III.D.

meaningful consideration for sentence reduction while preserving the legislature's intent to release individuals who are no longer a threat to public safety.<sup>29</sup>

## II. BACKGROUND & HISTORICAL DEVELOPMENT

### A. *By Acknowledging Diminished Culpability of Juveniles and Deep Racial Disparities in the Juvenile Lifer Population, Maryland Paves the Way for Second Chances*

#### 1. Juvenile Life Without Parole Sentences

In 2012, the United States Supreme Court struck down mandatory juvenile life without parole (“JLWOP”) sentences and mandated that courts consider emerging science on the brain development of juveniles.<sup>30</sup> The Court’s decision recognized the fundamental cognitive differences between children and adults: a tendency to pursue risky situations, a lack of emotional regulation, and an inability to appreciate the consequences of their actions.<sup>31</sup> In light of their repeated recognition<sup>32</sup> of adolescent neuroscience, the Supreme Court held that juvenile lifers<sup>33</sup> “must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.”<sup>34</sup> Policy advocates subsequently led the long-standing movement to ban JLWOP across the country,<sup>35</sup> citing a juvenile’s propensity to reform during

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<sup>29</sup> See discussion *infra* Section IV.B.

<sup>30</sup> *Miller v. Alabama*, 567 U.S. 460 (2012) (banning mandatory life without parole sentences for juveniles but leaving the possibility of JLWOP in rare cases where the court deems a child irredeemable).

<sup>31</sup> Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking*, 23 PSYCH., PUB. POL’Y, & L. 410, 413 (2017).

<sup>32</sup> See *Graham v. Florida*, 560 U.S. 48 (2010); see also *Miller*, 567 U.S. 460; see also *Montgomery v. Louisiana*, 577 U.S. 190 (2016).

<sup>33</sup> *Juvenile Life Without Parole (JLWOP)*, RESTORE JUST., <https://www.restorejustice.org/issues/sentencing/juvenile-life-without-parole/> (last visited Feb. 22, 2024) (“[A] child 17 years old or younger [sentenced] to life in prison without the possibility of parole.”).

<sup>34</sup> *Montgomery*, 577 U.S. at 213 (writing for the majority, Justice Kennedy explained their finding that a ban on juvenile life without parole should be retroactive).

<sup>35</sup> *A Majority of U.S. States Have Abandoned Sentencing Children to Die in Prison*, CAMPAIGN FOR THE FAIR SENT’G OF YOUTH, <https://cfsy.org/> (last visited Nov. 10, 2023) (referencing the map that illustrates where legislation has banned JLWOP and where states still allow the sentence).

maturation.<sup>36</sup> In 2024, thirty-three states and the District of Columbia have passed legislation to ban the sentence.<sup>37</sup>

Despite legislative efforts, Black and Brown children are disproportionately sentenced to JLWOP across the United States.<sup>38</sup> When Maryland legislators proposed the JRA, over 400 people were eligible for a sentence review hearing under the proposed standards.<sup>39</sup> Eighty-seven percent of this population was Black,<sup>40</sup> which is unsurprising given that Maryland leads the country in incarcerating Black man— twice the national rate.<sup>41</sup>

## 2. The Juvenile Restoration Act

Following George Floyd's death, policymakers sought to prioritize legislation dismantling Maryland's systemic racial injustices.<sup>42</sup> The JRA was a timely addition to the 2021 legislative session's initiatives,<sup>43</sup> offering "the

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<sup>36</sup> CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, TIPPING POINT: A MAJORITY OF STATES ABANDON LIFE-WITHOUT-PAROLE SENTENCES FOR CHILDREN 4 (2018), <https://cfsy.org/wp-content/uploads/Tipping-Point.pdf> [hereinafter JLWOP Movement]; see also Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE AND TREATMENT 449, 451 (2013) (explaining that the prefrontal cortex of the brain continues to develop until the age of 25).

<sup>37</sup> CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, *supra* note 35.

<sup>38</sup> JLWOP Movement, *supra* note 36, at 10 (noting that Black children make up seventy-two percent of juvenile life without parole sentences since the *Miller* decision).

<sup>39</sup> CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, JUVENILE RESTORATION (HB409/SB494) FACTSHEET (2021), [https://cfsy.org/wp-content/uploads/HB409\\_SB494\\_JuvenileRestorationAct\\_FACTSHEET-1.pdf](https://cfsy.org/wp-content/uploads/HB409_SB494_JuvenileRestorationAct_FACTSHEET-1.pdf).

<sup>40</sup> Dylan Segelbaum, *'It Means Everything: ' How the Juvenile Restoration Act Has Provided a Second Chance for People Sentenced as Children to Prison in Maryland*, BALT. BANNER (Oct. 3, 2022, 6:00 AM), <https://www.thebaltimorebanner.com/community/criminal-justice/it-means-everything-how-the-juvenile-restoration-act-has-provided-a-second-chance-for-people-sentenced-as-children-to-prison-in-maryland-HDCZ6OY2TFAR3G4IUK6VKUTJUM/>.

<sup>41</sup> JUST. POLICY INST., RETHINKING APPROACHES TO OVER INCARCERATION OF BLACK YOUNG ADULTS IN MARYLAND 3 (2019), [https://justicepolicy.org/wp-content/uploads/2022/02/Rethinking\\_Approaches\\_to\\_Over\\_Incarceration\\_MD.pdf](https://justicepolicy.org/wp-content/uploads/2022/02/Rethinking_Approaches_to_Over_Incarceration_MD.pdf).

<sup>42</sup> Baltimore Sun Editorial Board, *Maryland's House Speaker Crafts Ambitious 'Black Agenda' to Close Equity Gaps*, BALT. SUN (Jan. 22, 2021, 6:10 PM), <https://www.baltimoresun.com/opinion/editorial/bs-ed-0121-speaker-equity-plan-20210121-6bnzuqxirvcn5dnuwozft23bge-story.html>; see also Tyler Waldman, *General Assembly to Conduct Racial Impact Reviews of Criminal Justice Bills*, WBAL NEWS RADIO (Feb. 1, 2021), <https://www.wbal.com/general-assembly-to-conduct-racial-impact-reviews-of-criminal-justice-bills/> (recognizing systemic inequities and the impact of criminal justice legislation to combat them).

<sup>43</sup> Elizabeth Weill-Greenberg, *Maryland Bans Sentencing Children to Life Without Parole*, APPEAL (Apr. 13, 2021), <https://theappeal.org/politicalreport/maryland-bans-sentencing-children-to-life-without-parole/>.

potential to reduce the inequitable impacts on Black youth criminally charged as adults in the State.”<sup>44</sup> Applying a balance of age-appropriate guidelines with traditional notions of public safety, the legislature drafted a non-exhaustive list of factors to be considered by the court, including:

- (1) the individual’s age at the time of the offense;
- (2) the nature of the offense and the history and characteristics of the individual;
- (3) whether the individual has substantially complied with the rules of the institution in which the individual has been confined;
- (4) whether the individual has completed an educational, vocational, or other program;
- (5) whether the individual has demonstrated maturity, rehabilitation, and fitness to reenter society sufficient to justify a sentence reduction;
- (6) any statement offered by a victim or a victim’s representative;
- (7) any report of a physical, mental, or behavioral examination of the individual conducted by a health professional;
- (8) the individual’s family and community circumstance at the time of the offense, including any history of trauma, abuse, or involvement in the child welfare system;
- (9) the extent of the individual’s role in the offense and whether and to what extent an adult was involved in the offense;
- (10) the diminished culpability of a juvenile as compared to an adult, including an inability to fully appreciate risks and consequences; and,
- (11) any other factors the court deems relevant.<sup>45</sup>

As a threshold matter for release, a judge must also find that the movant is “not a danger to the public and the interests of justice will be better served by a reduced sentence.”<sup>46</sup> In doing so, a judge is at liberty to assess any of the above factors.<sup>47</sup>

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<sup>44</sup> See generally MD. DEP’T OF LEGIS. SERVS., FISCAL & POLICY NOTE, S.B. 494, 442d Sess. (2021), <https://mgaleg.maryland.gov/Pubs/BudgetFiscal/2021rs-SB494-REIN.pdf>.

<sup>45</sup> MD. CODE ANN., CRIM. PROC. § 8-110(d) (LexisNexis 2021); S.B. 494, 442nd Gen. Assemb., Reg. Sess. (Md. 2021).

<sup>46</sup> § 8-110(c)(1)–(2).

<sup>47</sup> § 8-110(d).

At issue in this comment is the judiciary's ability to consider factors otherwise not explicitly outlined in the JRA.<sup>48</sup> For example, under the fifth factor, the judiciary may look to "intuitive signs of rehabilitation" and maturity, such as acceptance of responsibility and showing of remorse for the underlying crime.<sup>49</sup> Moreover, under the eleventh factor, the judiciary finds a catch-all provision to evaluate any other indicia they deem relevant, thereby creating opportunities to circumvent the purposes of the JRA.<sup>50</sup>

*B. Dimensions of Remorse in Sentencing Practices from Repentance to Rehabilitation*

Use of remorse in sentencing or punishment dates back to Puritan courts, where remorse was a proxy for society's religious purity.<sup>51</sup> Punishment in colonial times mirrored aspects of modern general deterrence, aiming to dissuade people from engaging in sinful behavior.<sup>52</sup> To that end, public punishment at the gallows was a mechanism for teaching the townsfolk to live a life of innocence, untarnished by even the smallest of infractions.<sup>53</sup> In its earliest form, remorse served as a tool of social utility rather than a means of changing the defendant's morality.<sup>54</sup>

In the 21st century, judges have considerable discretion in sentencing a criminal defendant, but courts largely agree that remorse is among the most crucial mitigating factors.<sup>55</sup> Remorse is utilized as a measure of rehabilitation in the eyes of the court because it demonstrates a person's amenability to treatment.<sup>56</sup> Its use is further justified by the belief that its existence

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<sup>48</sup> See *infra* notes 49–50 and accompanying text.

<sup>49</sup> M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 302, 316 (2018); Medwed, *supra* note 13, at 512–13; see also § 8-110(d)(5).

<sup>50</sup> See § 8-110(d)(11); see discussion *infra* Section III.A.1; see also Montague Appeal, *supra* note 4.

<sup>51</sup> Rocksheng Zhong, *So You're Sorry? The Role of Remorse in Criminal Law* 4 (Jan. 2013) (Ph.D. thesis, Yale University) (on file with Yale Medicine Thesis Digital Library).

<sup>52</sup> *Id.* ("Defendants, particularly those sentenced to death, were expected to confess and repent so that religious sermon delivered at their public execution could instill righteousness among the townsfolk."); see also Bryan H. Ward, *Sentencing without Remorse*, 38 LOY. U. CHI. L.J. 131, 137 (2006) ("Minor sins were commonly punished, however, 'severity was not the point of punishing minor sins. The point was repentance and a good swift lesson.'"); see also Athula Pathinayake, *Should We Deter Against General Deterrence?*, 9 WAKE FOREST J.L. & POL'Y 63, 78 (2018) ("General deterrence can be described as deterring the general public through awareness of the punishments inflicted for the offense.").

<sup>53</sup> Ward, *supra* note 52.

<sup>54</sup> Though, the expression of remorse was not considered effective for the defendant. *Id.*

<sup>55</sup> *Id.* at 131.

<sup>56</sup> *Id.* at 138.

diminishes the likelihood of recidivism.<sup>57</sup> So significant is the notion of contrition that the United States Supreme Court held that a retrial was necessary where medication could affect a defendant's ability to demonstrate remorse, especially during sentencing.<sup>58</sup> Additionally, federal sentencing guidelines allow for a reduction in the offense level if an individual "clearly demonstrates acceptance of responsibility"<sup>59</sup> because such an expression acts as the first step in reformation.<sup>60</sup> In the realm of sentence reductions and parole, taking responsibility for one's actions is often cause for a reduced sentence or release.<sup>61</sup>

While the factors considered in sentencing and sentence reductions overlap, the implication of remorse in this context demonstrates a different character trait and goal within the criminal justice system—achievement of rehabilitation—giving judges a sense of comfort in their decision to modify a sentence.<sup>62</sup> Courts in Maryland recognize a judge's authority to consider the "demeanor of the accused" in their sentencing.<sup>63</sup> When resentencing in Maryland, judges have the discretion to use a lack of remorse against those maintaining their innocence.<sup>64</sup>

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<sup>57</sup> Susan A. Bandes, *Remorse and Criminal Justice*, 8 EMOTION REV. 14, 17 (2016).

<sup>58</sup> *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring) (explaining that a defendant's unaffected demeanor is important during sentencing because the court "must attempt to know the heart and mind of the offender").

<sup>59</sup> 18 USCS APPX § 3E1.1 (LexisNexis 2023).

<sup>60</sup> Richard Weisman, *Showing Remorse: Reflections on the Gap Between Expression and Attribution in Cases of Wrongful Conviction*, 46 CANADIAN J. CRIM. AND CRIM. JUST. 121, 124 (2004).

<sup>61</sup> Lovashni Khalikapasrad, *Remorse, Not Race: Essence of Parole Release?*, 9 J. RACE, GENDER, & ETHNICITY 131, 131 (2020).

<sup>62</sup> See Hanan, *supra* note 49, at 312 ("[E]xpressions of remorse signal that the defendant has undergone an internally driven 'moral reform.' Someone who expresses deep regret for his actions seems unlikely to commit the same crime again.").

<sup>63</sup> *Saenz v. State*, 95 Md. App. 238, 249 (1993) (quoting *United States v. Grayson*, 438 U.S. 41, 50 (1978)).

<sup>64</sup> *Jennings v. State*, 339 Md. 675 (1995).

### III. THE ABSENCE OF REMORSE SHOULD NOT PRECLUDE THE POSSIBILITY OF SENTENCE REDUCTION UNDER THE JRA WHEN THE APPLICANT HAS ONGOING APPEALS BASED ON INNOCENCE CLAIMS

#### A. *A Court of Last Resort: Incentive for Freedom Pressures Innocent People to Admit Guilt and Invalidate Exoneration Efforts*

##### 1. The Lure of Taking Responsibility

The traditional notions of maturity and rehabilitation often include considerations of remorse, but this practice can be extremely harmful to individuals who claim innocence.<sup>65</sup> Understandably, a droplet of prospect freedom may be enough to persuade dehydrated juvenile lifers to abandon viable claims of innocence and years of exoneration efforts.

The practice of considering one's remorse has affected Maryland exonerees, prolonging their incarceration simply for maintaining their innocence.<sup>66</sup> For example, Ransom Watkins ("Watkins") served 36 years in prison for a murder he did not commit.<sup>67</sup> He entered prison at the age of sixteen and maintained his innocence throughout his incarceration.<sup>68</sup> Watkins recounted his failed parole attempts and the board's indifference to his claims, citing that a "lack of remorse' hurt his chances . . . but his lack of guilt meant he had nothing to feel remorseful about—except his own circumstance."<sup>69</sup> Similarly, Eric Simmons ("Simmons") went to prison when he was twenty-one years old and maintained his innocence throughout his 24-year sentence.<sup>70</sup> A Maryland parole board warned Simmons to never come back up for parole if he would not show remorse for the underlying crime.<sup>71</sup> These

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<sup>65</sup> See Medwed, *supra* note 13 *passim* (discussing the dilemma behind innocent inmates admitting guilt to receive early release).

<sup>66</sup> Bruce DePuyt, *This Can't Keep Happening: Top Lawmakers Rally to Help Exonerees*, MD. MATTERS (Jan. 15, 2020, 6:43 PM), <https://www.marylandmatters.org/2020/01/15/this-cant-keep-happening-top-lawmakers-rally-to-help-exonerees/>.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* (explaining that his word meant nothing, but he never gave up on the truth).

<sup>70</sup> Tim Prudente, *Baltimore Brothers Set Free After 24 Years in Prison for Wrongful Murder Conviction*, BALT. SUN (Jun. 29, 2019, 5:39 PM), <https://www.baltimoresun.com/2019/05/03/baltimore-brothers-set-free-after-24-years-in-prison-for-wrongful-murder-conviction/>.

<sup>71</sup> Ovetta Wiggins, *Maryland Brothers Awarded \$3.8 million after being wrongfully jailed for 24 years*, WASH. POST (Jun. 17, 2020), <https://www.washingtonpost.com/local/md-politics/maryland-exonerees-2-million/2020/06/17/db4832a6-b0b6-11ea-8f56->

cases underscore Maryland's need to reevaluate their system of penalizing individuals who have no reason to be remorseful.

## 2. Systemic Injustice Causes Lengthy Exoneration Efforts

Even in cases of wrongful conviction, legal efforts may not yield a successful exoneration due to systemic challenges and procedural hurdles.<sup>72</sup> Maryland prosecutors opposing the JRA argued that this sentence reduction, creating the potential for three additional attempts for post-conviction relief, was unnecessary because offenders have numerous avenues to challenge their conviction and/or sentence.<sup>73</sup> However, opponents of this sentence reduction fail to appreciate the difficulties in overturning a wrongful conviction. Post-conviction matters take no less than a decade<sup>74</sup> of expensive litigation,<sup>75</sup> often at the mercy of prosecutors who must be willing to reexamine or challenge the previous investigation.<sup>76</sup> The criminal legal system should not find

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63f38c990077\_story.html (“In 2010, he said, the parole board told him, ‘Never come back. You’ll never get parole.’”); Interview with Eric Simmons, in Falls Church, Va. (Mar. 22, 2024).

<sup>72</sup> See, e.g., Michele Nethercott, *Finality, Fairness, and the Problem of Innocence in Maryland*, 52 U. BALT. L. REV. 33, 35–36 (2022) (“[E]ighteen years after the presentation of this alibi evidence, and after several rounds of litigation at the trial and appellate level, [George Seward’s] conviction remained intact because of the appellate court’s characterization of the performance of his trial attorney.”); see also Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 147–48 (1970) (calling exoneration efforts “self-defeating” where few individuals find freedom through post-conviction).

<sup>73</sup> See *infra* note 153 (laying out avenues for relief as (1) Motion for a new trial; (2) motion to modify or reduce sentence; (3) motion to modify based on illegal sentence, fraud, mistake or irregularity; (4) three judge panel to reduce or modify; (5) appeal to the Appellate Court of Maryland; (6) leave to appeal to the Supreme Court of Maryland; (7) Post-conviction; (8) Writ of Coram Nobis; (9) Writ of Habeas Corpus; (10) Writ of Actual Innocence; (11) Motion to vacate judgement; (12) Post-conviction DNA testing; and (13) Parole system).

<sup>74</sup> See *Explore the Numbers: Innocence Project’s Impact*, INNOCENCE PROJECT, <https://innocenceproject.org/exonerations-data/> (last visited May 3, 2025) (noting that their clients spent an average of 16 years in prison before exoneration).

<sup>75</sup> *Id.* (indicating that DNA testing for one case can cost between \$5,000 and \$50,000 alone).

<sup>76</sup> Medwed, *supra* note 13, at 531–32 (“The main ingredients in the exoneration stew include situations where: (1) there is either biological evidence appropriate for DNA testing that has not been degraded, destroyed, or lost over time or otherwise compelling, available, and newly discovered non-DNA evidence; (2) the inmate is serving a sufficiently lengthy sentence on a serious crime so as to provoke a lawyer or legal organization into reviewing the case and championing the inmate’s cause; (3) the posture of the case enables the defense team to dodge procedural default; and or (4) the assigned prosecutor or judge

comfort in a practice that asks someone to sacrifice their innocence claim only to potentially find relief under the JRA. Furthermore, it is essential to recognize that claims under the JRA and assertions of innocence are separate; one should not preclude or invalidate the other.

America's criminal legal system is no stranger to injustice and egregious errors by law enforcement and prosecutors.<sup>77</sup> While wrongful convictions are by no means endemic to Maryland, the problem is rooted in racial inequities<sup>78</sup> and official misconduct rates uniquely prevalent throughout the state.<sup>79</sup> Since 1989, fifty-four people in Maryland have been exonerated and spent approximately 761 years behind bars for crimes they did not commit.<sup>80</sup> Thirty-nine of those exonerations involved official misconduct contributing to the conviction.<sup>81</sup> Far exceeding the national

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demonstrates openness to the allegations"). The issue becomes even more complicated when one administration believes in a person's innocence and the next does not. *See* Dylan Segelbaum, *Baltimore State's Attorney Abandons Motion to Throw Out Adnan Syed's Conviction*, BALT. BANNER (Feb. 25, 2025, 7:39 PM), <https://www.thebaltimorebanner.com/community/criminal-justice/adnan-syed-motion-to-vacate-ivan-bates-T3PW5EDUKNHV7C7CV5TKMJQ5FQ/>.

<sup>77</sup> *See* Hannah Gaskill, *Bill Would Open the Door for Investigations in Wrongful Conviction Cases*, MD. MATTERS (Feb. 2, 2022, 6:35 AM), <https://www.marylandmatters.org/2022/02/02/bill-opens-the-door-for-investigations-in-wrongful-conviction-cases/> ("Armbrust noted a case where police coerced a false confession from a developmentally disabled person after threatening him with the death penalty, untruthfully telling him that he failed a polygraph examination and interrogating him throughout the night while withholding food and sleep."); The court explained Joseph Cassilly's disbarment after conduct contributing to and in furtherance of Josh Huffington's wrongful conviction as "a lawyer who, in his capacity as a prosecutor, knowingly and intentionally failed to disclose for more than a decade exculpatory evidence that came to light after a defendant's conviction, discarded the evidence, knowingly made false statements of fact to a court and defense counsel concerning the content of the evidence, opposed the defendant's postconviction petitions and sought to have forensic evidence that was the subject of the defendant's post-trial request for review destroyed, and, during bar counsel's investigation, failed to comply with a subpoena to provide a statement under oath." *See also* Kathryn Rubino, *'I Don't Give a Damn,' Says Disbarred Attorney in Outrageous Ethics Case*, ABOVE LAW (Oct. 27, 2021, 2:44 PM), <https://abovethelaw.com/2021/10/i-dont-give-a-damn-says-disbarred-attorney-in-outrageous-ethics-case/>.

<sup>78</sup> *See* discussion *supra* Section II.

<sup>79</sup> Gaskill, *supra* note 77 (noting that Shawn Armbrust of the Mid-Atlantic Innocence Project says, "exoneration cases in Maryland have higher than average rates of official misconduct.").

<sup>80</sup> *The National Registry of Exonerations*, UNIV. OF MICH., <https://exonerationregistry.org/Exonerations-in-the-United-States-Map#crimeState> (use map to click "Maryland") (last visited May 3, 2025).

<sup>81</sup> *Id.* (click on "Maryland"; then filter for "official misconduct").

average,<sup>82</sup> the state of Maryland committed *Brady* violations<sup>83</sup> in 80% of Baltimore’s exoneration cases,<sup>84</sup> casting doubts on the ability of the court to effectuate true justice.<sup>85</sup> In the United States as of 2022, Black Americans account for more than half of the National Registry’s documented exonerations.<sup>86</sup> Alarming, misconduct occurs in the wrongful murder convictions of Black individuals in the U.S. 78% of the time.<sup>87</sup> During a national reckoning on racism,<sup>88</sup> such as with the intent of the JRA,<sup>89</sup> Maryland courts and lawmakers must recognize the impact of racial bias and institutional discrimination on wrongful convictions.

Moreover, the key to a successful exoneration is not always in hiring the most skilled defense attorney or having the “best case” factually;<sup>90</sup> instead, what pushes a case beyond this threshold is based on an “often random blend of circumstances in their cases that fall outside of [an incarcerated person’s] control.”<sup>91</sup> While not determinative on these factors, this anomaly also requires considerable financial contributions and a diligent legal team willing

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<sup>82</sup> The authors note that *Brady* violations occurred in 63% of the wrongful convictions, which means Maryland misconduct far exceeds the average. See NAT’L REGISTRY OF EXONERATIONS, *supra* note 15 at 6; see also Chouleng Soun, *The Rising Tide of Wrongful Convictions: The Shortcomings of Brady and the Need for Additional Safeguards*, 56 NEW ENG. L. REV. 221, 234–45 (“*Brady* disclosures are necessary to an impartial criminal justice system because they contribute to an accurate determination of guilt or innocence. Unfortunately, the National Registry of exonerations found that official misconduct contributed to a wrongful conviction in 56% of 2,991 cases since 1989.”).

<sup>83</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”).

<sup>84</sup> Professor Erica Suter explains that while prosecutorial misconduct, such as withholding evidence, has led to many exonerations, there isn’t just one factor that contributes to wrongful prosecution. See Abby Zimmardi & Shannon Clark, *Release of Adnan Syed Focuses Attention on Maryland Wrongful Prosecutions*, MD. MATTERS (Sept. 26, 2022, 6:50 AM), <https://www.marylandmatters.org/2022/09/26/release-of-adnan-syed-focuses-attention-on-maryland-wrongful-prosecutions/>.

<sup>85</sup> Brief of the Law Enforcement Action Partnership and the National Police Accountability Project as *Amici Curiae* Supporting Petitioner, at 17, *Reed v. Goertz*, (No. 21-442) (“Erroneous convictions undermine public confidence in the fairness of the criminal legal system.”); Robert J. Norris et al., *The Criminal Costs of Wrongful Convictions: Can We Reduce Crime by Protecting the Innocent?*, 19 CRIMINOLOGY & PUB. POL’Y 1, 2 (2019).

<sup>86</sup> NAT’L REGISTRY OF EXONERATIONS, *supra* note 15, at 1.

<sup>87</sup> *Id.* at 6.

<sup>88</sup> See discussion *supra* Section II.A.1.

<sup>89</sup> Weill-Greenberg, *supra* note 43.

<sup>90</sup> Medwed, *supra* note 13, at 532 (explaining the random nature of what actually brings about an exoneration, not just the merits of the case itself).

<sup>91</sup> *Id.*

to dedicate extensive time to a post-conviction defense.<sup>92</sup> Given the complexities in attaining exonerations, it is unreasonable for the legal system to demand that juvenile lifers forfeit innocence claims as a prerequisite for the mere possibility of release the JRA grants.

Typically, the legal avenues available to sufficiently present a complete picture of innocence do not exist.<sup>93</sup> Once direct appeals are exhausted, individuals must rely on other avenues of relief like getting leave to appeal their conviction.<sup>94</sup> In Maryland, courts deny most motions for leave to appeal with minimal guidance on the standard.<sup>95</sup> Even in cases with overwhelming evidence of wrongful conviction, Maryland insulates wrongdoers and upholds decisions at distressing rates without repercussions.<sup>96</sup> Put simply, “once you are found guilty, the legal system is not designed to find truth after that point. It is designed to uphold whatever that verdict was regardless of new evidence, regardless of new people coming to light and coming forward.”<sup>97</sup> The JRA is often an innocent individual’s *last* opportunity for freedom. Maryland’s current system allows judges to ask that these movants perjure themselves in furtherance of that goal.

Arguably, one of Maryland’s most infamous cases is Adnan Syed (“Syed”), who has battled for exoneration since his conviction in 2000.<sup>98</sup> After exhausting most of his post-conviction avenues over his twenty-three years behind bars, Mr. Syed sought a sentence reduction under the JRA.<sup>99</sup> With fresh eyes on the case and discovery of *Brady* material, the state filed a motion to vacate his conviction.<sup>100</sup> However, the Appellate Court reinstated

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<sup>92</sup> Medwed, *supra* note 13, at 520–21 (explaining the team of people, including a group of law students who were required to help reinvestigate a wrongful conviction).

<sup>93</sup> Nethercott, *supra* note 72, at 38.

<sup>94</sup> Md. Rule 8-204; See MD CT. SPEC. APP., A GUIDE FOR SELF-REPRESENTATION 3 (2018), <https://www.courts.state.md.us/sites/default/files/import/cosappeals/pdfs/cosaguideselfrepresentation.pdf>, (explaining that in cases where direct appeal is not an attainable option, individuals must file an “application for leave to appeal”).

<sup>95</sup> Steve Klepper, *Maryland’s Discretionary Standard for Applications for Leave to Appeal*, MD. APP. BLOG (Mar. 2, 2022), <https://mdappblog.com/2022/03/02/marylands-discretionary-standard-for-applications-for-leave-to-appeal/>.

<sup>96</sup> Nethercott, *supra* note 72, at 37–39; see also Zimmardi & Clark, *supra* note 84.

<sup>97</sup> Hunter Parnell, *The Wrongful Conviction of Cyrus Wilson with Cyrus Wilson and Dawn Deaner*, PUB. DEFENSELESS (July 13, 2022) (downloaded using Spotify).

<sup>98</sup> See Lea Skene, *How Two New Maryland Laws Paved the Way for Adnan Syed’s Long-Awaited Release from Prison*, BALT. SUN (Sep. 25, 2022, 9:00 AM), <https://www.baltimoresun.com/2022/09/25/how-two-new-maryland-laws-paved-the-way-for-adnan-syeds-long-awaited-release-from-prison/> (calling Syed’s vacatur “an extraordinary confluence of events”).

<sup>99</sup> *Id.* (citing “alarming discoveries, including alternative suspects, disclosure issues[,] and unreliable evidence used at trial”).

<sup>100</sup> Alex Mann, *Baltimore Prosecutors Move to Vacate Adnan Syed Conviction in 1999 Murder Case Brought to National Fame in ‘Serial’ Podcast*, BALT. SUN (Sep. 14, 2022,

the conviction six months later because of a procedural error.<sup>101</sup> The Maryland Supreme Court affirmed this decision.<sup>102</sup> Three years after Baltimore City State’s Attorney Mosby’s administration vacated his conviction, State’s Attorney Ivan Bates withdrew the motion to vacate but supported Mr. Syed’s JRA petition.<sup>103</sup> Despite the opportunities for various reviews of sentences and convictions, procedural and system-placed barriers render them moot. The lack of legal remedy has prompted individuals to seek freedom through alternative means like the JRA, which may not be feasible given considerations of remorse.<sup>104</sup>

*B. Requiring Remorse from a JRA Applicant Defies the Legislature’s Intent in Creating a Second Chance at Redemption*

Maryland legislators created and passed the JRA because they believed people deserve a chance to be redeemed, and subsequent cases echoed their intent.<sup>105</sup> Legislators specifically did not require remorse as a factor within the bill because it could become an unintended barrier to

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6:57 PM), <https://www.baltimoresun.com/2022/09/14/baltimore-prosecutors-move-to-vacate-adnan-syed-conviction-in-1999-murder-case-brought-to-national-fame-in-serial-podcast/>.

<sup>101</sup> See generally *Lee v. State*, 257 Md. App. 481 (2023); see also Skene, *supra* note 98; see also Michael Levenson & Abbie Vansickle, *Court Reinstates Adnan Syed’s Murder Conviction in ‘Serial’ Case and Orders New Hearing*, N.Y. TIMES (Mar. 28, 2023), <https://www.nytimes.com/2023/03/28/us/adnan-syed-serial-conviction-reinstated.html>; see also Daniella Silva & Julia Jester, *Adnan Syed Returns to Courts as Maryland Supreme Court Weighs Victims’ Rights*, NBC NEWS (Oct. 5, 2023, 4:21 PM), <https://www.nbcnews.com/news/us-news/adnan-syed-serial-podcast-subject-returns-court-maryland-supreme-court-rcna119063>.

<sup>102</sup> See generally *Syed v. Lee*, 488 Md. 537 (2024) (remanding the case to the Baltimore City State’s Attorney’s office to redo the vacatur hearing because the Lee family did not receive proper notice to attend the hearing); see also Danielle J. Brown, *Maryland Supreme Court Reinstates Adnan Syed’s Murder Conviction, Orders New Hearing*, MD. MATTERS (Aug. 30, 2024, 10:55 PM), <https://marylandmatters.org/2024/08/30/maryland-supreme-court-reinstates-adnan-syeds-murder-conviction-orders-new-hearing/>.

<sup>103</sup> See Segelbaum, *supra* note 76.

<sup>104</sup> See e.g., Amanda Engel, *Adnan Syed Files for Relief under the Juvenile Restoration Act*, WMAR2NEWS (Dec. 23, 2024, 2:42 PM), <https://www.wmar2news.com/infocus/adnan-syed-files-for-relief-under-the-juvenile-restoration-act/> (“[O]ur concerns are focused on Adnan’s liberty ..... This filing is a small step toward ensuring that Adnan’s custody status is stabilized[,] and his freedom is safeguarded.”).

<sup>105</sup> See Segelbaum, *supra* note 40 (citing that Senator West “strongly believe[s] that each of us inside us, whether it’s our soul or our conscience or our heart or whatever, has the capacity for redemption.”); *Sexton v. State*, 258 Md. App. 525, 588 (2023) (quoting written testimony of Senator Christopher West submitted to the House Judiciary Committee concerning the JRA).

release.<sup>106</sup> In fact, legislators questioned the absence of remorse as a factor during the JRA's Judiciary Committee hearing.<sup>107</sup> In response to the inquiry, advocates of the JRA explained that "if indicia of remorse were a prerequisite to demonstrating suitability for release, those wrongfully convicted will never come home."<sup>108</sup> In essence, denying an innocent movant's sentence reduction based on remorselessness deems a person more of a danger to society than someone who committed a crime but rehabilitated themselves thereafter. Leaving this trend only serves to confuse movants and the community about the ability of the courts to adequately apply laws set forth by the General Assembly.

C. *Considering Remorse for Individuals Maintaining Their Innocence is Counterproductive to Goal of Public Safety*

Juvenile lifers are consistently the safest population for early release.<sup>109</sup> While national recidivism rates for adult offenders exceed thirty percent,<sup>110</sup> juvenile lifers recidivate at a rate less than two percent.<sup>111</sup> This rate is partially explained by recent developments in the study of juvenile

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<sup>106</sup> See *infra* notes 107–108.

<sup>107</sup> *Juveniles Convicted as Adults – Sentencing – Limitations and Reduction (Juvenile Restoration Act): Hearing on H.B. 409 Before the H. Jud. Cmte.*, 2021 Reg. Sess. (Md. 2021) (question from Luke Clippinger, Committee Chairman).

<sup>108</sup> Mr. Shipp responds to Chairman Clippinger's question about why remorse is not a required factor, citing to previous testimony by Rabia Chaudry and Former Baltimore City State's Attorney Marilyn Mosby about the prevalence of wrongful convictions in Maryland and how legislation like this could also contribute to the release of innocent inmates who otherwise can't get home. *Id.*

<sup>109</sup> TARIKA DAFTARY-KAPUR & TINA M. ZOTTOLI, MONTCLAIR ST. UNIV., REENTRY EXPERIENCES OF RELEASED JUVENILE LIFERS IN PHILADELPHIA 2 (2022), <https://www.msuddecisionmakinglab.com/lifers-policy-brief>; *Juveniles Convicted as Adults – Sentencing – Limitations and Reduction (Juvenile Restoration Act): Hearing on H.B. 409 Before the H. Jud. Cmte.*, 2021 Reg. Sess. (Md. 2021) (statement of bill sponsor, Del. Jazz Lewis).

<sup>110</sup> The recidivism rate was 30.7% after one year, 48.6% after three years, and 60.7% after ten years. See Matthew Clarke, *Justice Department Releases Ten-Year Recidivism Study*, PRISON LEGAL NEWS (Mar. 1, 2022), <https://www.prisonlegalnews.org/news/2022/mar/1/justice-department-releases-ten-year-recidivism-study/>. After three years, the recidivism rate was 31.55% in Maryland. See also DEP'T OF PUB. SAFETY AND CORR. SERV., *RECIDIVISM REPORT 9* (2022), [https://dpccs.maryland.gov/publicinfo/publications/pdfs/2022\\_p157\\_DPSCS\\_Recidivism%20Report.pdf](https://dpccs.maryland.gov/publicinfo/publications/pdfs/2022_p157_DPSCS_Recidivism%20Report.pdf).

<sup>111</sup> See DAFTARY-KAPUR & ZOTTOLI, *supra* note 109; *Juveniles Convicted as Adults – Sentencing – Limitations and Reduction (Juvenile Restoration Act): Hearing on H.B. 409 Before the H. Jud. Cmte.*, 2021 Reg. Sess. (Md. 2021) (statement of bill sponsor, Del. Jazz Lewis).

brain science and the ability of individuals to grow and mature.<sup>112</sup> Growth is even more apparent with participation in educational programming, counseling, and/or mentorship programs while incarcerated.<sup>113</sup> The over 800 juvenile lifers released since the Supreme Court's decision in *Miller v. Alabama*<sup>114</sup> exemplify this data, with diminutive recidivism rates reported across the country since their respective releases.<sup>115</sup> Maryland's juvenile lifers released under the JRA follow a similar pattern.<sup>116</sup>

Studies find there is only a *small* likelihood<sup>117</sup> that offenders who show remorse will not recidivate.<sup>118</sup> Today, this data undermines the policy concerns of juvenile reform opponents who argued that legislation like the JRA would release violent criminals, thereby jeopardizing public safety.<sup>119</sup> Moreover, little is known about remorse in sentencing and parole hearings because the concept is difficult to define for empirical data collection.<sup>120</sup> Some commentators suggest that determinations “probably rest on ‘gut feelings’ more than anything else.”<sup>121</sup> Additionally, the judiciary must be cognizant of the fact that an offender may feel shame rather than remorse,

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<sup>112</sup> See discussion *supra* Section II.

<sup>113</sup> See discussion *supra* Section II.

<sup>114</sup> See generally *Miller*, 567 U.S. 460 (2012) (holding that mandatory life without parole sentences are unconstitutional for juveniles); see also Cara H. Drinan, *The Miller Trilogy and the Persistence of Extreme Juvenile Sentencing* 58 AM. CRIM. L. REV. 1659, 1659–60 (2021).

<sup>115</sup> DAFTARY-KAPUR & ZOTTOLI, *supra* note 109, at 2; *A Study of Michigan Suggests Released ‘Juvenile Lifers’ Rarely Reoffend*, IMPRINT (Aug. 23, 2021, 11:44 AM), <https://imprintnews.org/news-briefs/michigan-released-juvenile-lifers-rarely-reoffend/58122>.

<sup>116</sup> See MD. OFF. OF THE PUB. DEF., *THE JUVENILE RESTORATION ACT YEAR ONE—OCTOBER 1, 2021 TO SEPTEMBER 30, 2022* 12–13 (2022). As of October 2022, 24 people have been released under the JRA, and none have recidivated or violated parole. *Id.*

<sup>117</sup> Nicole Bronnimann, *Remorse in Parole Hearings: An Elusive Concept with Concrete Consequences*, 85 MO. L. REV. 321, 330 (2020) (“It is thus fair to say that there is at least some empirical support for the notion that expression of remorse correlates with reduced recidivism. But that relationship is far from well-established.....”).

<sup>118</sup> Allison Maxwell & Gabrielle Morris, *Family Group Conferences and Reoffending*, in RESTORATIVE JUSTICE FOR JUVENILES: CONFERENCING, MEDIATION, AND CIRCLES 243, 246 (2001).

<sup>119</sup> Eddie Kadhim, *The Push to Stop Putting Juveniles Away for Life*, WMAR (Jan. 20, 2021, 6:35 AM), <https://www.wmar2news.com/news/local-news/the-push-to-stop-putting-juveniles-away-for-life> (statement of National Organization of Victims of Juvenile Murderers) (“While many juvenile offenders have the potential for positive change, there are many who are psychopaths. Psychopaths will always pose a danger because there is no cure or treatment for psychopathy.....Life without parole may be necessary to protect the public.”).

<sup>120</sup> Bronnimann, *supra* note 117.

<sup>121</sup> *Id.* at 330.

thereby *increasing* the likelihood of recidivism.<sup>122</sup> Further research is warranted to decipher the correlation between genuine showing of remorse and recidivism rates beyond human factors that disrupt the data.<sup>123</sup>

However, research suggests that signs of remorse could be inferred from the rehabilitative actions of offenders while incarcerated.<sup>124</sup> While an individual may not verbalize their remorse, evidence of their contrition may be “hiding in plain sight in offender rehabilitation.”<sup>125</sup> This may suggest a chance that even where remorse is absent from the record, an individual may be safe to release if they have participated in rehabilitative programming which teaches similar concepts, but further research is required.<sup>126</sup>

*D. Fate in the Hands of Judges: Remorse is Ill-Defined and Immeasurable*

Referred to as an “internal phenomenon,” remorse<sup>127</sup> is too vague of a concept to leave to the whims of judges.<sup>128</sup> Typically, judges expect visible reactions or verbal expressions of remorse, such as a defendant’s crying or apologizing for their actions.<sup>129</sup> Remorse is regarded as sincere when the offender’s nonverbal expressions match the inflection of their apology because any potential uncertainty is largely resolved.<sup>130</sup> Courts often see a defendant as cold and remorseless if these hallmarks are absent, but their absence may be a marker of youth, pressures of a formal court

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<sup>122</sup> *Id.* at 329.

<sup>123</sup> *Id.* at 330 (suggesting that data supporting a correlation between remorse and decreased recidivism could be faulty based on (1) parole commissioner’s difficulty distinguishing sincere remorse from a psychopath’s counterfeit remorse; and (2) outside pressures like drug addiction and relationship issues outweigh genuine remorse for a crime); *see also* discussion *infra* Section III.D.

<sup>124</sup> Michael Proeve, *Addressing the Challenges of Remorse in the Criminal Justice System*, 30 PSYCHIATRY, PSYCH. & L. 68, 70 (2023).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Bandes, *supra* note 57, no. 1, at 15 (defining remorse to “include several characteristics: a recognition that one has caused harm; an acceptance of responsibility for causing that harm; an associated internal strife; a desire to atone or make things right; a desire to be forgiven; and perhaps some actions in furtherance of atonement and reparation.”).

<sup>128</sup> Ward, *supra* note 52, at 135–36 (“[R]emorse is an entirely internal phenomenon which may not be amenable to refutation by countervailing external evidence.”).

<sup>129</sup> *See* Hanan, *supra* note 49, at 304–05.

<sup>130</sup> *See* Hanan, *supra* note 49, at 320 (indicating that if a defendant apologizes but does not show “true remorse” through nonverbal behavior, the apology will be “ineffective and may even be harmful.”); *see also* Emily P. Corwin et al., *Defendant Remorse, Need for Affect, and Juror Sentencing Decisions*, 40 J. AM. ACAD. PSYCHIATRY L. 41, 41 (2012).

environment,<sup>131</sup> cultural norms,<sup>132</sup> or mental illness.<sup>133</sup> Moreover, the subjective nature of remorse leaves it susceptible to misinterpretation,<sup>134</sup> especially where judges depend more on nonverbal cues like demeanor, which are “the ‘most elusive and least articulated of all criteria.’”<sup>135</sup> Despite the lack of determinative legal measurement, the legal system still values remorse as “the true window to the person’s essence.”<sup>136</sup>

The likelihood for inaccurate assessments of remorse and implicit bias increases when the defendant and the judge differ in race or culture.<sup>137</sup> Researchers point to the prevalence of racial stereotypes that Black individuals are more prone to violence or criminality as a source of bias.<sup>138</sup> When ambiguities arise, implicit prejudice may unconsciously reconcile uncertain factors to help a judge determine whether a person is safe to release, such as for the JRA.<sup>139</sup> To address these problems, Maryland’s Rules

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<sup>131</sup> See Hanan, *supra* note 49, at 322–23.

<sup>132</sup> See Ward, *supra* note 52, at 134.

<sup>133</sup> Zhong, *supra* note 51, at 12 (“Given that psychiatric disorders can alter . . . expression of remorse, persons with mental illness may be further disadvantaged in this regard.”).

<sup>134</sup> See Hanan, *supra* note 49, at 305–06, 321 (commenting on “remorse bias” because of subjectivity in expression and interpretation); see also Eve Hanan, *Bias and the Remorse Discount*, 43 CHAMPION 16, 17 (2019) (“[T]here is ‘little to no evidence that remorse can be accurately evaluated based on demeanor or body language.’”).

<sup>135</sup> Nonverbal cues or behaviors from a defendant in sentencing are, for example, crying, frowning, having an unsteady voice, eye contact, looking at the floor, covering your face, etc. See Emily P. Corwin et al., *Defendant Remorse, Need for Affect, and Juror Sentencing Decisions*, 40 J AM ACAD. PSYCHIATRY L. 41, 42 (2012) (providing that nonverbal cues or behaviors from a defendant in sentencing are, for example, crying, frowning, having an unsteady voice, eye contact, looking at the floor, covering your face, etc.); see also Bandes, *supra* note 57, at 14.

<sup>136</sup> Bandes, *supra* note 57, at 14.

<sup>137</sup> See Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 4 (2000); see also *Implicit Bias*, AM. PSYCH. ASS’N., <https://www.apa.org/topics/implicit-bias> (last visited Feb. 19, 2024) (“Implicit bias, also known as implicit prejudice or implicit attitude, is a negative attitude, of which one is not consciously aware, against a specific social group.”).

<sup>138</sup> See Hanan, *supra* note 49, at 329–30 (citing a heightened “association between African Americans and criminality and dangerousness.”); see also Danielle Macedo, *What Kind of Justice is This? Overbroad Judicial Discretion and Implicit Bias in the American Criminal Justice System*, 24 J. GENDER RACE & JUST. 43, 47 (2021) (“[W]hether because of conscious bias, unconscious stereotypes linking race with crime, or colorblind application of racially tinged policies . . . [judicial] sentencing [decisions] are not racially neutral’ overall.”); see also *Belton v. State*, 483 Md. 523, 528 (2023) (concerning the Appellate Court’s opinion which “compared Belton—an African American man—to Grendel, the mythical monster in the Old English epic, *Beowulf*.”).

<sup>139</sup> Hanan, *supra* note 49, at 334; see Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test* 74 J. PERSONALITY & SOC. PSYCH. 1464, 1474 (1998).

Committee has recommended a new rule that requires courts to generally recognize the potential for implicit racial bias in the judiciary.<sup>140</sup>

As introduced in the preceding subsection, empirical data investigating the concept of remorse in re-sentencing and probation is also flawed because of uncontrollable factors like implicit bias and stressors of re-entry.<sup>141</sup> Re-entry hardships affect all returning citizens and leads to recidivism regardless of remorse.<sup>142</sup> Studies find that viewpoints on the relationship of remorse to sentencing decisions vary significantly between judges.<sup>143</sup> A 2013 Yale study cites judicial disagreement on whether remorse is “legally relevant,” even suggesting that it should not be outcome-determinative.<sup>144</sup> The same research points to varied salience of remorse dependent on the judge’s punitive goals, e.g., deterrence versus rehabilitation.<sup>145</sup> Judges addressed the dilemma of guilt or innocence, emphasizing that “defendants must be free to assert their innocence . . . and a defendant cannot be expected to show remorse if he does not even admit the crime.”<sup>146</sup>

The consequences of remorse considerations for cases of actual innocence are too grave to ignore. While Montague’s potential freedom depends on the outcome of his appeals,<sup>147</sup> other innocent Marylanders received sentence reductions under the JRA.<sup>148</sup> For example, a Baltimore City Circuit Court judge, with support from the State’s Attorney’s Office, deemed Kenneth Bond (“Bond”) safe to reintegrate into society despite his innocence claims due to “personal transformation, education, and his potential to contribute positively to his community.”<sup>149</sup> In February 2023, Bond walked free after twenty-seven years in prison with the help of

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<sup>140</sup> STANDING COMM. ON RULES OF PRAC. AND PROC., REP. NO. 221, NOTICE OF PROPOSED RULES CHANGES 14 (2024).

<sup>141</sup> See *supra* notes 129–132 and accompanying text.

<sup>142</sup> THE LEADERSHIP CONF. ON CIV. & HUM. RTS., FACT SHEET - BARRIERS TO SUCCESSFUL RE-ENTRY OF FORMERLY INCARCERATED PEOPLE 1 (2017), <https://civilrightsdocs.info/pdf/criminal-justice/Re-Entry-Fact-Sheet.pdf>.

<sup>143</sup> See Zhong, *supra* note 51, at 16 (citing remorse groupings as (1) the legal relevance of remorse in criminal justice; (2) the time and place for remorse; (3) expressions of remorse; and (4) remorse and mental illness).

<sup>144</sup> *Id.* at 17.

<sup>145</sup> *Id.* at 17–18.

<sup>146</sup> *Id.* at 18.

<sup>147</sup> See discussion *supra* Section I.

<sup>148</sup> See *Kenneth Bond, Wrongfully Convicted, Freed After 27 Years*, GEORGETOWN PRISONS AND JUST. INITIATIVE, <https://prisonsandjustice.georgetown.edu/news/kenneth-bond-wrongfully-convicted-freed-after-27-years/> [hereinafter Bond JRA] (last visited Jan. 5, 2024).

<sup>149</sup> *Id.*

Georgetown's Making an Exoneree Program.<sup>150</sup> Bond's conviction included the markers of wrongful conviction, including ineffective assistance of counsel, and he spent decades contesting the conviction until the JRA provided him a pathway to release.<sup>151</sup> In comparison, the Bond case highlights the necessity to reevaluate how innocence claims are addressed under the JRA to promote consistency in judicial decision-making.

*E. The Paradox of Victim's Rights*

To many prosecutors, sentence reductions, even those for juvenile lifers, infringe upon the rights of victims.<sup>152</sup> Calling the JRA the "16th look back act," opponents claimed the reduction hearing would drag victims back into court to relive their trauma.<sup>153</sup> While victim participation is not required during JRA hearings, the possibility of reopening wounds due to continued proceedings is crucial to recognize in any discussion of criminal justice reform.<sup>154</sup>

However, claims of innocence are not in tension with a victim's rights. The healing of crime victims is simply not served by the continued incarceration of innocent individuals, which leaves true justice and closure unattainable.<sup>155</sup> Certainly, those in charge of the courts and public safety would rather the guilty party find themselves behind bars than freely walking the streets.<sup>156</sup> The current structure, which upholds victims' rights and their

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<sup>150</sup> See *Making an Exoneree*, GEORGETOWN, <https://prisonsandjustice.georgetown.edu/programs/makinganexoneree/> (last visited Jan. 5, 2024).

<sup>151</sup> Bond JRA, *supra* note 148.

<sup>152</sup> See Steven Grossman & Stephen Shapiro, *Judicial Modification of Sentences in Maryland*, 33 U. BALT. L. REV. 1, 28–29 (2003) (citing that allowing sentence reductions "deprives victims of closure."); see also Guest Commentary, *State's Attorney: Sentencing Rule Changes Would Retraumatize Victims. That Shouldn't Happen.*, MD. MATTERS (Apr. 7, 2021, 6:25 AM), <https://www.marylandmatters.org/2021/04/07/sheriff-sentencing-rule-changes-would-retraumatize-victims-that-shouldnt-happen/>.

<sup>153</sup> *Juveniles Convicted as Adults – Sentencing – Limitations and Reduction (Juvenile Restoration Act): Hearing on S.B. 494 Before the S. Jud. Proc. Cmte.*, 2021 Reg. Sess. (Md. 2021) (written statement of Scott Shellenberger, State's Att'y for Baltimore County) (explaining that Maryland has 13 avenues for challenging a conviction and finding relief, but the JRA would add three more).

<sup>154</sup> MD. CODE ANN., CRIM. PROC. § 8-110 (LexisNexis 2021).

<sup>155</sup> Jennifer N. Weintraub & Kimberly M. Bernstein, *Identifying and Charging True Perpetrators in Cases of Wrongful Convictions*, 1 WRONGFUL CONVICTION L. REV. 181, 182 (2020).

<sup>156</sup> The goals of punishment are retribution, deterrence, rehabilitation, and incapacitation. See Weintraub & Bernstein, *supra* note 155. These goals, specifically those like retribution, are predicated on the person receiving the punishment being one who committed a crime. *Id.* Where no crime has been committed, the goals of punishment serve no purpose in

closure on a pedestal of possibly faulty convictions, communicates a belief that goes against the conventional understanding of the criminal justice system's goals.

Even where innocence is not a concern, some jurisdictions have begun to push for restorative justice in facilitating closure for victims.<sup>157</sup> While victims may not be open to this practice initially, some families eventually see resentencing hearings as a way to set themselves free from the pain they held on to following the criminal event.<sup>158</sup> For example, Darryl Green forgave Kimyon Marshall during a resentencing hearing, feeling as though he could finally leave his “prison of hatred” after the murder of his brother.<sup>159</sup> Ultimately, the Harford County Circuit Court released Kimyon.<sup>160</sup> JRA hearings could foster the same opportunity for victims to experience forgiveness if they choose.<sup>161</sup>

#### IV. SOLUTION

##### A. *Statutory Amendment Following the Incarceration Reduction Amendment Act*

The Maryland General Assembly should amend the JRA to preclude considerations of remorse or a failure to assume responsibility in cases where

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protecting the public or changing the person's behavior. *Id.*; see also DORIS L. MACKENZIE, SENTENCING AND CORRECTIONS IN THE 21ST CENTURY: SETTING THE STAGE FOR THE FUTURE 1 (2001), <https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/189106-2.pdf>

<sup>157</sup> See *Restorative Justice Program*, OFF. OF THE ATT'Y GEN. FOR THE D.C., <https://oag.dc.gov/public-safety/restorative-justice-program> (last visited Mar. 17, 2024) (defining restorative justice as a “theory of justice that emphasizes repairing the harm caused by criminal behavior); see also Jane C. Murphy, *Restorative Justice: Healing Victims and Reducing Crime*, BALT. SUN (Jan. 24, 2018, 9:07 AM), <https://www.baltimoresun.com/2018/01/24/restorative-justice-healing-victims-and-reducing-crime/>.

<sup>158</sup> Caitlin Keating, *How One Man Forgave His Brother's Killer—and Helped Him Be Released from Prison*, PEOPLE (Jun. 1, 2023, 10:55 AM), <https://people.com/darryl-green-deep-forgiveness-man-forgave-brothers-killer-exclusive-7506937>; The grieving process is complicated, but participation in resentencing like to JRA could allow victims to heal and move on. See also *Juveniles Convicted as Adults – Sentencing – Limitations and Reduction (Juvenile Restoration Act): Hearing on S.B. 494 Before the S. Jud. Proc. Cmte.*, 2021 Reg. Sess. (Md. 2021) (statement of Becky Feldman) (explaining that most victims in Baltimore City are neutral when it comes to resentencing efforts, but some even want to help facilitate their release, citing specific victims who even run reentry programs) [hereinafter Feldman Testimony].

<sup>159</sup> Keating, *supra* note 158.

<sup>160</sup> *Id.*

<sup>161</sup> See, e.g., Feldman Testimony, *supra* note 158.

the applicant claims innocence, based upon the District of Columbia's approach under the Incarceration Reduction Amendment Act ("IRAA"). In 2016, the District of Columbia passed the IRAA, which considers factors similar to the JRA, such as public safety, the defendant's childhood, and demonstrations of rehabilitation.<sup>162</sup> Later, the Omnibus Public Safety and Justice Amendment Act of 2018 and the Second Look Amendment Act of 2019 modified the IRAA, adding provisions for a more inclusive application of the law.<sup>163</sup> In the District of Columbia today, individuals convicted of an offense that occurred before the age of 25 are eligible for review after they serve 15 years of that sentence.<sup>164</sup> These amendments originated from the District of Columbia Council's commitment to public safety in light of the developmental distinctions of youthful and emerging adult offenders<sup>165</sup> possessing a unique capacity for positive growth.<sup>166</sup>

Judges in subsequent IRAA sentence reductions throughout the District of Columbia have refused to deny a movant's reduction where a lack of remorse stems from innocence claims.<sup>167</sup> Judge Robert Rigsby specifically contended that allowing remorse to block a sentence reduction would punish defendants for asserting their constitutional rights and put them in a position where they would have to choose between claiming innocence and satisfying the court's need for guilt to receive that reduction.<sup>168</sup> The District of

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<sup>162</sup> D.C. CODE § 24-403.03(c)(1)–(11) (2021).

<sup>163</sup> *Id.*

<sup>164</sup> Charles Stimson & GianCarlo Canaparo, *D.C. Is Poised to Triple Down on Early Release of Violent Criminals*, HERITAGE FOUND. (Sep. 19, 2019), <https://www.heritage.org/crime-and-justice/commentary/dc-poised-triple-down-early-release-violent-criminals>; *The New Law: The Second Look Amendment Act*, PUB. DEF. SERV. FOR THE D.C., <https://www.pdsdc.org/resources/client-resources/second-look-amendment> (last visited Jan. 13, 2024).

<sup>165</sup> See Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 *FORDHAM L. REV.* 641, 642 (2016) (explaining that emerging adults, aged 18 to 21, are still developing and susceptible to the same impulsivity and immaturity as adolescents).

<sup>166</sup> See Walter Pavlo, *DC Superior Court Giving Second Chances to Prisoners*, *FORBES* (Oct. 14, 2023, 3:56 PM), <https://www.forbes.com/sites/walterpavlo/2023/10/14/dc-superior-court-giving-second-chances-to-prisoners/?sh=3990ca964b43>; see also Leah Sakala & Leigh Courtney, *The New DC Second Look Amendment Act is a Step in the Right Direction, and Community Supports for Young Adults Can Build on This Progress*, *GREATER D.C. BLOG* (Dec. 17, 2020), <https://greaterdc.urban.org/blog/new-dc-second-look-amendment-act-step-right-direction-and-community-supports-young-adults-can>.

<sup>167</sup> See Wendell Poole Order, *supra* note 1, at 10–11; Ord. Granting Def. Motion to Supplement Amend Motion to Vacate Convictions on the Ground of Actual Innocence with Claim to Reduce Sentence Under D.C. Code § 24-403.03 at 11, *United States v. Troy D. Burner*, 1993 FEL 003980 (D.C. Super. Ct.) [hereinafter *Burner Order*]; Ord. Granting Def. Motion for Reduction of Sentence Under the Incarceration Reduction Amend. Act at 12–13, *United States v. Warren Allen*, 2000 FEL 006780 (D.C. Super. Ct.).

<sup>168</sup> Wendell Poole Order, *supra* note 1, at 10–11.

Columbia Superior Court stated that acceptance of guilt is not a factor under the IRAA, and requiring a showing would be counterproductive to the defendant's strategy given his post-conviction petition, even if remorse could factor into rehabilitation determinations.<sup>169</sup> Further, the expression of sadness for the loss of life and its impact on the victim's family was enough to dissuade the court from denying the sentence reduction based on an absence of responsibility.<sup>170</sup> If Montague were convicted in the District of Columbia, merely forty miles south of Baltimore, his showing of "sincere sympathy" for the victim and his family may have been enough to receive a sentence reduction or even release under the IRAA.<sup>171</sup>

*B. Impact on Maryland's Judiciary*

While a fix to the statutory language could come by a recommendation from the Committee on Rules of Practice and Procedure,<sup>172</sup> the Justices may not vote favorably on such a proposal.<sup>173</sup> In 2021, the Supreme Court of Maryland considered an expansion of the JRA's scope to include individuals aged 25 and under.<sup>174</sup> Maryland Justices chose to defer to the General Assembly as "state lawmakers are better positioned to enact such a sweeping change" given the complexity of procedural questions created by the change.<sup>175</sup> Considering the similarities in the objectives and statutory language of the IRAA and its expansions, Maryland's General Assembly should amend the JRA to adopt the same approach to sentence reductions.<sup>176</sup>

In asking judges to follow the District of Columbia's practice of refusing to hold a claim of innocence against applicants,<sup>177</sup> the General Assembly will likely consider the impact this change in discretionary power

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<sup>169</sup> Burner Order, *supra* note 167, at 11.

<sup>170</sup> *Id.* at 12.

<sup>171</sup> *Id.*; *see also* Ballou-Watts Order, *supra* note 4, at 7.

<sup>172</sup> The Standing Committee of Rules of Practice and Procedure is a group of lawyers and other system actors appointed by the Supreme Court of Maryland to review proposed changes to law and then make recommendations for favorable changes to the court for Maryland Procedure; *see generally* *Standing Committee on Rules of Practice and Procedure*, MD. CTS., <https://www.mdcourts.gov/rules> (last visited Dec. 28, 2023); *see also* MD. CODE ANN., CTS. & JUD. PROC. § 13-301 (LexisNexis 2023).

<sup>173</sup> Phil Davis, *Maryland's Highest Court Takes No Stand on Proposal That Could Trim Prison Sentences for Long-Serving Inmates*, BALT. SUN (Aug. 27, 2021, 2:39 PM), <https://www.yahoo.com/now/maryland-highest-court-takes-no-183900313.html>.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Compare* D.C. CODE § 24-403.03 (2021), *with* MD. CODE ANN., CRIM. PROC. § 8-110(d) (LexisNexis 2021).

<sup>177</sup> § 24-403.03.

will have on judges.<sup>178</sup> In Maryland, judges have broad revisory power for criminal sentences and some would likely oppose a reduction of their discretion.<sup>179</sup> However, if the judiciary finds that this change in the interest of society, there may be less resistance.<sup>180</sup> In 2004, a victim's rights movement to restrict the timing of sentence reductions was successful because, as Chief Judge Bell claimed, "judges don't react to public clamor . . . but, we do react to what is good for the system and society as a whole."<sup>181</sup>

Maryland already reacted to the predicament of remorse where innocence is a concern during initial sentencing.<sup>182</sup> While Maryland believes contrition is a valuable consideration to sentencing, its scope is minimized where the demeanor is "linked to a defendant's prior claim of innocence."<sup>183</sup> The General Assembly should not find it a substantial reach to extend the same analytical framework to reductions.

Scholars and judges attempted to create a solution to this issue in the context of parole, suggesting that, while refusing to admit guilt should not preclude release, a potential parolee should "provide a compelling reason" for this decision.<sup>184</sup> Going further, the recommendation required "significant factual reasons for casting doubt on their convictions."<sup>185</sup> While this seems like a logical compromise for the competing interests in a sentence reduction, creating the aforementioned policy in Maryland would burden a reviewing judge's fact finding objectives. However, in JRA hearings, judges are not determining culpability.<sup>186</sup> Rather, judges are determining fitness to re-enter society.<sup>187</sup>

As the General Assembly contemplates the Maryland Second Look Act, legislation to allow a comparable sentence reduction hearing to any person after serving at least twenty years of their sentence is crucial to

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<sup>178</sup> See Grossman & Shapiro, *supra* note 152, at 1, 2–3 (explaining that the study of judicial discretion in sentence modifications was conducted after the General Assembly wanted a clearer understanding of procedure).

<sup>179</sup> *Id.* at 1–2, 28 (citing opposition from "virtually all trial judges" in Maryland for a bill limiting timing for sentence modifications); see also Md. Rule 4-345.

<sup>180</sup> Guest Commentary, *supra* note 152.

<sup>181</sup> *Id.*

<sup>182</sup> See generally Saenz v. State, 95 Md. App. 238 (1993).

<sup>183</sup> *Id.* at 250–51.

<sup>184</sup> Paul Cassell, *The Parole System Needs a Small Safety Valve for the Innocent*, N.Y. Times (Dec. 4, 2014, 10:46 AM), <https://www.nytimes.com/roomfordebate/2014/11/13/parole-when-innocence-is-claimed/the-parole-system-needs-a-small-safety-valve-for-the-innocent>.

<sup>185</sup> *Id.*

<sup>186</sup> See discussion *supra* Section II.A.2.

<sup>187</sup> See discussion *supra* Section II.A.2.

reconcile the issue of remorse requirements presented in this comment.<sup>188</sup> A greater number of applicants seeking reduction could introduce more innocence claims to judges, thereby increasing the likelihood that a lack of remorse could serve as a barrier to release. It is imperative for legislators to approach sentencing reforms while carefully considering the consequences and obstacles created by previous bills.

## V. CONCLUSION

Given the rising awareness of wrongful convictions and the decades of barriers to overturning them, Maryland must reimagine its response to innocent movants pursuant to the JRA. Finality in convictions is a cornerstone of the criminal justice system, but it should never eclipse the rights of defendants to hold the system accountable. Allowing remorse to keep innocent people in prison for life creates an imbalance of justice that diminishes the power and purpose of the JRA.

The General Assembly's passed the JRA to establish a pathway for juvenile lifers to prove their evolution, achieving a new beginning where hope otherwise did not exist. Following other jurisdictions that recognize the pitfalls of such a requirement would align Maryland with justice for all involved—allowing redemption for those who have earned a second chance choosing to acknowledge possible prosecutorial failures and giving closure to victims through possible rightful prosecution. Achieving justice does not require the courts to place one ideal over another; it is not a zero-sum game that places convictions above all else and holds mercy over the heads of those willing to pursue the truth.

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<sup>188</sup> See S.B 145, 446th Gen. Assemb., Reg. Sess. (Md. 2024); *2024 Legislative Priorities for Criminal Justice Reform in Maryland*, MD ALL. FOR JUST. REFORM, <https://www.ma4jr.org/initiatives-2024/> (last visited Feb. 25, 2024).

## COMMENT

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### TEACHERS, RAISE YOUR HANDS: WHY MARYLAND MUST ALLOW CLASS SIZE AS A PERMISSIVE SUBJECT FOR PUBLIC SCHOOL TEACHERS' COLLECTIVE BARGAINING

By: Grace Andrews-Becker\*

#### I. INTRODUCTION

The Blueprint for Maryland's Future (the "Blueprint") promises sweeping policy changes to Maryland's education system, providing greater opportunities for every child and "unprecedented investments" for educational reform.<sup>1</sup> While this Blueprint proposes changes to teachers' salaries, planning time, and training, it does not address the continued challenges teachers face in the workplace and what rights they may have to address those challenges.<sup>2</sup> Today, students demonstrate increasingly complex mental health and academic needs,<sup>3</sup> the state education system faces significant teacher shortages,<sup>4</sup> and over half the classrooms in the state have more than twenty students assigned to them.<sup>5</sup> A Howard County Public

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\* **Grace Andrews-Becker:** J.D. Candidate 2025, University of Baltimore School of Law. I am grateful to my faculty advisor, Professor Andrew Ziaja, for his invaluable guidance throughout the research and writing process. I also extend my sincere appreciation to the entire *University of Baltimore Law Forum* staff for their diligent editorial efforts. I am especially thankful to my husband, Karson, and my family for their steadfast support throughout law school. Lastly, I wish to acknowledge the educators and school administrators who have profoundly influenced my life: Jackie Andrews, Cynthia Deckman, and Heidi Knight.

<sup>1</sup> MD. STATE DEP'T OF EDUC., MARYLAND TRANSFORMS: A STRATEGIC PLAN FOR MARYLAND BY MARYLAND 12 (2023),

<https://strategicplan.marylandpublicschools.org/maryland-transforms/>.

<sup>2</sup> *See id.*

<sup>3</sup> Mary Ellen Flannery, *Class Sizes: A Growing Issue Among Educators*, NAT'L EDUC. ASS'N TODAY (June 14, 2023), <https://www.nea.org/nea-today/all-news-articles/class-sizes-growing-issue-among-educators>.

<sup>4</sup> Kristen Griffith, *Maryland Still Has a Teacher Shortage, but This School Year Looks Better than Last*, BALT. BANNER (Aug. 8, 2023, 5:30 AM), <https://www.thebaltimorebanner.com/education/k-12-schools/maryland-teacher-shortage-HKASK3IY7VFO3MJQC3U32DIX2Y/>.

<sup>5</sup> MD STATE DEP'T OF EDUC., CLASS SIZES IN MARYLAND PUBLIC SCHOOLS: 2021-2022 SCHOOL YEAR 5, 19 (2023), <https://marylandpublicschools.org/about/Documents/OCP/SpecialReports/ClassSizeReport-2021-2022.pdf>.

School teacher received caseloads averaging 150 students a year.<sup>6</sup> That same teacher transitioned to Baltimore City Public Schools, where they then taught a summer credit-recovery course to sixty-seven students.<sup>7</sup> Another teacher stated that they are responsible for teaching 93 students over three classes, meaning if they were to hold an individual check-in with each student, they would have less than 2.5 minutes with each student before class time expires.<sup>8</sup>

Senator Pamela Beidle brought a possible solution to these problems before the Maryland General Assembly in 2023 by introducing Senate Bill 206 (“S.B. 206”).<sup>9</sup> Maryland’s Education Code prohibits teachers from discussing class size as a subject in their collective bargaining over the terms and conditions of their employment.<sup>10</sup> S.B. 206, however, sought to repeal this prohibition and allow class size to be a permissive bargaining subject.<sup>11</sup> Identical versions of S.B. 206 were brought twice before the General Assembly in the 2022 legislative session and once in 2020.<sup>12</sup> All legislative attempts to repeal the current law, including S.B. 206, failed at the committee level for reasons not apparent in the legislative histories.<sup>13</sup>

Another development in Maryland policy and law further obscures this issue. As of July 1, 2023, Maryland enacted the Public Employee Relations Act (“PERA”).<sup>14</sup> Before PERA, Maryland organized its collective bargaining laws by work sector.<sup>15</sup> PERA realigned and consolidated the collective

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<sup>6</sup> *Education–Collective Bargaining–Certificated Employees–Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of Timothy Nathan Ferrell, Balt. City Pub. Sch. Tchr.), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/1PmjiJCMDw9uQ3A8IL445MmJnqVCKdOfz.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/1PmjiJCMDw9uQ3A8IL445MmJnqVCKdOfz.pdf).

<sup>7</sup> *Id.*

<sup>8</sup> *Education–Collective Bargaining–Certificated Employees–Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of Samantha Zwerling, Md. State Educ. Ass’n), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/1v\\_E1SDBFdgOtJ9Aw7unX7wyjSCDlnlq.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/1v_E1SDBFdgOtJ9Aw7unX7wyjSCDlnlq.pdf).

<sup>9</sup> See S.B. 206, 2023 Leg., 445th Sess. (Md. 2023).

<sup>10</sup> MD. CODE ANN., EDUC. § 6-406 (West 2025).

<sup>11</sup> Md. S.B. 206.

<sup>12</sup> *Id.*; H.D. 890, 2022 Leg., 444th Sess. (Md. 2022); S.B. 962, 2022 Leg., 444th Sess. (Md. 2022); H.D. 1074, 2020 Leg., 442nd Sess. (Md. 2020).

<sup>13</sup> See S.B. 206, 444th Leg., Sess. (Md. 2022); see also H.D. 890, 442nd Leg., Sess. (Md. 2020); see also S. 962, 444th Leg., Sess. (Md. 2022); See also H.D. 1074, 442nd Leg., Sess. (Md. 2022).

<sup>14</sup> HAW. LAB. RELS. BD., REP. TO THE HAW. STATE LEG. PURSUANT TO H. CON. RES. NO. 61, Reg. Sess. at 20–22 (2023), <https://labor.hawaii.gov/hlrp/files/2023/12/HCR61-HD1-Rept-to-Leg-FINAL-12.28.2023.pdf>.

<sup>15</sup> See *id.*

bargaining laws across all work sectors into one standardized Title.<sup>16</sup> Previous versions of PERA suggested repealing the prohibition to negotiate class sizes;<sup>17</sup> however, this is absent in the current version of the law.<sup>18</sup>

This comment evaluates class size as a permissive bargaining subject for Maryland’s public-sector collective bargaining laws. Part II illustrates the origins of collective bargaining laws across the country and how Maryland’s state laws and teachers’ unions fit into the national picture of collective bargaining.<sup>19</sup> Part III discusses the underlying issue warranting significant educational reform through collective bargaining.<sup>20</sup> Namely, this section examines the tension between Maryland teachers’ collective bargaining rights, PERA, and the Blueprint’s objective to establish Maryland as a national leader in education.<sup>21</sup> Part IV proposes a solution to the tension: repealing the current prohibition on class size as a bargaining subject and allowing class size as a permissive bargaining subject.<sup>22</sup> In support of this solution, Part IV explores how information-sharing between negotiating parties promotes equality among bargaining parties and generates creative problem-solving.<sup>23</sup> Finally, Part V reinforces that the difficulties teachers face in the classroom lead to general burnout and low retention, which warrants opening the discussion on an impactful workplace condition—class sizes.<sup>24</sup>

## II. HISTORICAL DEVELOPMENT

Collective bargaining imposes a mutual obligation on both an employer and an employee’s union representative to “meet, confer, and negotiate in good faith” concerning conditions of employment, including wages, workplace disputes, and worker safety.<sup>25</sup> With over fourteen million workers in the United States belonging to a union,<sup>26</sup> collective bargaining is a critical

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<sup>16</sup> *Id.* (explaining that PERA consolidates collective bargaining laws concerning state employees, public university and community college employees, public school system employees, and independent home care providers under one statute).

<sup>17</sup> H.D. 984, 2023 Leg., 445th Sess. (Md. 2023) (first unenacted version).

<sup>18</sup> *See* MD. CODE ANN., STATE GOV’T, §§ 22-101–22-601 (West 2023).

<sup>19</sup> *See infra* Part II.

<sup>20</sup> *See infra* Part III.

<sup>21</sup> *See infra* Part III.

<sup>22</sup> *See infra* Part IV.

<sup>23</sup> *See infra* Section IV.A.

<sup>24</sup> *See infra* Part V.

<sup>25</sup> AM. BAR ASS’N, THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT § 13.IA-B (John E. Higgins et al. eds., 8th ed. 2023) (ebook).

<sup>26</sup> BUREAU OF LABOR STATISTICS, UNION MEMBERS—2024, at 1 (2024), <https://www.bls.gov/news.release/pdf/union2.pdf>.

tool for employers and employees alike.<sup>27</sup> However, national support and laws governing employees' collective action are inconsistent.<sup>28</sup>

*A. History of Collective Bargaining Laws in the United States.*

Initially, the U.S. did not welcome the idea of employees associating to improve the terms and conditions of their work.<sup>29</sup> One of the earliest employee strikes occurred in 1806 when Philadelphia shoemakers demanded pay increases.<sup>30</sup> The Mayor's Court of Philadelphia indicted the union organizers under criminal conspiracy charges.<sup>31</sup> The first national labor organization in the U.S. arose in 1869 as the Knights of Labor ("KOL").<sup>32</sup> The KOL was a secret organization for its first ten years and shifted towards regional control.<sup>33</sup> 1886 marked the end of the KOL, as that year brought nearly 1,600 strikes, violence, and widespread backlash against unionization.<sup>34</sup>

Despite this disapproval, workers continued to protest.<sup>35</sup> Decades of railways workers protesting in the early 1900s gave rise to the first federal collective bargaining statutes.<sup>36</sup> Because their protests led to frequent work stoppages and interruptions to interstate commerce,<sup>37</sup> Congress enacted the Railway Labor Act ("RLA") in 1926, which guaranteed the right of railway workers to organize, join unions, and elect representatives free from employer influence.<sup>38</sup> The RLA also instituted mandatory dispute resolution procedures to force workers and employers into good-faith negotiations over

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<sup>27</sup> See NAT'L EDUC. ASS'N'S CENTER FOR ADVOC., COLLECTIVE BARGAINING: WHAT IT IS AND HOW IT WORKS (2017), [https://www.nea.org/sites/default/files/2020-06/CB\\_What-It-Is-and-How-It-Works1.pdf](https://www.nea.org/sites/default/files/2020-06/CB_What-It-Is-and-How-It-Works1.pdf).

<sup>28</sup> See generally KENNETH G. DAU-SCHMIDT ET AL., LABOR LAW IN THE CONTEMPORARY WORKPLACE 18–20 (4th ed. 2023); see *infra* Section II.B.

<sup>29</sup> DAU-SCHMIDT ET AL., *supra* note 29, at 18.

<sup>30</sup> *Id.*; see also Commonwealth v. Pullis, 3 Doc. Hist. 59 (1806).

<sup>31</sup> DAU-SCHMIDT ET AL., *supra* note 29, at 18.

<sup>32</sup> Patrick Grubbs, *Cordwainers Trial of 1806*, PHILA. ENCYC., <https://philadelphiaencyclopedia.org/essays/cordwainers-trial-of-1806/> (last visited Apr. 11, 2025).

<sup>33</sup> Patrick Grubbs, *Knights of Labor*, PHILA. ENCYC., <https://philadelphiaencyclopedia.org/essays/cordwainers-trial-of-1806/> (last visited Apr. 11, 2025).

<sup>34</sup> *Id.*

<sup>35</sup> See JIMMY BALSER ET AL., CONG. RSCH. SERV., LSB10861, THE RAILWAY LABOR ACT AND CONGRESSIONAL *Action* 3 (2023), <https://crsreports.congress.gov/product/pdf/LSB/LSB10861>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1.

disputes.<sup>39</sup> Nine years following the RLA, the National Labor Relations Act (“NLRA”) was passed and granted private-sector employees the right to unionize.<sup>40</sup>

It took over two decades following the NLRA’s passage for these rights to extend to the public-sector.<sup>41</sup> In 1962, President John F. Kennedy issued Executive Order 10988, recognizing that “efficient administration of the Government and the well-being of employees require[s] . . . orderly and constructive relationships.”<sup>42</sup> This order granted federal employees the right to bargain collectively and established three tiers of representation rights.<sup>43</sup> As a result of President Kennedy’s Executive Order, public-sector union membership surged.<sup>44</sup> Local, state, and federal employee union memberships grew from ruffly nine hundred thousand members in 1960 to almost six million by 1976.<sup>45</sup> There was a similar occurrence among state legislatures; thirty-six states enacted public sector union rights laws by 1976.<sup>46</sup>

### *B. Inconsistencies in Collective Bargaining Laws Across the Nation*

The history of collective bargaining laws highlights key differences between public and private-sector workforces. Private sector unions represent the interests of non-governmental workers against corporate abuse.<sup>47</sup> Therefore, the National Labor Relations Board and the NLRA regulate private-sector collective bargaining rights.<sup>48</sup> Public-sector employees represent federal, state, and local government workers, including teachers, police officers, and postal service staff.<sup>49</sup> There is no federal legislation

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<sup>39</sup> *Id.*

<sup>40</sup> *Guidance: National Labor Relations Act*, NAT’L LAB. REL. BD., <https://www.nlr.gov/guidance/key-reference-materials/national-labor-relations-act> (last visited Mar. 18, 2024).

<sup>41</sup> See NAT’L EDUC. ASS’N’S CENTER FOR ADVOC., *supra* note 28.

<sup>42</sup> Exec. Order No. 10988, 27 Fed. Reg. 551 (Jan. 17, 1962).

<sup>43</sup> *Id.* (explaining that the three tiers of representation are exclusive representation, formal recognition, and informal recognition—tier determination is based on employee participation).

<sup>44</sup> Michael Goldfield, *Public Sector Union Growth and Public Policy*, 18 POL’Y STUD. J. 404, 404 (1989).

<sup>45</sup> *Id.*

<sup>46</sup> Joseph A. McCartin, “A Wagner Act for Public Employees”: *Labor’s Deferred Dream and the Rise of Conservatism, 1970-1976*, 95 J. OF AM. HIST., 123, 126 (2008).

<sup>47</sup> See LA RAE G. MUNK, *COLLECTIVE BARGAINING: BRINGING EDUCATION TO THE TABLE 1* (Mackinac Ctr. For Pub. Pol’y ed., 1998).

<sup>48</sup> See *Guidance: National Labor Relations Act*, *supra* note 40.

<sup>49</sup> See MD. CODE ANN., STATE GOV’T, § 22-101(h) (West 2025).

providing public-sector employees the right to bargain collectively.<sup>50</sup> Thus, public-sector collective bargaining laws are subject to state regulation.<sup>51</sup>

Due to state regulation, public-sector collective bargaining laws are inconsistent across the country.<sup>52</sup> Georgia, North Carolina, South Carolina, Texas, Mississippi, and Arkansas expressly prohibit all collective bargaining across all work sectors.<sup>53</sup> Other states, such as Indiana, Oklahoma, and Texas, prohibit collective bargaining but make an exception for particular sectors, such as firefighters and police officers.<sup>54</sup> Some states, like Kentucky and Mississippi, only recognize teachers' collective bargaining powers as a creature of case law.<sup>55</sup>

However, significant variance remains among states that permit collective bargaining.<sup>56</sup> For example, Nebraska and Massachusetts provide blanket bargaining laws for all public-sector employees.<sup>57</sup> Other states, such as Maine and California, specify their collective bargaining laws by work sector,<sup>58</sup> yet they consolidate the jurisdiction of these statutes under a centralized labor relations board.<sup>59</sup> There are also differences in the powers granted by these state statutes.<sup>60</sup> For example, Delaware prohibits workers from striking,<sup>61</sup> Minnesota only prohibits essential employees from striking,<sup>62</sup> whereas Maine prohibits any “work stoppages.”<sup>63</sup>

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<sup>50</sup> *Collective Bargaining Laws*, NAT'L COUNCIL ON TCHR. QUALITY, <https://www.nctq.org/contract-database/collectiveBargaining> (Jan. 2019).

<sup>51</sup> *Id.*

<sup>52</sup> DEP'T NAT'L EDUC. ASS'N, COLLECTIVE BARGAINING & MEMBER ADVOCACY 2 (2022), <https://www.nea.org/sites/default/files/2020-07/Fact%20Sheet.%20New%20Educators.pdf>.

<sup>53</sup> *Id.*

<sup>54</sup> PUB. EMP. LAB. REL. BD., STATE OF N.M., PUBLIC SECTOR COLLECTIVE BARGAINING BY STATE 129–33 (2022), <https://www.pelrb.nm.gov/wp-content/uploads/2023/03/Public-Sector-Collective-Bargaining-by-State.pdf>.

<sup>55</sup> *Id.*; see also *Fayette Cnty. Educ. Ass'n v. Hardy*, 626 S.W.2d 217, 219 (Ky. App. 1980) (“[A] public agency may elect to negotiate with a representative of its employees, although it has no duty to do so.”); see also *Jackson v. Hazlehurst Mun. Separate Sch. Dist.*, 427 So.2d 134, 137 (Miss. 1983) (holding that teachers have a constitutional right to join unions, which can be designated as collective bargaining representatives for school districts); *Collective Bargaining Laws*, *supra* note 51 (hover over state with cursor to reveal information).

<sup>56</sup> See PUB. EMP. LAB. REL. BD., STATE OF N.M., *supra* note 55.

<sup>57</sup> *Collective Bargaining Laws*, *supra* note 51 (hover over state with cursor to reveal information).

<sup>58</sup> See PUB. EMP. LAB. REL. BD., STATE OF N.M., *supra* note 55.

<sup>59</sup> See ME. LAB. REL. BD., <https://www.maine.gov/mlrb/> (last visited Mar. 18, 2024); see also CAL. PUB. EMP. REL. BD., <https://perb.ca.gov> (last visited Mar. 18, 2024).

<sup>60</sup> See DEP'T NAT'L EDUC. ASS'N, *supra* note 53.

<sup>61</sup> DEL. CODE ANN. TIT. 19, § 1316 (West 2025).

<sup>62</sup> MINN STAT. ANN. § 179A.18 (West 2025).

<sup>63</sup> ME. STAT. TIT. 26, § 979-C (2024).

C. *The Rise and Influence of Teachers' Unions on Collective Bargaining Laws in America*

Political activism was a central feature of the 1960s in America, as civil rights, student, and anti-war movements demanded changes in public policy.<sup>64</sup> Labor organizations also sought reform as the American economy expanded for nearly a decade without interruption, and union members knew the government had the means to meet their demands.<sup>65</sup> This knowledge increased union memberships<sup>66</sup> and empowered public employees to take risks, like striking.<sup>67</sup>

Teachers' unionization served as a "pacesetter and barometer" for public-sector unionism and collective bargaining at the state and local levels.<sup>68</sup> Before Executive Order 10899, New York teachers acting under the United Federation of Teachers demanded collective bargaining rights from their school boards.<sup>69</sup> On November 7, 1960, election day, a strike occurred when "5,600 teachers, school secretaries, school counselors, and social workers struck [and] another 2,000 [school employees] called in sick."<sup>70</sup> Over 300 teacher strikes occurred in the decade following the election day strike.<sup>71</sup>

The election day significantly affected teachers' unionism and bargaining rights.<sup>72</sup> Notably, the nation's first collective bargaining agreement with public school teachers was signed in New York City in 1962 as a direct result of the election day strike.<sup>73</sup> Union memberships steadily grew during this time as well.<sup>74</sup> The American Federation of Teachers saw its 50,000 members in 1962 grow to 225,000 within eight years.<sup>75</sup> This growth continued even in

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<sup>64</sup> See generally Jack Barbash, *Chapter 6: Unions and Rights in the Space Age*, U.S. DEP'T OF LAB., <https://www.dol.gov/general/aboutdol/history/chapter6> (last visited Mar. 18, 2025).

<sup>65</sup> *Id.*

<sup>66</sup> See Goldfield, *supra* note 45, at 410–14.

<sup>67</sup> See Barbash, *supra* note 65; *The Right to Strike*, TANNER AND ASSOCIATES, P.C. (Sept. 16, 2021), <https://www.rodannerlaw.com/news/the-right-to-strike> (identifying only twelve states that have right to strike laws); Robert Shaffer, *Public Employee Unionism: A Neglected Social Movement of the 1960s*, 44 SOC'Y FOR HIST. EDUC., 489, 491 (Aug. 2011) (discussing how, as new collective bargaining laws arose post-1960's America, public employee strikes were often in defiance of the laws of the state).

<sup>68</sup> Goldfield, *supra* note 45, at 411.

<sup>69</sup> *Nov. 7, 1960: Teachers Strike*, UNITED FED'N OF TCHR. (Nov. 7, 2019), <https://www.uft.org/news/feature-stories/todays-history-lesson/nov-7-1960-teachers-strike>.

<sup>70</sup> *Id.*

<sup>71</sup> *1960s: Teacher Power*, CAL. FED'N OF TCHRS. (Nov. 19, 2023), <https://www.cft.org/post/1960s-teacher-power>.

<sup>72</sup> *Id.*; *Nov. 7, 1960: Teachers Strike*, *supra* note 70.

<sup>73</sup> *1960s: Teacher Power*, *supra* note 72.

<sup>74</sup> See Goldfield, *supra* note 45, at 405–07.

<sup>75</sup> *Id.* at 406.

states without strong collective bargaining laws.<sup>76</sup> For example, eighty percent of teachers in Nebraska were union members by 1977 despite no changes in its state public policy.<sup>77</sup>

Much like general collective bargaining laws, modern-day teachers' collective bargaining laws and union rights vary by state.<sup>78</sup> Out of fifty states, six prohibit collective bargaining across all public sectors.<sup>79</sup> Thirty-four states grant kindergarten through twelfth grade teachers at least some rights to organize and collectively bargain.<sup>80</sup> Nine states recognize bargaining rights so long as the school board permits it.<sup>81</sup> Tennessee takes a different approach and adopts "Collaborative Conferencing" between teachers and school systems.<sup>82</sup> State approaches to other education professionals, such as support staff and higher education administrators, also vary.<sup>83</sup>

*D. The Erosion of Public-Sector Collective Bargaining and Union Rights.*

Despite the collective progress of bargaining laws and rights over the last eighty years, anti-union forces recently restricted the rights of public-sector employees.<sup>84</sup> One such restriction comes from state "Right to Work" laws.<sup>85</sup>

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<sup>76</sup> *Id.* at 411.

<sup>77</sup> *Id.*

<sup>78</sup> See NAT'L EDUC. ASS'N'S CENTER FOR ADVOC., *supra* note 28.

<sup>79</sup> See DEP'T NAT'L EDUC. ASS'N, *supra* note 53.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* (the nine states are Alabama, Arizona, Colorado, Kentucky, Louisiana, Utah, Virginia, West Virginia, and Wyoming).

<sup>82</sup> *Id.* "Collaborative conferencing" begins with a submitted written request to the district board of education. The board of education then appoints members to a special question committee to vote on whether the Board must participate in responding to the request and what, if any, organization will represent the employees in the requested matter. Predetermined mandatory and prohibited subjects guide the special question committee's voting. After a vote to continue by the special question committee, the school board and the employee representative may enter a memorandum of understanding on the addressed terms and conditions of employment. JC Bowman, *Collaborative Conferencing*, PRO. EDUC. OF TN., <https://www.proedtn.org/page/CollabConferencing> (last visited Feb. 19, 2024).

<sup>83</sup> See NAT'L EDUC. ASS'N, COLLECTIVE BARGAINING & MEMBER ADVOC. DEP'T, WHITEPAPER: THE BENEFITS OF COLLECTIVE BARGAINING IN PUBLIC EDUCATION (2022), <https://www.nea.org/resource-library/whitepaper-benefits-collective-bargaining-public-education>.

<sup>84</sup> See *id.*; see generally ANDREW BAKER & TRAVIS WEST, 'RIGHT TO WORK' LAWS AND IMPACT ON UNIONIZATION (2020), <https://www.bloomberglaw.com/external/document/X8JDHS00000000/labor-relations-professional-perspective-right-to-work-laws>.

<sup>85</sup> BAKER & WEST, *supra* note 85.

Right to work laws were initially restricted to private-sector employees.<sup>86</sup> Employees are not required to become full union members or pay union membership fees or dues.<sup>87</sup> Section 8(3)(a) of the NLRA, however, obliges unions to “fairly represent every employee in a recognized bargaining unit.”<sup>88</sup> Because the union must represent every employee in its bargaining unit, member or not, employees must pay agency fees or dues to support the union’s work.<sup>89</sup> But in 1947, Congress passed the Taft-Hartley Act—added as Section 14(b) of the NLRA—allowing employees to evade union agency fees as state law permits.<sup>90</sup> Today, twenty-seven states prevent unions from collecting agency fees from the members they must represent through these right to work laws.<sup>91</sup>

In 2018, the United States Supreme Court addressed whether right to work laws could apply to public-sector employees in *Janus v. AFSCME*.<sup>92</sup> In its decision, the Court overturned forty years of precedent and held that public-sector employees were not required to pay agency fees for their union representation.<sup>93</sup> The Court reasoned that state laws that force agency fee payments violate the First Amendment because they compel employees to “subsidize private speech on matters of substantial public concern.”<sup>94</sup>

Across the country, *Janus* produced uneven effects across the country in less than a year.<sup>95</sup> Some states, such as California, did not experience severe losses to employee union representation post-*Janus*,<sup>96</sup> thanks to swift legislative action. The same day the Supreme Court issued its *Janus* decision, the Governor of California signed Senate Bill 866 into effect.<sup>97</sup> This law provided unions greater control over their dues authorization process by

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<sup>86</sup> *Id.*

<sup>87</sup> AM. BAR ASS’N, *supra* note 26, at § 26.II.A.

<sup>88</sup> 29 U.S.C. § 159(a); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953) (citing *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198, 202–04 (1944)).

<sup>89</sup> DAU-SCHMIDT ET AL., *supra* note 29, at 74.

<sup>90</sup> *Id.*

<sup>91</sup> BAKER & WEST, *supra* note 85.

<sup>92</sup> *Id.*; *see also Janus v. Am. Fed’n of State, Cnty.*, 138 S.Ct. 2448, 2456 (2018).

<sup>93</sup> BAKER & WEST, *supra* note 85.

<sup>94</sup> *Janus*, 138 S.Ct. at 2460 (2018).

<sup>95</sup> *See Daniel DiSalvo & Michael Hartney, Teachers Unions In the Post-Janus World*, 20 EDUC. NEXT (July 7, 2020), <https://www.educationnext.org/teachers-unions-post-janus-world-defying-predictions-still-hold-major-clout/>.

<sup>96</sup> Bureau of Lab. Stat., *News Release: Union Members—2018*, U.S. DEP’T OF LAB. 11 (Jan. 18, 2019), [https://www.bls.gov/news.release/archives/union2\\_01182019.pdf](https://www.bls.gov/news.release/archives/union2_01182019.pdf) (showing that in 2017, 15.5 % of employees in California were union members and 16.9% were represented by unions, and in 2018, 14.7% were members and 15.8% were represented by unions).

<sup>97</sup> *See Jason Fischbein & Joss Teal, California Legislature Reacts to Supreme Court’s Blow Against Unions*, SAN DIEGO BAR ASS’N (Aug. 2018), <https://www.sdcb.org/?pg=FTR-Aug-2018-5>; *see also Janus*, 138 S.Ct. at 2456.

limiting employer communication regarding union representation and requiring employers to continue deducting union dues from payroll.<sup>98</sup>

Meanwhile, Maryland saw an uptick in its union membership and representation numbers post-*Janus*.<sup>99</sup> This increase in union memberships may be due to Maryland's collective bargaining laws, which protect public-sector employees' bargaining rights in a way not impaired by the *Janus* decision.<sup>100</sup> Moreover, the Maryland General Assembly amended provisions of public-sector labor laws, allowing exclusive bargaining representatives to "access employee orientation and employee contact information."<sup>101</sup>

*Janus* hit unions the hardest in states with weaker collective bargaining laws, such as West Virginia, which saw an overall decrease in union memberships and representation.<sup>102</sup> Before *Janus*, states like West Virginia could overcome these decreases with the help of national federations.<sup>103</sup> Unfortunately, *Janus* also affected the memberships and revenues of these national federations.<sup>104</sup> The American Federation of Teachers ("AFT") lost over 80,000 members and \$18 million in annual fee revenue, and the National Education Association ("NEA") lost 88,000 members and \$32 million in fee revenue, totaling a ten percent cut to its operating budget.<sup>105</sup> These losses are particularly troubling to the two largest national teachers unions, as the AFT and NEA can no longer repurpose revenues from stronger union states to subsidize unions with weaker state union laws.<sup>106</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> Bureau of Lab. Stat., *supra* note 97 (showing that in 2017, 10.8% of employees in Maryland were union members and 11.8% were represented by unions, and in 2018, 11% of employees were union members and 12.1% were represented by unions).

<sup>100</sup> STATE OF MD. OFF. OF THE ATT'Y GEN., GENERAL GUIDANCE ON THE RIGHTS AND DUTIES OF PUBLIC-SECTOR WORKERS AND EMPLOYERS AFTER JANUS (2018), [https://www.marylandattorneygeneral.gov/news%20documents/After\\_Janus.pdf](https://www.marylandattorneygeneral.gov/news%20documents/After_Janus.pdf) (explaining that *Janus* does not override existing agreements between unions and its members to pay dues.).

<sup>101</sup> *Id.*

<sup>102</sup> Bureau of Lab. Stat., *supra* note 96 (In 2017, 11% of employees in West Virginia were union members and 11.9% were represented by unions, and in 2018, 10% of employees were union members and 10.8% were represented by unions).

<sup>103</sup> DiSalvo & Hartney, *supra* note 96.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

*E. The Influence of Maryland's First Teachers' Union.*

Maryland teachers' unionization was pivotal in creating collective bargaining legislation for Maryland's teachers.<sup>107</sup> In 1866, the Maryland State Teachers' Association ("MSTA") established itself as the first teachers' union in the state.<sup>108</sup> By the 1940s, the MSTTA implemented "robust legislative programs," executive board officers, annual conventions, and publications.<sup>109</sup> These legislative programs "fundamentally transformed and improved" education across the state.<sup>110</sup> By 1956, these programs created a teachers' retirement system and worker's compensation coverage and set minimum class sizes and teacher salaries.<sup>111</sup>

The MSTTA's efforts towards education equity ensured Maryland was a "national exemplar" in education.<sup>112</sup> Three years before *Brown v. Board of Education*,<sup>113</sup> the MSTTA desegregated, removed "white" from its membership requirements, and merged with the Maryland Education Association.<sup>114</sup> By the mid-1960s, the MSTTA passed a resolution to provide educational opportunities for students of any age, race, creed, physical and intellectual ability.<sup>115</sup>

*F. Teachers' Union Rights and Collective Bargaining Laws in Maryland.*

Through its legislature, the Maryland General Assembly enshrined the right to collectively bargain for numerous sectors, including state employees, teachers, sheriffs, librarians, corrections officers, and first responders.<sup>116</sup> These sectors may use collective bargaining to negotiate economic and non-economic provisions, such as wages and benefits, scheduling, uniforms, and

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<sup>107</sup> See *Across Three Centuries, MSEA Labor Activism Makes Gains for Educators and Students*, MD. STATE EDUC. ASS'N (Sept. 15, 2023), <https://marylandeducators.org/across-three-centuries-msea-labor-activism-makes-gains-for-educators-and-students/>.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (holding that state laws permitting racial segregation in public schools are unconstitutional).

<sup>114</sup> See *supra* note 107 (noting that the Maryland Education Association was formerly known as the Maryland State Colored Teacher's Association).

<sup>115</sup> *Id.*

<sup>116</sup> Zaakary Barnes, Pol'y Specialist, Emp., Lab. & Ret., Presentation to the Maryland Senate Finance Committee on behalf of the National Conference of State Legislatures 2 (Oct. 10, 2023), [https://mgaleg.maryland.gov/meeting\\_material/2023/fin%20-%20133414115609789187%20-%20Briefing%20Materials%2010-10-23.pdf](https://mgaleg.maryland.gov/meeting_material/2023/fin%20-%20133414115609789187%20-%20Briefing%20Materials%2010-10-23.pdf).

workplace conditions.<sup>117</sup> Under these laws, employees have the right to organize freely and employers cannot interfere with an employee, their union, or their representative's right to bargain collectively.<sup>118</sup> Moreover, Maryland prohibits employees from striking and employers from imposing "lockouts."<sup>119</sup>

Teachers work under contracts negotiated between their union and the Board of Education.<sup>120</sup> Maryland law organizes the terms of contract negotiations into three categories: mandatory, permissive, and illegal subjects.<sup>121</sup> Parties must discuss and negotiate when the union representative or Board propose a mandatory subject.<sup>122</sup> Mandatory subjects include leave, work hours, tuition reimbursement, and planning time.<sup>123</sup> If one party raises a permissive subject to negotiate, the other may refuse to discuss it.<sup>124</sup> Permissive subjects include evaluation systems and whether bargaining sessions can be open or closed to employees or the public.<sup>125</sup> Finally, illegal subjects are those banned by state law, preventing either party from discussing or negotiating such subjects.<sup>126</sup> Maryland law prohibits teachers' unions and school boards from negotiating over the calendar year and class size.<sup>127</sup>

#### *G. Development on the Prohibition to Set Class Sizes.*

Maryland's first collective bargaining law concerning teachers was broad.<sup>128</sup> Codified in 1978 as section 6-408(b) of Maryland's Education Title, the law required public school employers to meet and negotiate with employee organizations or its representatives "on all matters [] relate[d] to

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<sup>117</sup> *See id.* at 4.

<sup>118</sup> *See id.* at 8.

<sup>119</sup> *Id.*

<sup>120</sup> *Bargaining Your Contract—Your Right and Duty*, MD STATE EDUC. ASS'N (Dec. 8, 2017), <https://marylandeducators.org/bargaining-your-contract-your-right-and-duty/>.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Bargaining Your Contract—Your Right and Duty*, *supra* note 121.

<sup>127</sup> *Id.*

<sup>128</sup> *See* *Montgomery Cnty. Educ. Ass'n v. Bd. of Educ. of Montgomery Cnty.*, 311 Md. 303 (1987).

salaries, wages, hours, and other working conditions.”<sup>129</sup> Under this version of the law, there were only mandatory and illegal bargaining subjects.<sup>130</sup>

As a result, courts were left to determine whether a particular “other working condition” was a mandatory or illegal bargaining subject.<sup>131</sup> The Supreme Court of Maryland held that the “true intent and meaning of the provisions” of the Education Article gave deference to the school board’s interpretation.<sup>132</sup> Justifying this deference, the court stated that “literally almost any educational matter may relate to an employee’s working conditions” and to hold otherwise could shift educational policy decisions to the hands of teachers rather than school boards.<sup>133</sup>

The Maryland State Board of Education resolves whether class size constitutes an educational policy subject to the Board’s interpretation of whether it is a mandatory or illegal bargaining subject.<sup>134</sup> To determine this, the State Board of Education employs a two-step analysis.<sup>135</sup> First, the Board decides whether there is a statutory duty that supersedes its collective bargaining obligations.<sup>136</sup> If not, then the Board applies a balancing test weighing the employee’s interests against the school board’s interests.<sup>137</sup> In 1987, the Board concluded that no statutory duty superseded its obligations and, in conducting the balancing test, determined class size was a “significant matter of educational policy” that the local Board must decide.<sup>138</sup> In supporting its decision, the Board recognized class size as an important factor in educational quality.<sup>139</sup> When establishing class sizes, school systems must consider developments in research and requirements for special populations while maintaining the community’s interests.<sup>140</sup>

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<sup>129</sup> MD. CODE ANN., EDUC. § 406(b) (originally enacted as 1978 Md. Laws 198–99); *Montgomery Cnty. Educ. Ass’n*, 311 Md. at 305.

<sup>130</sup> *Garrett Cnty. Teacher’s Ass’n, Inc. v. Garrett Cnty. Bd. of Educ.*, State Bd. Opinion No. 88-6 (Apr. 27, 1987).

<sup>131</sup> *See Bd. of Educ. for Dorchester Cnty. v. Hubbard*, 305 Md. 774 (1986) (addressing kindergarten teachers who sought relief from the courts when the county Board of Education refused their grievance that class sizes were unmanageable and an additional teacher was needed; however, the specific issue of whether class size was a mandatory subject was not addressed since the teachers lost on procedural grounds).

<sup>132</sup> *Id.* at 791.

<sup>133</sup> *Id.* at 792.

<sup>134</sup> *Garrett Cnty. Teacher’s Ass’n, Inc.*, State Bd. Opinion No. 88-6 at 67. (Board of Education overruled a county hearing examiner’s decision that class size was a lawful subject of negotiation and arbitration because class size determines a teacher’s working conditions and has minimal “system wide impacts.”)

<sup>135</sup> *Id.* at 68.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 69.

<sup>139</sup> *Id.*

<sup>140</sup> *Garrett Cnty. Teacher’s Ass’n, Inc.*, State Bd. Opinion No. 88-6 at 69.

However, for teachers, all educational policies are working conditions, and for the Board, all teachers' working conditions are educational policies.<sup>141</sup> The Supreme Court of Maryland confronted this elusive line between "educational policy" and "other working conditions" in 1987.<sup>142</sup> The court held that a broad reading of section 6-408(b) could allow union representatives to override the Board on matters of educational policy.<sup>143</sup> Such an interpretation, the court reasoned, would destroy any deference given to the Board in interpreting statutory bargaining subjects.<sup>144</sup> Moreover, the court will find the Board's interests outweigh those of its teachers when a topic, such as academic calendars, involves considerations beyond those of teachers, such as scheduling other staff, and when negotiating those topics may take a long time and deprive the community of education.<sup>145</sup>

Despite the interpretive questions surrounding section 6-408(b), the Maryland General Assembly left section 6-408(b) unamended for nearly twenty-five years.<sup>146</sup> In 2002, the Senate Committee enacted an amendment under Senate Bill 233 and added numerous exceptions to section 6-408(b), including subsection 6-408(b)(3).<sup>147</sup> This exception states that "a public-school employer may not negotiate the school calendar, the maximum number of students assigned to a class, or any matter precluded by applicable statutory law."<sup>148</sup> This provision was recodified to section 6-408(c)(3) in 2010<sup>149</sup> and again in 2023 to section 6-406.<sup>150</sup> Although this provision was recodified, its contents remained untouched.<sup>151</sup>

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<sup>141</sup> *Montgomery County*, 311 Md. at 310. An education association sought judicial review on whether school calendars were subject to collective bargaining negotiations. *Id.* The Association argued for a broad reading of § 6-408(b), insisting the school calendar constituted hours and working conditions for teachers, but the Court rejected this argument and held academic calendars as educational policies prohibited from negotiations. *Id.*

<sup>142</sup> *See id.* at 303.

<sup>143</sup> *Id.* at 314.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 320.

<sup>146</sup> *See* Negotiations Between Public School Employers and Employee Organizations, Ch. 287, S.B. 233, 2002 Sess. (Md. 2002) (amending § 6-408(b) (1978)).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Public School Relations Board – Fairness in Negotiations Act, Ch. 324, S.B. 590, 2010 Reg. Sess. (Md. 2010) (amending and recodifying § 6-408(b)(3)).

<sup>150</sup> Public Employee Relations Act, Ch. 114, H.B. 984, 2023 Reg. Sess. (Md. 2023) (recodifying § 6-408(b)(3) to § 6-406 (2023)).

<sup>151</sup> *See id.*; compare with MD. CODE ANN., EDUC., § 6-406(c)(3) (West 2024).

### III. ISSUE: MARYLAND’S PROGRESSIVE COLLECTIVE BARGAINING AND EDUCATION REFORM FALLS SHORT IN ADDRESSING TEACHERS’ WORKPLACE CONDITIONS

#### A. *Enacting the Public Employee Relations Act Modernized and Streamlined Collective Bargaining in Maryland.*

Governor Wes Moore signed the Public Employee Relations Act (“PERA”) on April 24, 2023, which became effective on July 1, 2023.<sup>152</sup> PERA realigned, consolidated, and updated public-sector employees’ collective bargaining laws.<sup>153</sup>

Before PERA, laws specific to a particular work sector governed public-sector collective bargaining.<sup>154</sup> At face value, the sector-based approach allowed the respective workforces, boards, and unions to customize their approach to specific matters, such as executive representative elections or grievance proceedings.<sup>155</sup> In action, however, the sector-based approach became “overly complicated.”<sup>156</sup> This approach created three different public labor relations boards with different procedural processes to remedy disputes and jurisdiction over specific categories of public-sector work.<sup>157</sup> The sector-based approach required the state to fund and staff three labor boards, but each board was understaffed, underfunded, and “spread too thin” in its ability

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<sup>152</sup> H.D. 984, 2023 Leg., 445th Sess. (Md. 2023).

<sup>153</sup> *Id.*

<sup>154</sup> *Public Employee Relations Act: Hearing on H.D. 984 Before the H. Appropriations Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of Jazz Lewis, Member, H. Appropriations Comm.), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/app/1NhGR1c\\_g5OQXCqkuynwrqh2h68SZVhSg.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/app/1NhGR1c_g5OQXCqkuynwrqh2h68SZVhSg.pdf).

<sup>155</sup> *See id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* The three former public labor relations boards included the State Labor Relations Board, the State Higher Education Labor Relations Board, and the Public Schools Labor Relations Board. *See* MD. CODE ANN., STATE PERS. & PENS. §§ 3-201–3-209 (repealed 2023); STATE PERS. & PENS. §§ 3-2a-01–3-2a-09 (repealed 2023); MD. CODE ANN., EDUC. §§ 6-801–6-807 (repealed 2023).

to resolve disputes between employers and employees.<sup>158</sup> This approach ultimately left employees with “delayed and inconsistent rulings.”<sup>159</sup>

To address these inadequacies, PERA abandoned the three-board, sector-based approach and established a singular Public Employee Relations Board.<sup>160</sup> Proponents of PERA are hopeful that a central board will streamline dispute procedures and officiate disputes consistently.<sup>161</sup> While this legislation is broad-sweeping, it accommodates the nuances of the respective work sectors because PERA requires the new board to appoint “deputy directors” to oversee and manage disputes.<sup>162</sup> These deputy directors are knowledgeable in public school, executive branch, and higher education labor relations.<sup>163</sup>

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<sup>158</sup> *Public Employee Relations Act: Hearing on H.D. 984 Before the H. Appropriations Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of Jazz Lewis, Member, H. Appropriations Comm.), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/app/1NhGR1c\\_g5OQXCqkuynwrqh2h68SZVhSg.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/app/1NhGR1c_g5OQXCqkuynwrqh2h68SZVhSg.pdf); see also *Public Employee Relations Act: Hearing on H.D. 984 Before the H. Appropriations Comm.*, 2023 Leg., 445th Sess. 2 (Md. 2023) (statement of Denise Gilmore, Legis. and Pol. Dir., Am. Fed’n State, Cnty. and Municipal Emps.), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/app/1FA84cTPn4Czt4ITdhqrZJlfXZbv-LtI9.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/app/1FA84cTPn4Czt4ITdhqrZJlfXZbv-LtI9.pdf) (“The total staff the state employs for these three boards is just two people. Maryland’s Labor Boards have a total budget of about \$440,000, which pales in comparison to states like Washington and Ohio, who have budgets of nearly \$5.3 million and \$4.18 million, respectively.”).

<sup>159</sup> *Public Employee Relations Act: Hearing on H.D. 984 Before the H. Appropriations Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of Jazz Lewis, Member, H. Appropriations Comm.), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/app/1NhGR1c\\_g5OQXCqkuynwrqh2h68SZVhSg.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/app/1NhGR1c_g5OQXCqkuynwrqh2h68SZVhSg.pdf); see also *Public Employee Relations Act: Hearing on H.D. 984 Before the H. Appropriations Comm.*, 2023 Leg., 445th Sess. 2 (Md. 2023) (statement of Denise Gilmore, Legis. and Pol. Dir., Am. Fed’n State, Cnty. and Municipal Emps.), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/app/1FA84cTPn4Czt4ITdhqrZJlfXZbv-LtI9.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/app/1FA84cTPn4Czt4ITdhqrZJlfXZbv-LtI9.pdf) (“Our current set up means Maryland public employees can wait years at times to get decisions on an unfair labor practice charge on disputes with their employer.”).

<sup>160</sup> H.D. 0984, 2023 Leg., 445th Sess. (Md. 2023).

<sup>161</sup> *Public Employee Relations Act: Hearing on H.D. 984 Before the H. Appropriations Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of Jazz Lewis, Member, H. Appropriations Comm.), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/app/1NhGR1c\\_g5OQXCqkuynwrqh2h68SZVhSg.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/app/1NhGR1c_g5OQXCqkuynwrqh2h68SZVhSg.pdf).

<sup>162</sup> *Public Employee Relations Act: Hearing on H.D. 984 Before the H. Appropriations Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of Kristy Anderson, Gen. Coun., Md. State Educ. Ass’n), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/app/11-bCs2akX3L1uUQGPo2eofr6ZrpxXCzQ.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/app/11-bCs2akX3L1uUQGPo2eofr6ZrpxXCzQ.pdf).

<sup>163</sup> *Id.*

*B. Although Maryland Implemented Progressive Collective Bargaining Laws, They Still Limit Teachers' Bargaining Rights.*

In addition to broad changes in collective bargaining for public employees in Maryland, PERA also attempted to make substantial changes to teachers' collective bargaining rights.<sup>164</sup> The first version of PERA proposed "repealing and reenacting, with amendments," section 6-406, which prohibited class sizes and school calendars as bargaining subjects.<sup>165</sup> During the first committee hearing over PERA, the Maryland Association of Boards of Education ("MABE") expressed its strong opposition to changing that provision of the law.<sup>166</sup> Citing that such a change would be "dramatic and disruptive," the MABE was concerned that adding class size and school calendar as permissive bargaining subjects would interfere with implementing the Blueprint into school systems.<sup>167</sup> The MABE also cited "significant funding and policy issues" to amending this law but did not elaborate on those funding and policy issues in its submission to the House Appropriations Committee.<sup>168</sup> MABE's and Public School Superintendents' Association of Maryland ("PSSAM")'s letters are the only documented opposition to PERA's proposed section 6-406 amendment.<sup>169</sup> The second version of PERA removed the suggestion to repeal, reenact, and amend the prohibition on class size as a bargaining subject.<sup>170</sup>

As much promise as PERA shows for public employees' collective bargaining rights, it still falls short of helping teachers fight against

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<sup>164</sup> See H.D. 984, 2023 Leg., 445th Reg. Sess. (Md. 2023) (unenacted).

<sup>165</sup> See *id.*

<sup>166</sup> See *Public Employee Relations Act: Hearing on H.D. 984 Before the H. Appropriations Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of John Wollums, Couns., Md. Ass'n Bds. of Educ.), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/app/171zhlUecenpelALdazXlp4p62Fj\\_v429.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/app/171zhlUecenpelALdazXlp4p62Fj_v429.pdf).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Public Employee Relations Act: Hearing on H.D. 984 Before the H. Appropriations Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (Mary Pat Fannon, Pub. Sch. Superintendents' Ass'n of Md.),

[https://mgaleg.maryland.gov/cmte\\_testimony/2023/app/1PK4v-9MGMTpcimz5zcnwRh\\_HGwNfyCec.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/app/1PK4v-9MGMTpcimz5zcnwRh_HGwNfyCec.pdf); *Public Employee Relations Act: Hearing on H.D. 984 Before the H. Appropriations Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of John Wollums, Couns., Md. Ass'n Bds. of Educ.),

[https://mgaleg.maryland.gov/cmte\\_testimony/2023/app/171zhlUecenpelALdazXlp4p62Fj\\_v429.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/app/171zhlUecenpelALdazXlp4p62Fj_v429.pdf); see also *Committee Testimony and Witness List: HB0984*, MD. GEN. ASSEMBLY (Mar. 7, 2023),

<https://mgaleg.maryland.gov/mgawebwebsite/Legislation/WitnessSignup/HB0984?ys=2023RS>,

<sup>170</sup> See H.D. 984, 2023 Leg., 445th Reg. Sess. (Md. 2023) (unenacted).

overwhelming workloads.<sup>171</sup> This shortcoming is particularly troubling because teachers are rapidly leaving the profession<sup>172</sup> due to feeling under-respected, overworked, and underpaid.<sup>173</sup> Teachers work approximately fifty-four hours per week and spend less than half that time directly teaching students.<sup>174</sup> Further, teachers do not feel they have control or influence over their schedules.<sup>175</sup> These feelings are due to the administrative control over teachers' work and the general role teachers play in catering to the needs of their students.<sup>176</sup> One teacher reported that it could take as long as forty-five minutes to discipline a single student, contact their parents, and complete the necessary documentation—all of which must occur during school hours.<sup>177</sup>

Unsurprisingly, teachers' job satisfaction has reached an all-time low.<sup>178</sup> In 2008, sixty-two percent of teachers reported feeling "very satisfied" with their job.<sup>179</sup> In 2022, that figure dropped to twelve percent.<sup>180</sup> The Merrimack College Teacher Survey also reports that over half of teachers would not advise their younger self to pursue teaching, and forty-four percent of survey respondents stated that they were likely to quit teaching in the next two years.<sup>181</sup> Maryland's teachers echo these sentiments.<sup>182</sup> In a poll conducted on behalf of the Maryland State Education Association ("MSEA") through the NEA, ninety-two percent of educators who responded indicated that "their workload was a serious or very serious concern."<sup>183</sup> Ninety-one percent

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<sup>171</sup> See *Workload Overload: How Educators Can Combat the Crisis of Class Size, Caseloads, and Workloads*, MD. STATE EDUC. ASS'N (Jan. 25, 2022), <https://marylandeducators.org/workload-overload-how-educators-can-combat-the-crisis-of-class-size-caseloads-and-workload/>.

<sup>172</sup> See *id.* (noting that 48% of schools are struggling to hire full-time teachers).

<sup>173</sup> Ileana Najarro, *Here's How Many Hours a Week Teachers Work*, EDUC. WK. (Apr. 14, 2022), <https://www.edweek.org/teaching-learning/heres-how-many-hours-a-week-teachers-work/2022/04>.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* (stating that sixty-three percent of teachers reported "strongly disagree" to the idea that "they have a lot of control and influence over their schedule such as the classes they teach and non-academic duties they take on.").

<sup>176</sup> *Id.*

<sup>177</sup> See *id.*

<sup>178</sup> Madeline Will, *Teacher Job Satisfaction Hits an All-Time Low*, EDUC. WK. (Apr. 14, 2022), <https://www.edweek.org/teaching-learning/teacher-job-satisfaction-hits-an-all-time-low/2022/04>.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> See Matt Small, *Burnout, Stress Affecting Most Maryland Teachers, Poll Finds*, MD. MATTERS (Feb. 19, 2022), <https://www.marylandmatters.org/2022/02/19/burnout-stress-affecting-most-maryland-teachers-poll-finds/>.

<sup>183</sup> *Id.*

stated that “burnout was a serious or very serious concern.”<sup>184</sup> This survey also found that sixty-one percent of educators said they would be “somewhat or much more likely to stay in the profession if class sizes could be reduced.”<sup>185</sup> Ninety percent stated that “having the ability to reduce class sizes would somewhat or greatly improve their working conditions.”<sup>186</sup>

In addition to collective bargaining reform, Maryland has taken substantial steps toward education reform. The Maryland General Assembly passed the Blueprint for Maryland’s Future in 2021 with the promise to “increase education funding,” “enrich student experiences,” and “improve the quality of education for all children in Maryland.”<sup>187</sup> The Blueprint has five pillars, the second of which is to strive to develop “High Quality and Diverse Teachers and Leaders.”<sup>188</sup> Under this pillar, the Blueprint promises to raise teaching salaries, create monetary incentives for board-certified teachers, and “raise expectations for teacher preparation and induction.”<sup>189</sup> The Blueprint does not mention teachers’ working conditions or any objectives for improving those conditions.<sup>190</sup>

Maryland stands at the crossroads of significant public-sector collective bargaining reform and a burnt-out, weakening teacher workforce. Smaller class sizes may be the “silver bullet” for a remedy, as class size is “at the root of the challenging working conditions” teachers face.<sup>191</sup> Decreased teaching staff results in larger class sizes and higher caseloads for teachers to manage.<sup>192</sup> But, because larger classes make it difficult for teachers and students to build and strengthen the relationships required to foster student success, class sizes become unmanageable.<sup>193</sup>

National context emphasizes this issue: Maryland is just one of nine states that classify class size as a prohibited subject of collective bargaining.<sup>194</sup>

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *What Is the Blueprint for Maryland’s Future?*, MD. STATE DEP’T OF EDUC., <https://blueprint.marylandpublicschools.org/> (last visited Feb. 19, 2024).

<sup>188</sup> MD. STATE DEP’T OF EDUC., *supra* note 2, at 12–13 (providing the five pillars: Early Childhood Education, High Quality and Diverse Teachers and Leaders, College and Career Readiness, More Resources for all Students to be Successful, and Governance and Accountability).

<sup>189</sup> *Id.*

<sup>190</sup> *See id.*

<sup>191</sup> *Workload Overload*, *supra* note 172.

<sup>192</sup> *Id.*

<sup>193</sup> *See id.*

<sup>194</sup> *Collective Bargaining Laws*, *supra* note 51 (showing that Maryland, Maine, Indiana, Tennessee, South Dakota, Nebraska, Wisconsin, Kansas, and Alaska all prohibit class size as a bargaining subject).

Meanwhile, fourteen states and the District of Columbia view class size as a legal bargaining subject.<sup>195</sup>

#### IV. SOLUTION: REPEAL SECTION 6-406 AND ALLOW CLASS SIZE AS A PERMISSIVE BARGAINING SUBJECT.

Senate Bill 206's sole objective was to "repeal the prohibition on public school employers from negotiating the maximum number of students assigned to a class."<sup>196</sup> Senate Bill 206 did not require school boards to set minimum or maximum class sizes or force them to pay teachers more for larger classes.<sup>197</sup> Instead, it would have allowed teachers, union representatives, and labor boards to address, discuss, and negotiate class sizes at the bargaining table.<sup>198</sup>

Each attempt to repeal the prohibition on class size as a bargaining subject under section 6-406 of Maryland's Education Title failed at the committee level.<sup>199</sup> Interestingly, most witnesses and testimony before various legislative committee hearings supported repealing section 6-406.<sup>200</sup> Although the legislative histories are silent regarding why these bills died,<sup>201</sup> the witness testimony and reports from those opposing Senate Bill 206 may explain its failure. County school boards and the PSSAM opposed at least

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<sup>195</sup> *Id.* (showing that New Hampshire, Connecticut, New York, Pennsylvania, Florida, Iowa, North Dakota, Colorado, Idaho, Oregon, and Nevada allow class size as a permissive bargaining subject while California and Minnesota define class size as a mandatory bargaining subject).

<sup>196</sup> See S.B. 206, 2023 Leg., 445th Sess. (Md. 2023) (unenacted).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*; see also H.D. 890, 2022 Leg., 444th Sess. (Md. 2022); S.B. 962, 2022 Leg., 444th Sess. (Md. 2022); H.D. 1074, 2020 Leg., 442nd Sess. (Md. 2020).

<sup>200</sup> Twenty-eight out of thirty-six witnesses and testimony reports supported S.B. 206, seventeen out of twenty supported S.B. 962, and five out of nine supported H.B. 1074. See *Committee Testimony and Witness Signup: S.B. 206*, MD. GEN. ASSEMBLY, <https://mgaleg.maryland.gov/mgawebsite/Legislation/WitnessSignup/SB0206?ys=2023RS> (last visited Mar. 18, 2024); *Committee Testimony and Witness Signup: H.B. 890*, MD. GEN. ASSEMBLY, <https://mgaleg.maryland.gov/mgawebsite/Legislation/WitnessSignup/HB0890?ys=2022RS> (last visited Mar. 18, 2024); *Committee Testimony and Witness Signup: H.B. 1074*, MD. GEN. ASSEMBLY, <https://mgaleg.maryland.gov/mgawebsite/Legislation/WitnessSignup/HB1074?ys=2020RS> (last visited Mar. 18, 2024).

<sup>201</sup> H.D. 890, 2022 Leg., 444th Sess. (Md. 2022); S.B. 962, 2022 Leg., 444th Sess. (Md. 2022); H.D. 1074, 2020 Leg., 442nd Sess. (Md. 2020).

one version of a bill to repeal section 6-406, and the MABE opposed all three bills to repeal section 6-406.<sup>202</sup>

*A. Opposition to S.B. 206.*

Those opposing Senate Bill 206 cited the inherent inequities among representative unions and school board's bargaining power as a concern.<sup>203</sup> Notably, by including class size as a permissive subject for negotiation, the onus of raising it is placed on the local bargaining unit.<sup>204</sup> Depending on the bargaining units' inherent strengths or weaknesses, this onus can create an inequity among local unions.<sup>205</sup> Moreover, the Washington County Board of Education raised concerns that the school board may be unable to negotiate class size because it lacked control over its budget or the total number of students enrolled in the county.<sup>206</sup>

Opponents of Senate Bill 206 also cited insufficient resources as an issue with its enactment.<sup>207</sup> The MABE and the PSSAM worried that if teachers successfully negotiated restrictions on class sizes, public schools would not have the physical space or fiscal resources to accommodate smaller

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<sup>202</sup> See *Committee Testimony and Witness Signup: S.B. 206*, supra note 201; *Committee Testimony and Witness Signup: H.B. 890*, supra note 201; *Committee Testimony and Witness Signup: H.B. 1074*, supra note 201.

<sup>203</sup> *Education—Collective Bargaining—Certificated Employees—Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of Mary Pat Fannon, Pub. Sch. Superintendents' Ass'n of Md.), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/19ptjRNudXlfChxc8Y9tqEwzyR0-0T2\\_C.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/19ptjRNudXlfChxc8Y9tqEwzyR0-0T2_C.pdf); see also *Education—Collective Bargaining—Certificated Employees—Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of Jamie Brown, Wash. Cnty. Bd. of Educ.), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/1qvR1FRHwdE5R-bSp8TQ7b9Kr4f\\_I0WMF.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/1qvR1FRHwdE5R-bSp8TQ7b9Kr4f_I0WMF.pdf).

<sup>204</sup> *Education—Collective Bargaining—Certificated Employees—Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of Mary Pat Fannon, Pub. Sch. Superintendents' Ass'n of Md.), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/19ptjRNudXlfChxc8Y9tqEwzyR0-0T2\\_C.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/19ptjRNudXlfChxc8Y9tqEwzyR0-0T2_C.pdf).

<sup>205</sup> *Id.*

<sup>206</sup> *Education—Collective Bargaining—Certificated Employees—Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of Jamie Brown, Wash. Cnty. Bd. of Educ.), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/1qvR1FRHwdE5R-bSp8TQ7b9Kr4f\\_I0WMF.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/1qvR1FRHwdE5R-bSp8TQ7b9Kr4f_I0WMF.pdf).

<sup>207</sup> *Id.*; *Education—Collective Bargaining—Certificated Employees—Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of Mary Pat Fannon, Pub. Sch. Superintendents' Ass'n of Md.), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/19ptjRNudXlfChxc8Y9tqEwzyR0-0T2\\_C.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/19ptjRNudXlfChxc8Y9tqEwzyR0-0T2_C.pdf).

classes.<sup>208</sup> The Washington County Board of Education elaborated that budget constraints make it “nearly impossible for school boards to agree to any measure that will . . . expand the usable space in the school facility.”<sup>209</sup> The PSSAM considered that more classes require more teachers.<sup>210</sup> With the current teacher shortage and the new demands placed on teacher education and training by the Blueprint, finding teachers to staff more classes will be difficult.<sup>211</sup>

Finally, opponents of Senate Bill 206 raised concerns about the administrative impacts on school boards and the state labor board. The PSSAM explained that with the current system, superintendents and school boards allocate students to classes based on the number of teachers available.<sup>212</sup> This method is a “hugely important management and budget tool,” which could be upended if forced to allocate teaching staff based on the number of students enrolled.<sup>213</sup> Moreover, these opponents question how Senate Bill 206 will fit into PERA.<sup>214</sup> The current labor relations board has no experience handling class size disputes, which they fear could result in longer-than-anticipated resolutions.<sup>215</sup>

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<sup>208</sup> *Education–Collective Bargaining–Certificated Employees–Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of Mary Pat Fannon, Pub. Sch. Superintendents’ Ass’n of Md.), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/19ptjRNudXlfChxc8Y9tqEwzyR0-0T2\\_C.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/19ptjRNudXlfChxc8Y9tqEwzyR0-0T2_C.pdf); *Education–Collective Bargaining–Certificated Employees–Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of Jamie Brown, Wash. Cnty. Bd. of Educ.), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/1qvR1FRHwdE5R-bSp8TQ7b9Kr4f\\_I0WMF.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/1qvR1FRHwdE5R-bSp8TQ7b9Kr4f_I0WMF.pdf).

<sup>209</sup> *Education–Collective Bargaining–Certificated Employees–Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of Jamie Brown, Wash. Cnty. Bd. of Educ.), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/1qvR1FRHwdE5R-bSp8TQ7b9Kr4f\\_I0WMF.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/1qvR1FRHwdE5R-bSp8TQ7b9Kr4f_I0WMF.pdf).

<sup>210</sup> *Education–Collective Bargaining–Certificated Employees–Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of Mary Pat Fannon, Pub. Sch. Superintendents’ Ass’n of Md.), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/19ptjRNudXlfChxc8Y9tqEwzyR0-0T2\\_C.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/19ptjRNudXlfChxc8Y9tqEwzyR0-0T2_C.pdf).

<sup>211</sup> *See id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Education–Collective Bargaining–Certificated Employees–Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of John Wollums, Couns., Md. Ass’n Bds. Educ.), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/1B2HqrlZaaRaySp0X2TCX2NXIKlPvq\\_hr.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/1B2HqrlZaaRaySp0X2TCX2NXIKlPvq_hr.pdf).

<sup>215</sup> *Id.*

However, these concerns rely on misguided assumptions about how permissive bargaining subjects work and what a “successful” negotiation outcome could be should class size become a permissive bargaining subject. First, opponents claim that school boards do not have the power to negotiate over class size.<sup>216</sup> However, by repealing section 6-406, class size becomes a permissive bargaining subject, meaning the union and the board must agree to discuss and negotiate class sizes.<sup>217</sup> Hence, the board would retain full power to deny a request by a teachers’ union representative to discuss class sizes.<sup>218</sup>

Second, opponents assume that by enacting Senate Bill 206, teachers would successfully negotiate caps on class sizes.<sup>219</sup> However, Senate Bill 206 merely opens the door to a conversation and promotes information-sharing.<sup>220</sup> Instead of superintendents and school boards taking on all administrative problem-solving, these parties *and* teachers can develop solutions to specific school issues.<sup>221</sup> Moreover, including “deeply invested” teachers in their classrooms’ success allows for a more comprehensive approach to educational reform and problem-solving.<sup>222</sup>

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<sup>216</sup> *Id.*

<sup>217</sup> See *Education–Collective Bargaining–Certificated Employees–Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. (Md. 2023) (statement of Cheryl Bost, Md. State Educ. Ass’n),

[https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/1Y1hZHtBESGr1RzIA3I0G\\_A8Yc4wPMnDu.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/1Y1hZHtBESGr1RzIA3I0G_A8Yc4wPMnDu.pdf); see also *Bargaining Your Contract—Your Right and Duty*, *supra* note 121.

<sup>218</sup> See *Bargaining Your Contract—Your Right and Duty*, *supra* note 120.

<sup>219</sup> See *Education–Collective Bargaining–Certificated Employees–Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of John Wollums, Couns., Md. Ass’n Bds. Educ.),

[https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/1B2HqrlZaaRaySp0X2TCX2NXIKlPvq\\_hr.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/1B2HqrlZaaRaySp0X2TCX2NXIKlPvq_hr.pdf); *Education–Collective Bargaining–Certificated Employees–Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023)

(statement of Jamie Brown, Wash. Cnty. Bd. of Educ.),

[https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/1qvR1FRHwdE5R-bSp8TQ7b9Kr4f\\_I0WMF.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/1qvR1FRHwdE5R-bSp8TQ7b9Kr4f_I0WMF.pdf).

<sup>220</sup> See *Education–Collective Bargaining–Certificated Employees–Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of Gerimi Belin, Balt. Tchr. Union),

[https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/12P855d6wUvT--YunMF53AEk3p5yr6hN.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/12P855d6wUvT--YunMF53AEk3p5yr6hN.pdf).

<sup>221</sup> *Id.*

<sup>222</sup> See *Education–Collective Bargaining–Certificated Employees–Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. 1 (statement of Duncan Evans, Balt. Tchr. Union),

[https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/14wtZp8R17PsHhP3OJK41HRDXyffbRC1O.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/14wtZp8R17PsHhP3OJK41HRDXyffbRC1O.pdf).

*B. Collective Bargaining on Class Sizes Lifts the Voices of the Community.*

Although school boards may deny a request to discuss class sizes, mounting pressure from teachers' unions and the community may leverage the board to address the issue.<sup>223</sup> Because an "educators' working conditions are students' learning conditions," the community benefits from teachers addressing school conditions through collective bargaining.<sup>224</sup> The NEA and its affiliates, including the MSEA,<sup>225</sup> realize they can better address systemic issues by involving themselves with key stakeholders, community partners, and parents.<sup>226</sup> In doing so, these community members and unions unite to create proposals and secure the resources vital to student success.<sup>227</sup>

The witnesses and testimony reports supporting Senate Bill 206 illuminate the community's concern and interest in class sizes.<sup>228</sup> Twelve of the twenty-eight witnesses in favor of Senate Bill 206 were community members or high school students.<sup>229</sup> Moreover, in a recent poll, Baltimore City families and students cited "class sizes of no more than twenty students" as a top five priority.<sup>230</sup>

Teachers explained how class size affects students and the community in testimony reports and witness hearings for Senate Bill 206. A Baltimore City Public School teacher shared that when they have smaller class sizes, they can notice "bruises and cuts that shouldn't be there" or changes in a student's disposition when classrooms are not "packed wall to wall with students."<sup>231</sup> To that teacher, smaller class sizes provide the opportunity to build connections so students cannot easily hide signs of abuse or depression.<sup>232</sup> Another Baltimore City teacher raised concerns over students' learning and

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<sup>223</sup> See NAT'L EDUC. ASS'N, *supra* note 84; see also Ken Green, *How Unions Build Strength Through Community Engagement*, UNIONTRACK (Oct. 29, 2019), <https://uniontrack.com/blog/community-engagement>.

<sup>224</sup> NAT'L EDUC. ASS'N, *supra* note 84.

<sup>225</sup> *NEA Affiliates*, NAT'L EDUC. ASS'N, <https://www.nea.org/nea-affiliates> (last visited Feb. 20, 2024) (select Maryland on the map; then click "join" to be redirected to the Maryland State Education Association).

<sup>226</sup> NAT'L EDUC. ASS'N, *supra* note 84, at 5.

<sup>227</sup> *Id.*

<sup>228</sup> See *Committee Testimony and Witness Signup: S.B. 206*, *supra* note 200.

<sup>229</sup> See *id.*

<sup>230</sup> Ferrell, *supra* note 7.

<sup>231</sup> *Education—Collective Bargaining—Certificated Employees—Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of Franca Muller Paz, Balt. City Pub. Sch. Tchr.), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/1rlo\\_X7uNqrvl0QYtSGKsnaY\\_3PmQ\\_Ooa.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/1rlo_X7uNqrvl0QYtSGKsnaY_3PmQ_Ooa.pdf).

<sup>232</sup> *Id.*

workplace conditions.<sup>233</sup> This teacher taught classes based on groupings in the student’s skill levels; these are “danger zone,” “needs improvement,” “on grade level,” or “above grade level” classes.<sup>234</sup> Over ten years, this teacher taught one “above-grade-level” class, the only class they taught with less than twenty students.<sup>235</sup> Their sole “on grade level” class had twenty-two students, while their three “needs improvement” classes ranged from twenty-seven to twenty-eight students.<sup>236</sup> Their five “danger zone” classes ranged from thirty-one to forty-five students.<sup>237</sup> In addition to teaching forty-five students testing at a “dangerous level” below their grade, their classroom was did not have air conditioning.<sup>238</sup> The resulting learning and working environment was, in their words, “traumatic.”<sup>239</sup>

### *C. Information-Sharing Facilitates Creative Problem Solving.*

Prohibiting class size as a bargaining subject harms the school board and its teachers.<sup>240</sup> When teachers cannot discuss class size, they can also not discuss its adverse effects on student learning, the community, or workplace conditions.<sup>241</sup> These discussions are necessary to bring awareness of such issues before the school board and allow parties to develop mutually beneficial solutions.<sup>242</sup> Prohibiting class size as a bargaining subject creates a communication barrier between boards and unions, which leads to

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<sup>233</sup> *Education—Collective Bargaining—Certificated Employees—Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of Cheryl Lynn Owens, Balt. City Pub. Sch. Tchr.), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/1tAdRTBjd4vTS0hkVPyhiECQ1sAE5YLhb.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/1tAdRTBjd4vTS0hkVPyhiECQ1sAE5YLhb.pdf).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Education—Collective Bargaining—Certificated Employees—Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of Cheryl Lynn Owens, Balt. City Pub. Sch. Tchr.), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/1tAdRTBjd4vTS0hkVPyhiECQ1sAE5YLhb.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/1tAdRTBjd4vTS0hkVPyhiECQ1sAE5YLhb.pdf).

<sup>240</sup> *See Explainer: Could Educators Bargain Class Size?* MD. STATE EDUC. ASS’N (Mar. 10, 2024), <https://marylandeducators.org/explainer-could-educators-bargain-class-size/>.

<sup>241</sup> *See id.*

<sup>242</sup> *See Andrew Hasty & Darnice Marsh, Creating Value Through Labor-Management Partnerships at Work*, U.S. DEP’T OF LAB. BLOG (Aug. 23, 2023), <https://blog.dol.gov/2023/08/29/creating-value-through-labor-management-partnerships-at-work>.

distrust,<sup>243</sup> prolongs the negotiation process, and increases the odds of employees striking.<sup>244</sup>

i. Information Sharing Balances Inequities in Bargaining Power.

Employers often have the upper hand compared to their employees or union representatives at the bargaining table.<sup>245</sup> When this power asymmetry is present during negotiations, the bargaining process becomes a learning process for employee unions, as they counter-offer their way closer to the employer's resistance point.<sup>246</sup> However, employee unions struggle to negotiate close enough to the minimum terms the employer will accept through this process and often accept settlements that are farther from the employer's resistance point.<sup>247</sup>

Information sharing between an employee's union representative and employers can help resolve this asymmetric bargaining power in a way that benefits both parties.<sup>248</sup> When a union representative raises an issue, and an employer responds by voluntarily sharing information, the employee union can use that information to leverage a better offer for themselves.<sup>249</sup> Also, employers can implement "reality construction" to steer employees' interpretation of the information they provide.<sup>250</sup>

The prohibition on negotiating class sizes creates a significant asymmetry in bargaining power between the teachers' unions and school boards that warrants repealing the prohibition. Under current classroom conditions, class sizes pose an obstacle to student and teacher success and retention and section 6-406 leaves no opportunity for improvement on behalf of teachers.<sup>251</sup> In fact, "educators are held accountable through their evaluations over student outcomes, but they currently have no meaningful way to ensure that their

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<sup>243</sup> *Id.*

<sup>244</sup> Motohiro Morishima, *Information Sharing and Collective Bargaining in Japan: Effects on Wage Negotiation*, 44 ILR REV. 469, 471 (Apr. 1991) (comparing information sharing strategies and its effects on collective bargaining agreements in Japan and the United States).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *See id.*

<sup>249</sup> *Id.*

<sup>250</sup> Morishima, *supra* note 245, at 471.

<sup>251</sup> *See Education—Collective Bargaining—Certificated Employees—Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. (Md. 2023) (statement of Cheryl Bost, Md. State Educ. Ass'n), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/1Y1hZHtBESGr1RzIA310G\\_A8Yc4wPMnDu.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/1Y1hZHtBESGr1RzIA310G_A8Yc4wPMnDu.pdf).

classrooms have a manageable number of students.”<sup>252</sup> Repealing section 6-406 empowers teachers to speak up, as they would have “a tool that allows them to have a stronger voice for themselves and [] students.”<sup>253</sup> Considering teacher burnout and departures from the profession, allowing teachers to discuss class size is an opportunity of the utmost importance.<sup>254</sup>

ii. Information Sharing Generates Mutually Beneficial Solutions to Problems.

School boards and teachers are accountable for different responsibilities in public education.<sup>255</sup> Information sharing exposes the various approaches and perspectives that school boards and union representatives take toward addressing issues and problem-solving.<sup>256</sup> Thus, when information sharing occurs, the school board and the teachers’ union representatives can better understand each other’s priorities, realign their goals, and establish a mutually beneficial solution.<sup>257</sup>

Goal realignment reflects how employees and employers can manage their expectations in the bargaining process and develop a solution that hits closer to their respective resistance points.<sup>258</sup> For example, when employers inform their employee’s union representatives of “bad news” or less-than-ideal conditions, employees might agree to forgo certain benefits or demands for the sake of the organization’s longevity.<sup>259</sup> Similarly, when employees voice their concerns, employers may revisit specific terms and conditions of employment—such as productivity targets—to ensure their workplace is in a competitive market position for production and future employee recruitment.<sup>260</sup>

Maryland’s teachers are willing to propose creative solutions that address the school board’s concerns about limited resources.<sup>261</sup> T. Nathan Ferrell of Baltimore City Public Schools welcomed this opportunity in the Senate

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<sup>252</sup> See *Education—Collective Bargaining—Certificated Employees—Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. 1 (statement of Duncan Evans, Balt. Tchr. Union), [https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/14wtZp8R17PsHhP3OJK41HRDXyffbRC1O.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/14wtZp8R17PsHhP3OJK41HRDXyffbRC1O.pdf).

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> See Hasty & Marsh, *supra* note 243.

<sup>256</sup> *Id.*

<sup>257</sup> See *id.*; see also Morishima, *supra* note 245, at 472.

<sup>258</sup> See generally Morishima, *supra* note 245.

<sup>259</sup> *Id.* at 473.

<sup>260</sup> *Id.* at 472–73.

<sup>261</sup> See Ferrell, *supra* note 7.

Finance Committee Hearing on Senate Bill 206.<sup>262</sup> According to them, solutions do not need to cap class sizes.<sup>263</sup> Instead, these solutions can include implementing the Blueprint, developing retention strategies for support staff positions with high turnover, and addressing specific issues like pre-k expansions.<sup>264</sup>

*D. Teachers and Boards Can Create a Custom Solution with Circumstances Specific to Maryland in Mind.*

Opponents of Senate Bill 206 considered the bill's administrative impacts and how a permissive bargaining subject would work with PERA.<sup>265</sup> However, teachers' union representatives and school boards can consider their circumstances when negotiating towards a custom solution. Given the variance in collective bargaining laws across the country,<sup>266</sup> each state faces particular circumstances regarding teachers' collective bargaining rights.<sup>267</sup> This section provides examples of how teachers' unions and school boards can work together to address the issue of class size in their negotiations.

For example, class size is a permissive bargaining subject in New Hampshire.<sup>268</sup> Each county school board and the representative teachers' union created agreements specific to the county's needs.<sup>269</sup> The Pelham Education Association and the Pelham School Board agreed to "make every

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<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Education—Collective Bargaining—Certificated Employees—Class Size: Hearing on S.B. 206 Before the S. Fin. Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (statement of Jamie Brown, Wash. Cnty. Bd. of Educ.),

[https://mgaleg.maryland.gov/cmte\\_testimony/2023/fin/1qvR1FRHwdE5R-bSp8TQ7b9Kr4f\\_I0WMF.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/fin/1qvR1FRHwdE5R-bSp8TQ7b9Kr4f_I0WMF.pdf); *Public Employee Relations Act: Hearing on H.D. 984 Before the H. Appropriations Comm.*, 2023 Leg., 445th Sess. 1 (Md. 2023) (Mary Pat Fannon, Pub. Sch. Superintendents' Ass'n of Md.),

[https://mgaleg.maryland.gov/cmte\\_testimony/2023/app/1PK4v-9MGMTPcimz5zcnwRh\\_HGwNfyCec.pdf](https://mgaleg.maryland.gov/cmte_testimony/2023/app/1PK4v-9MGMTPcimz5zcnwRh_HGwNfyCec.pdf).

<sup>266</sup> *Supra* Section II.C.

<sup>267</sup> *Supra* Section II.B.

<sup>268</sup> *Collective Bargaining Laws*, *supra* note 51.

<sup>269</sup> *Compare AN AGREEMENT BETWEEN THE PELHAM EDUC. ASS'N AND THE PELHAM SCH. BD. 2020-2024*, at 10 (2019), <https://www.pelhamsd.org/Downloads/2020-2024-SIGNED-PEA-AGREEMENT.pdf>, *with* *NEA-NH/NEA, AGREEMENT BETWEEN THE NOTTINGHAM SCH. BD. AND THE NOTTINGHAM TCHR.'S ASS'N 2020-2023*, at 3, (2020),

[https://www.nh.gov/pelrb/collective/documents/nottingham\\_teacher6.pdf](https://www.nh.gov/pelrb/collective/documents/nottingham_teacher6.pdf), *and* *LOCAL 1044 AFT, AFL-CIO, AGREEMENT BETWEEN THE NASHUA BD. OF EDUC. AND THE NASHUA TCHR.'S UNION 2021-2025*, at 22 (2022),

[https://www.nh.gov/pelrb/collective/documents/nashua\\_teach7.pdf](https://www.nh.gov/pelrb/collective/documents/nashua_teach7.pdf).

effort to follow” the proposed class size guidelines.<sup>270</sup> The agreement between the Nottingham School Board and the Nottingham Teachers’ Association “strive[s] towards meeting the regulations of class size as set forth by the New Hampshire Department of Education . . . provid[ed] that classroom space is available and the quality of education would not be jeopardized.”<sup>271</sup> In contrast, the Nashua Board of Education and the Nashua Teachers’ Union sets maximum class sizes and outline what happens when excess students are in a class.<sup>272</sup>

California, where class size is a mandatory bargaining subject, is an example of how class size negotiations work under a single Public Employee Relations Board (“PERB”).<sup>273</sup> A centralized PERB is valuable for resolving ambiguities about a “class.”<sup>274</sup> For example, PERB defines “class size” as the number of students in a period and not the total number of students a teacher supervises in a workday.<sup>275</sup> Under PERB’s interpretation, a cohort can also constitute a class size.<sup>276</sup> Additionally, California’s PERB helps to reinforce collective bargaining agreements and memorandums of understanding during periods of heavy revision and uncertainty, such as the COVID-19 pandemic.<sup>277</sup> During the pandemic, the PERB’s Mediation and Conciliation Service assisted in swiftly negotiating terms between teachers’ unions and school boards under the guidance of the Education Employment Relations Act and statewide mandates.<sup>278</sup> Effectively, the PERB prevented school boards from unilaterally enforcing return-to-work protocols not discussed with teachers union representatives, as required by law.<sup>279</sup>

Like Maryland, Illinois prohibits class size as a bargaining subject.<sup>280</sup> However, the Chicago Teacher’s Union (“CTU”) “fought really hard,” and

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<sup>270</sup> AN AGREEMENT BETWEEN THE PELHAM EDUC. ASS’N AND THE PELHAM SCH. BD., *supra* note 270, at 10.

<sup>271</sup> AGREEMENT BETWEEN THE NOTTINGHAM SCH. BD. AND THE NOTTINGHAM TCHR.’S ASS’N, *supra* note 270, at 3.

<sup>272</sup> AGREEMENT BETWEEN THE NASHUA BOD. OF EDUC. AND THE NASHUA TCHRS’ UNION, LOCAL 1044 AFT, *supra* note 270.

<sup>273</sup> *Collective Bargaining Laws*, *supra* note 51; see also CALIFORNIA PUB. EMP. REL. BD., <https://perb.ca.gov> (last visited Feb. 17, 2024).

<sup>274</sup> See *Grossmont Educ. Ass’n v. Grossmont Union High Sch.* PERB Dec. No. 313a, ¶ 7 (1984); see also *Oxnard Fed’n of Tchr.s and School Emp., Local 1273 v. Oxnard Union High Sch. Dist.* PERB Dec. No. 2803, at 43 (2022).

<sup>275</sup> *Grossmont Educ. Ass’n*, PERB Dec. No. 313a, at ¶ 7.

<sup>276</sup> *Oxnard Fed’n of Tchr.s and School Emp., Local 1273*, PERB Dec. No. 2803, at 43.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Collective Bargaining Laws*, *supra* note 51.

created a Joint Class Size Assessment Council.<sup>281</sup> The CTU appointed six Board members and six retired teachers to investigate reports on unmanageable class sizes.<sup>282</sup> They also created a “Class Size Table” with three tiers of class sizes: one tier set the limits, the second tier established an “acceptable-sized” oversized class, and the third tier established an “impermissible” oversized class.<sup>283</sup> Teachers who reported their class sizes as an “acceptably” oversized class had to refer to the Class Size Council before seeking further action.<sup>284</sup> Those teachers reporting an “impermissible” class size had an “automatic trigger” for the Council to investigate why their class size was so large and offer a solution.<sup>285</sup>

## V. CONCLUSION

Before codifying the prohibition on negotiating class sizes under section 6-406, the Supreme Court of Maryland required showing that the Board’s interests outweigh teachers’ interests to justify whether a subject is a term or condition of employment subject to bargaining or an educational policy prohibited from collective bargaining.<sup>286</sup> However, when educational policies are working conditions,<sup>287</sup> equating the Board’s interests with the teachers’ is a better approach. In other words, the Board’s interests should not outweigh the teachers’ interests, but rather, the Board’s interests must be the teachers’ interests. The only way this can happen is to open discussions on these policies and workplace issues, when it requires repealing section 6-406.

Unfortunately, Maryland’s teachers are losing interest in teaching. State teacher attrition hit nine percent in the 2021–2022 school year, and nearly every local education agency started the school year with more teacher vacancies than in previous years.<sup>288</sup> Over half of these vacancies were due to teacher resignations.<sup>289</sup> Moreover, Maryland is not producing enough teachers to overcome this issue. Enrollment in Maryland’s teacher preparation programs has dropped thirty-three percent since 2012.<sup>290</sup>

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<sup>281</sup> *Class Size: Common Concerns*, CHICAGO TCHRS. UNION, <https://www.ctulocal1.org/rights/concerns/class-size/> (last visited Mar. 18, 2024).

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Montgomery Cnty. Educ. Ass'n v. Bd. of Educ. of Montgomery Cnty.*, 311 Md. 303 (1987).

<sup>287</sup> *Id.*

<sup>288</sup> Letter from Mohammed Choudhury, State Superintendent of Schs., to the Members of the State Bd. of Educ. (July 26, 2022) (on file with author).

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

Although the Blueprint is a promising plan, it does not adequately address the interests of teachers. While it proposes across-the-board salary increases and “growing the pipeline” for those who want to enter the teaching profession,<sup>291</sup> there is little guidance on what rights or mechanisms teachers may use to enforce their interests, their students’ interests, or their workplace conditions. For teachers to raise those interests, they must be able to discuss them with their school boards.

In justifying its interest-balancing analysis, the Supreme Court of Maryland cited that it did not want to deprive the community during protracted negotiations.<sup>292</sup> However, the community has been deprived for thirty-seven years because teachers cannot bring class size issues to the bargaining table. Classes are overcrowded, and teachers cannot address or help meet the unique needs of students.<sup>293</sup> Further, class sizes are an issue the community wants to address, as classes under twenty students are a “top five priority” among community members.<sup>294</sup>

Finally, involving teachers in certain educational policy decisions is beneficial. Allowing teachers to negotiate class sizes in their collective bargaining promotes information sharing, which teachers can use to amplify the community’s voices. Further, teachers’ unions and Boards of Education can come together to develop comprehensive policy changes that benefit everyone. After all, Maryland’s teachers’ unions have a history of successfully creating, enacting, and maintaining significant, industry-leading changes to collective bargaining laws and education reform.<sup>295</sup>

Amidst PERA’s significant changes to collective bargaining and the Blueprint’s push toward education reform, Maryland still falls behind other states concerning teachers’ collective bargaining rights.<sup>296</sup> Senate Bill 206 and its previous versions proposed a significant shift in favor of these rights, and for good reason. Therefore, it is in the best interest of students, teachers, boards of education, and the greater Maryland community to allow teachers to discuss class sizes at the bargaining table.

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<sup>291</sup> *The Blueprint for Maryland’s Future in Action*, MD. STATE DEP’T OF EDUC., <https://blueprint.marylandpublicschools.org/blueprint-in-action/> (last visited Mar. 18, 2024).

<sup>292</sup> *Montgomery Cnty. Educ. Ass’n v. Bd. of Educ. of Montgomery Cnty.*, 311 Md. 303, 318 (1987).

<sup>293</sup> *Supra* Section IV.B.

<sup>294</sup> Ferrell, *supra* note 6.

<sup>295</sup> *Supra* Section II.E.

<sup>296</sup> NAT’L EDUC. ASS’N, *supra* note 84.

## COMMENT

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### ARTIFICIAL INTELLIGENCE: MARYLAND'S DOUBLE-EDGED SWORD IN EMPLOYMENT DECISIONS

By: Jessica S. Kweon\*

#### I. INTRODUCTION

Emanating from science fiction, artificially intelligent machines have been a reality since the 1950s.<sup>1</sup> While the use of artificial intelligence (“AI”) has “skyrocketed” nationwide in a post-pandemic world,<sup>2</sup> legislators have struggled to keep pace.<sup>3</sup> In 2020, Maryland passed House Bill 1202 (“H.B. 1202”), becoming one of the first states to regulate artificial intelligence use in employment decisions.<sup>4</sup> However, Maryland’s current laws fail to address discriminatory impacts and privacy issues arising from artificial intelligence use in recruitment and employment processes.<sup>5</sup>

The following sections of this comment discuss how Maryland can address discrimination and data privacy concerns regarding the use of

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\* **Jessica Sunha Kweon:** J.D. Candidate, May 2025, University of Baltimore School of Law. At UBalt Law, Jessica has served as a Law Scholar, Teaching Assistant, and Research Assistant for several professors, supporting both student learning and faculty scholarship. As an Articles Editor for Volume 55 of the University of Baltimore Law Forum, Jessica has also helped shape legal scholarship in Maryland and will have seven publications by Summer 2025. Jessica is also the outgoing President of the Board of Advocates, leading moot court and mock trial advocates while being a two-time National Environmental Law Moot Court competitor.

<sup>1</sup> Rockwell Anyoha, *The History of Artificial Intelligence*, HARV. (2017), <https://www.scirp.org/reference/referencespapers?referenceid=3561147> (The concept of artificial intelligence began as early as the “‘heartless’ Tin man from the *Wizard of Oz* and continued with the humanoid robot that impersonated Maria in *Metropolis*.”).

<sup>2</sup> Joe McKendrick, *AI Adoption Skyrocketed Over the Last 18 Months*, HARV. BUS. REV. (Sept. 27, 2021), <https://hbr.org/2021/09/ai-adoption-skyrocketed-over-the-last-18-months>.

<sup>3</sup> Benedict Sheehy & Yee-Fui Ng, *The Challenges of AI Decision-Making in Government and Administrative Law: A Proposal for Regulatory Design*, 57 IND. L. REV. 665, 666 (2024) (noting that “Governments have struggled to understand and address AI decision-making appropriately[,]” thereby harming “vulnerable populations”).

<sup>4</sup> H.D. 1202, 2020 Leg., 441st Reg. Sess. (Md. 2020).

<sup>5</sup> See Eli Kales, *Use of AI Tools Raises Concerns About Potential for Employment Discrimination*, MD. THE DAILY REC. (Aug. 8, 2023),

<https://thedailyrecord.com/2023/08/08/use-of-ai-tools-raises-concerns-about-potential-for-employment-discrimination/>; see also Madyson Fitzgerald, *As Employers Expand Artificial Intelligence in Hiring, Maryland is One of Few States That Have Rules*, MD. MATTERS (July 18, 2023, 6:50 AM), <https://marylandmatters.org/2023/07/18/as-employers-expand-artificial-intelligence-in-hiring-maryland-is-one-of-few-states-that-have-rules/>.

artificial intelligence in employment decisions.<sup>6</sup> Section II begins with a brief history of the development of artificial intelligence.<sup>7</sup> This section then examines the beneficial and harmful uses of artificial intelligence in the United States and Maryland workforces.<sup>8</sup>

Section III explores the legal issues that arise from the use of artificial intelligence in employment decisions, including discrimination resulting from algorithmic bias and data privacy concerns.<sup>9</sup> This section also highlights the shortcomings of Maryland's current legislation in artificial intelligence regulation and research.<sup>10</sup>

Lastly, Section IV proposes two potential legislative actions to mitigate harm resulting from artificial intelligence in employment decisions based on existing solutions at the local, state, and federal levels.<sup>11</sup> Part one provides recommendations for Maryland to explicitly address artificial intelligence use in legislation.<sup>12</sup> Part two encourages greater research in artificial intelligence to better inform future artificial intelligence lawmaking.<sup>13</sup> Finally, while legislation is pending, part three offers an alternative recommendation for employers to self-regulate and defer to current guidance by federal authorities as artificial intelligence laws continue developing.<sup>14</sup> Collectively, these solutions present a more comprehensive and robust legislative action to protect Maryland employees amidst the recent rise of artificial intelligence use in employment decisions across the country.<sup>15</sup>

## II. HISTORICAL DEVELOPMENT

### A. *The History of Artificial Intelligence*

Alan Turing was an English mathematician and computer scientist who transformed computer science in the 20th century.<sup>16</sup> Widely known as

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<sup>6</sup> See *infra* Sections II–IV.

<sup>7</sup> See *infra* Section II.A.

<sup>8</sup> See *infra* Section II.B–C.

<sup>9</sup> See *infra* Section III.A.

<sup>10</sup> See *infra* Section III.B.

<sup>11</sup> See *infra* Sections IV.A–B.

<sup>12</sup> See *infra* Section IV.A.

<sup>13</sup> See *infra* Section IV.C.

<sup>14</sup> See *infra* Section IV.B.

<sup>15</sup> McKendrick, *supra* note 2.

<sup>16</sup> See B. Jack Copeland & Diane Proudfoot, *Alan Turing's Forgotten Ideas in Computer Science*, SCI. AM. 99 (1999), [https://personal.utdallas.edu/~otoole/HCS6330\\_F10/03\\_turing.pdf](https://personal.utdallas.edu/~otoole/HCS6330_F10/03_turing.pdf) (summarizing Turing's achievements).

the “father” of modern computer science and artificial intelligence,<sup>17</sup> Turing first raised the possibility of artificial intelligence in 1950.<sup>18</sup> Turing pondered whether a digital computer could “think” based on an “imitation game”<sup>19</sup> — known as the “Turing Test.”<sup>20</sup> This game involved a human interrogator who must distinguish between a human and a machine respondent based on a teletyped conversation.<sup>21</sup> Turing predicted that in fifty years, an average interrogator would have a seventy percent chance or less to make the correct identification after a five-minute conversation.<sup>22</sup> While Turing addressed objections pertaining to storage capacity and other limitations, such as emotion and theology, which are innate to the human experience, Turing argued that, in theory, a digital computer could think intelligently and produce human-like responses.<sup>23</sup>

In 1955, John McCarthy, Marvin Minsky, Nathaniel Rochester, and Claude Shannon formally proposed the Dartmouth Summer Research Project on Artificial Intelligence (DSRPAI), the seminal event for artificial intelligence research.<sup>24</sup> Notably, in the DSRPAI proposal, McCarthy first coined the term artificial intelligence.<sup>25</sup> Thereafter, the first DSRPAI occurred in 1956, marking the start of the research discipline.<sup>26</sup> There, Allen Newell, Cliff Shaw, and Herbert Simon presented the *Logic Theorist*—the first artificial intelligence program<sup>27</sup> —and demonstrated the potential of artificial intelligence research.<sup>28</sup> In 2004, McCarthy formally defined the

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<sup>17</sup> ALAN TURING: HIS WORK AND IMPACT 481 (S. Barry Cooper & Jan van Leeuwen eds., 2013).

<sup>18</sup> Alan M. Turing, *Computing Machinery and Intelligence*, MIND 49 (1950), <https://redirect.cs.umbc.edu/courses/471/papers/turing.pdf>.

<sup>19</sup> *Id.*

<sup>20</sup> B. Jack Copeland, *The Turing Test*, 10 MINDS & MACH. 519, 522 (2000).

<sup>21</sup> Turing, *supra* note 18.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See generally JOHN MCCARTHY ET AL., A PROPOSAL FOR THE DARTMOUTH SUMMER RESEARCH PROJECT ON ARTIFICIAL INTELLIGENCE 2–4 (1955), <http://jmc.stanford.edu/articles/dartmouth/dartmouth.pdf> (comprising original proposals for DSRPAI).

<sup>25</sup> Stephanie Dick, *Artificial Intelligence*, 1.1 HARV. DATA SCI. REV. 1, 2 (2019), <https://hdsr.mitpress.mit.edu/pub/0aytgrau/release/3>.

<sup>26</sup> James Moor, *The Dartmouth College Artificial Intelligence Conference: The Next Fifty Years*, 27 AI MAG. 87, 87 (2006).

<sup>27</sup> PAMELA MCCORDUCK, MACHINES WHO THINK: A PERSONAL INQUIRY INTO THE HISTORY AND PROSPECTS OF ARTIFICIAL INTELLIGENCE 123–124 (A K Peters, Ltd. & Natick, Mass. eds., 2004), [https://monoskop.org/images/1/1e/McCorduck\\_Pamela\\_Machines\\_Who\\_Think\\_2nd\\_ed.pdf](https://monoskop.org/images/1/1e/McCorduck_Pamela_Machines_Who_Think_2nd_ed.pdf).

<sup>28</sup> Moor, *supra* note 26, at 87.

term artificial intelligence as “the science and engineering of making intelligent machines, especially intelligent computer programs.”<sup>29</sup>

After the 1950s, artificial intelligence flourished as computers improved in performance, storage capacity, affordability, and accessibility.<sup>30</sup> Researchers, including McCarthy, created program languages such as List Processing (“LISP”) for artificial intelligence research.<sup>31</sup> Other early artificial intelligence programs, like Newell and Simon’s 1957 *General Problem Solver*<sup>32</sup> and the 1960s *ELIZA* chatbot<sup>33</sup> showed progress toward problem-solving and language-interpretation by artificial intelligence.

The 1980s “AI Boom” represented the next rapid development in artificial intelligence.<sup>34</sup> In 1980, the newly founded American Association of Artificial Intelligence hosted its first national conference at Stanford University.<sup>35</sup> In the same year, scientists developed “expert systems[s]” that used factual and heuristic specialized knowledge to automate inferences.<sup>36</sup>

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<sup>29</sup> JOHN MCCARTHY, WHAT IS ARTIFICIAL INTELLIGENCE 2 (2007), <https://www-formal.stanford.edu/jmc/whatisai.pdf>.

<sup>30</sup> Anyoha, *supra* note 1.

<sup>31</sup> JOHN MCCARTHY, HISTORY OF LISP 1 (1979), <http://jmc.stanford.edu/articles/lisp/lisp.pdf>.

<sup>32</sup> See HERBERT A. SIMON & ALLEN NEWELL, HUMAN PROBLEM SOLVING: THE STATE OF THE THEORY IN 1970 152 (1971); *see also* NEWELL ET AL., REPORT ON A GENERAL PROBLEM-SOLVING PROGRAM 2–3 (explaining that the General Problem Solver was first presented in 1959); *see* GEORGE W. ERNEST & ALLEN NEWELL, GPS: A CASE STUDY IN GENERALITY AND PROBLEM SOLVING 3 (Robert L. Ashenurst ed., 1969) (the General Problem Solver, as its name suggests, solves a “variety of problems” that “are simple according to human standards, although they still require intellectual effort.”); *see* NILS J. NILSSON, THE QUEST FOR ARTIFICIAL INTELLIGENCE: A HISTORY OF IDEAS AND ACHIEVEMENTS 88 (2010) (Notably, the General Problem Solver “was an outgrowth of . . . the Logic Theorist in that it was based on manipulating symbol structures . . .”).

<sup>33</sup> Joseph Weizenbaum, *ELIZA—A Computer Program for the Study of Natural Language Communication Between Man and Machine*, 9 COMM’NS OF THE ACM 36, 36 (1996) (ELIZA was “a program which ma[de] natural language conversation with a computer possible.”).

<sup>34</sup> Joseph Anderson, *AI and the Legal Puzzle: Filling Gaps, But Missing Pieces*, 75 MERCER L. REV. 1521, 1525 (2024) (“The AI Boom was marked by the investment of hundreds of thousands of dollars in artificial intelligence research and development of the first driverless car.”).

<sup>35</sup> *AAAI-80: First National Conference on Artificial Intelligence*, AAAI, <https://aaai.org/conference/aaai/aaai80/#:~:text=The%20First%20National%20Conference%20on,at%20Stanford%20University%2C%20Stanford%20California> (last visited Apr. 8, 2025).

<sup>36</sup> See PAMELA MCCORDUCK, THIS COULD BE IMPORTANT: MY LIFE AND TIMES WITH THE ARTIFICIAL INTELLIGENTSIA (1979) (ebook) (explaining that DENDRAL and MYCIN were among the first “expert system[s]” to use the “expertise of human specialists”). There remains debate on whether DENDRAL or MYCIN was the first expert system. Robert K. Lindsay et al., *DENDRAL: A Case Study of the First Expert System for Scientific Hypothesis Formation*, 61 ARTIFICIAL INTEL. 209, 211 (1993) (“Whether DENDRAL was

The popularization of artificial neural networks also led to the development of backpropagation algorithms that would later inspire “deep learning.”<sup>37</sup>

Progress slowed during the subsequent “AI Winter” due to a lack of funding stemming from high costs and low interest in artificial intelligence research.<sup>38</sup> Nevertheless, the emergence of intelligent agents, which modeled the mind, sparked advancement.<sup>39</sup> Notably, in 1997, IBM’s *Deep Blue*, a chess-playing program, defeated Gary Kasparov, the reigning world chess champion and grandmaster.<sup>40</sup> That same year, Windows released a speech

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the first expert system is debatable . . . Allen Newell identifies MYCIN as ‘the granddaddy of expert systems’, but acknowledges that those associated with both projects may not concur.”). DENDRAL, which generated organic compounds, was discovered in 1965. *Id.*; see also Edward A. Geigenbaum & Bruce G. Buchanan, *DENDRAL and Meta-DENDRAL: Roots of Knowledge Systems and Expert System Applications*, 59 ARTIFICIAL INTEL. 233, 234 (1993). MYCIN, discovered in 1960, was an expert system that made medical diagnoses of blood infections. EDWARD A. FEIGENBAUM, KNOWLEDGE ENGINEERING: THE APPLIED SIDE OF ARTIFICIAL INTELLIGENCE 3–4 (1980).

<sup>37</sup> MICHAEL CHUI ET AL., MCKINSEY GLOB. INST., NOTES FROM THE AI FRONTIER: INSIGHTS FROM HUNDREDS OF USE CASES 3 (2018), <https://www.mckinsey.com/west-coast/~media/mckinsey/featured%20insights/artificial%20intelligence/notes%20from%20the%20ai%20frontier%20applications%20and%20value%20of%20deep%20learning/notes-from-the-ai-frontier-insights-from-hundreds-of-use-cases-discussion-paper.pdf> (while “there is an incomplete outline of [deep learning’s] origins,” there were several pioneers in the 1980s); see, e.g., John J. Hopfield, *Neural Networks and the Physical Systems with Emergent Collective Computational Abilities*, 79 PROC. NAT’L ACAD. SCI. 2254 (1982); David E. Rumelhart et al., *Learning Representations by Back-Propogating Errors*, 323 NATURE 533 (1986), [https://www.iro.umontreal.ca/~vincentp/ift3395/lectures/backprop\\_old.pdf](https://www.iro.umontreal.ca/~vincentp/ift3395/lectures/backprop_old.pdf). Deep learning uses backpropagation algorithms to process more complex data in multiple layers. Yann LeCun et al., *Deep Learning*, 521 NATURE 436, 436 (2015); see also Geoffrey E. Hinton et al., *A Fast Learning Algorithm for Deep Belief Nets*, 18 NEURAL COMPUTATION 1527, 1527 (2006) (coining “deep” learning through a two-layer neural network model). The development of deep learning has allowed for great advancement in solving problems, including image recognition, speech recognition, predictions, análisis, question answering, and language translation. LeCun et al., *supra* note 37. However, even Hinton “warn[s] about the growing dangers” resulting from the acceleration of artificially intelligent chatbots and systems following his departure from Google. Zoe Kleinman & Chris Vallance, *AI ‘Godfather’ Geoffrey Hinton Warns of Dangers as He Quits Google*, BBC (May 2, 2023), <https://www.bbc.com/news/world-us-canada-65452940>; See also discussion *infra* note 46.

<sup>38</sup> STAN. UNIV., ARTIFICIAL INTELLIGENCE AND LIFE IN 2030, at 51 (2016), [https://ai100.stanford.edu/sites/g/files/sbiybj18871/files/media/file/ai100report10032016fnl\\_singles.pdf](https://ai100.stanford.edu/sites/g/files/sbiybj18871/files/media/file/ai100report10032016fnl_singles.pdf).

<sup>39</sup> David L. Poole & Alan K. Mackworth, *A Brief History of Artificial Intelligence*, A.I. 3E § 1.2 (Aug. 3, 2023), <https://artint.info/3e/html/ArtInt3e.Ch1.S2.html>.

<sup>40</sup> Murray Campbell et al., *Deep Blue*, 134 ARTIFICIAL INTELLIGENCE 134, 134 (2002), <https://core.ac.uk/download/pdf/82416379.pdf>.

recognition software.<sup>41</sup> In 2000, Cynthia Breazeal developed Kismet, a robot that could display and identify human emotions.<sup>42</sup>

Now, in the “big data”<sup>43</sup> era, the development of artificial intelligence applications has extended to speech recognition, virtual assistants and agents, and computer vision.<sup>44</sup> The recent advancements in large language models using generative artificial intelligence based on data inputs, like ChatGPT,<sup>45</sup> also raise new ethical issues in the modern day.<sup>46</sup>

### *B. The Recent Use of Artificial Intelligence in the Workforce*

While artificial intelligence has existed for decades, the recent rise of artificial intelligence use has “revolutionize[d]” the workplace.<sup>47</sup> Notably, artificial intelligence use by employers spiked during the COVID-19 pandemic.<sup>48</sup> More organizations invested in artificial intelligence and

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<sup>41</sup> LAWRENCE A. MALAKHOFF & MARTIN V. APPEL, THE DEVELOPMENT OF A VOICE RECOGNITION PROTOTYPE FOR FIELD LISTING 234 (1997), [http://www.asarms.org/Proceedings/papers/1997\\_037.pdf](http://www.asarms.org/Proceedings/papers/1997_037.pdf).

<sup>42</sup> See CYNTHIA L. BREAZEAL, SOCIABLE MACHINES: EXPRESSIVE SOCIAL EXCHANGE BETWEEN HUMANS AND ROBOTS 18 (2000), <https://groups.csail.mit.edu/lbr/hrg/2000/phd.pdf>.

<sup>43</sup> EDITH RAMIREZ ET AL., FED. TRADE COMM’N, BIG DATA: A TOOL FOR INCLUSION OR EXCLUSION?, at i (2016), <https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf>.

<sup>44</sup> See JACQUES BUGHIN ET AL., MCKINSEY GLOB. INST., ARTIFICIAL INTELLIGENCE: THE NEXT DIGITAL FRONTIER? 8 (2017), <https://www.mckinsey.com/de/~media/mckinsey/industries/advanced%20electronics/our%20insights/how%20artificial%20intelligence%20can%20deliver%20real%20value%20to%20companies/mgi-artificial-intelligence-discussion-paper.pdf>.

<sup>45</sup> ChatGPT, OPENAI, [HTTPS://OPENAI.COM/](https://openai.com/) (last visited Mar. 4, 2025).

<sup>46</sup> See Jianlong Zhou, *Ethical ChatGPT: Concerns, Challenges, and Commandments*, 13 ELECTRONICS 1, 3 (2024), <https://www.mdpi.com/2079-9292/13/17/3417> (finding that among thousands of publications, ChatGPT is linked to several ethical concerns regarding bias, privacy, and abuse); See also discussion *supra* note 37. Other large language models, such as Meta’s LLaMA and Google’s Bard presents similar issues. See Sebastian Porsdam Mann et al., *Generative AI Entails a Credit-Blame Asymmetry*, 5 NATURE MACHINE INTELLIGENCE 472, 472 (2023).

<sup>47</sup> Benjamin Laker, *AI at the Crossroads: Navigating Job Displacement, Ethical Concerns, and the Future of Work*, FORBES (May 9, 2023, 9:00 AM), <https://www.forbes.com/sites/benjaminlaker/2023/05/09/ai-at-the-crossroads-navigating-job-displacement-ethical-concerns-and-the-future-of-work/?sh=7f665d4c391c> (“[I]t’s clear there is enormous potential to revolutionize the world of work.”).

<sup>48</sup> Anand Rao et al., *Navigating the Top 5 AI Trends Facing Your Business*, PWC (Mar. 9, 2021), <https://www.pwc.com.au/digitalpulse/ai-predictions-2021-report.html> (of over 1,000 US executives, “[f]ifty-two percent of survey respondents have accelerated their AI approach in the wake of the COVID-19 crisis[.]”); *The State of AI and Machine Learning*, APPEN, July 2022, at 31, fig. 25 (2022) (of 501 US respondents, 55% of companies accelerated their AI strategies in response to the pandemic).

automation to expedite remote work, improve consumer experience, decrease costs, and increase productivity and innovation while addressing skill shortages and supply chain issues.<sup>49</sup>

Today, about eighty percent of employers use artificial intelligence in their employment decision-making processes,<sup>50</sup> often in the interest of efficiency.<sup>51</sup> In employment hiring decisions, employers may use algorithmic tools to analyze resumes, make job performance predictions, and perform facial recognition during interviews to evaluate a candidate's demeanor.<sup>52</sup> Some argue that artificial intelligence helps companies hire diversely and reduce unconscious bias by anonymizing resumes and interviewees or analyzing objective factors through facial recognition technology in interviews.<sup>53</sup> Post-hiring data also helps companies enhance employee experiences and productivity<sup>54</sup> as well as inform promotion and firing decisions.<sup>55</sup>

Nevertheless, there is growing concern amongst employees that the use of artificial intelligence tools results in job insecurity, displacement, and the creation of an "unequal playing field."<sup>56</sup> Employees have also largely objected to the use of facial recognition technology in the workplace due to limitations in emotional interpretation and bias.<sup>57</sup> Consequently, the use of

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<sup>49</sup> McKendrick, *supra* note 2; Kerri Reynolds, *COVID-19 Increased the Use of AI. Here's Why It's Here to Stay*, WORLD ECON. F. (Feb. 24, 2021), <https://www.weforum.org/agenda/2021/02/covid-19-increased-use-of-ai-here-s-why-its-here-to-stay/>.

<sup>50</sup> Lindsey Wagner, *Artificial Intelligence in the Workplace*, ABA (June 10, 2022), [https://www.americanbar.org/groups/labor\\_law/publications/labor\\_employment\\_law\\_news/spring-2022/ai-in-the-workplace/](https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/spring-2022/ai-in-the-workplace/) (statement of Charlotte Burrows, chairwoman of the Equal Employment Opportunity Commission).

<sup>51</sup> Zhisheng Chen, *Ethics and Discrimination in Artificial Intelligence-Enabled Recruitment Practices*, 10 HUMAN. & SOC. SCI. COMMC'NS 1, 1 (2023).

<sup>52</sup> *Id.* at 10 fig.3. (assessing artificially intelligent recruitment tools).

<sup>53</sup> Gary D. Friedman, *Artificial Intelligence Is Increasingly Being Used to Make Workplace Decisions—But Human Intelligence Remains Vital*, FORTUNE (Mar. 13, 2023, at 7:10 AM), <https://fortune.com/2023/03/13/artificial-intelligence-make-workplace-decisions-human-intelligence-remains-vital-careers-tech-gary-friedman/>.

<sup>54</sup> Don Weinstein, *People Leaders Need Data-Driven Technology Too*, MIT SLOAN MGMT. REV. (Nov. 22, 2022), <https://sloanreview.mit.edu/article/people-leaders-need-data-driven-technology-too/> ("Data can help companies better understand and improve the employee experience, leading to a more productive workforce.").

<sup>55</sup> Kales, *supra* note 5.

<sup>56</sup> *Id.*

<sup>57</sup> Lee Rainie et al., *AI in Hiring and Evaluating Workers: What Americans Think*, PEW RSCH. CTR. (Apr. 20, 2023), [https://www.pewresearch.org/wp-content/uploads/sites/20/2023/04/PI\\_2023.04.20\\_AI-in-Hiring\\_FINAL.pdf](https://www.pewresearch.org/wp-content/uploads/sites/20/2023/04/PI_2023.04.20_AI-in-Hiring_FINAL.pdf) ("Roughly three-quarters of Americans say employers' face recognition technology would misinterpret workers' expressions; about half say it would recognize some skin tones better than others[.]").

artificial intelligence has resulted in discrimination and data privacy concerns.<sup>58</sup>

*C. The Recent Use of Artificial Intelligence in Maryland's Workforce*

In 2023, the Employment Law Center of Maryland—a nonprofit firm—adopted an artificial intelligence tool, CoCounsel, to assist in legal research, drafting, and reviewing documents.<sup>59</sup> Members of the firm shared that the tool improved efficiency and would “help close the gap for access to justice.”<sup>60</sup> In recent years, other employers and businesses have increasingly implemented artificial intelligence.<sup>61</sup> This includes automative decision-making tools like resume scanners, video interviewing, and employee monitoring software.<sup>62</sup>

*D. Current Regulation of Artificial Intelligence in Maryland*

Although Maryland is one of three states moving forward in legislation pertaining to face recognition technology, its laws are still limited.<sup>63</sup> H.B. 1202, enacted in 2020, requires private employers to receive consent from applicants to use facial recognition technology during pre-employment interviews.<sup>64</sup> H.B. 1202 does not state any particular penalty for violations and does not extend to public employers.<sup>65</sup> In 2022, Maryland legislators established the Industry 4.0 Technology Grant Program in the Department of Commerce to aid small and mid-sized manufacturing companies with modernizing their production and increasing overall

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<sup>58</sup> See Brittany Kammerer, *Hired by a Robot: The Legal Implications of Artificial Intelligence Video Interviews and Advocating for Greater Protection of Job Applicants*, 107 IOWA L. REV. 817, 819 (2022),

[https://ilr.law.uiowa.edu/sites/ilr.law.uiowa.edu/files/2023-02/N2\\_Kammerer.pdf](https://ilr.law.uiowa.edu/sites/ilr.law.uiowa.edu/files/2023-02/N2_Kammerer.pdf) (“While AI has many benefits such as removing human bias and improving efficiency, it also has risks such as algorithmic bias and data privacy.”).

<sup>59</sup> Clara Niel, *Maryland Law Firm Adopts AI Tool to Improve Efficiency, Access*, BALT. SUN (May 14, 2023, 10:59 AM), <https://www.baltimoresun.com/maryland/bs-md-ai-law-firm-20230514-o36iry63vjhmdcvg5qtmjnizy-story.html> (highlighting statement of Joseph Gibson, managing attorney of The Employment Law Center of Maryland).

<sup>60</sup> *Id.*

<sup>61</sup> Kales, *supra* note 5.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> H.D. 1202, 2020 Leg., 441st Reg. Sess. (Md. 2020).

<sup>65</sup> *See id.*

economic growth.<sup>66</sup> The 2023 pilot program—funded by \$1 million—will financially support qualifying projects, such as automated or robotic equipment, smart systems, and artificial intelligence tools.<sup>67</sup>

Meanwhile, in the executive branch, Governor Wes Moore issued an Executive Order in 2024 supporting the modernization of Maryland’s digital infrastructure.<sup>68</sup> The action includes integrating artificial intelligence, upgrading outdated government computer systems for state government employees, and creating an “AI Subcabinet.”<sup>69</sup> Two years later, in 2024, Maryland legislators expanded the responsibilities of the Department of Information Technology to include inventory and assessment of the use of artificial intelligence in state government systems, and working with Governor’s now-codified AI Subcabinet.<sup>70</sup> Thus, Maryland, like the rest of the nation, is balancing enhancing the benefits of artificial intelligence against legal and ethical risks.<sup>71</sup>

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<sup>66</sup> *Governor Hogan Announces Maryland Manufacturing 4.0 Grant Program*, MD. DEP’T OF COM. (Aug. 22, 2022), <https://commerce.maryland.gov/media/governor-hogan-announces-maryland-manufacturing-40-grant-program>; *See also* H.D. 622, 2022 Leg., 444th Reg. Sess. (Md. 2022).

<sup>67</sup> H.D. 622, 2022 Leg., 444th Reg. Sess. (Md. 2022).

<sup>68</sup> Bryan P. Sears, *Moore Announces Focus on AI, Updating State Computer Systems*, MD. MATTERS (Jan. 8, 2024), <https://www.marylandmatters.org/2024/01/08/moore-announces-focus-on-ai-updating-state-computer-systems/>; *see also* Md. Exec. Order No.

01.01.2024.02, available at

[https://governor.maryland.gov/Lists/ExecutiveOrders/Attachments/31/EO%2001.01.2024.02%20Catalyzing%20the%20Responsible%20and%20Productive%20Use%20of%20Artificial%20Intelligence%20in%20Maryland%20State%20Government\\_Accessible.pdf](https://governor.maryland.gov/Lists/ExecutiveOrders/Attachments/31/EO%2001.01.2024.02%20Catalyzing%20the%20Responsible%20and%20Productive%20Use%20of%20Artificial%20Intelligence%20in%20Maryland%20State%20Government_Accessible.pdf)

<sup>69</sup> Md. Exec. Order No. 01.01.2024.02.; MD. MANUAL ON-LINE, *Governor’s Artificial Intelligence Subcabinet*,

<https://msa.maryland.gov/msa/mdmanual/08conoff/cabinet/html/ai.html> (last visited Apr.

10, 2025) (explaining the AI Subcabinet, comprised of one chair and nine ex officio

members in various state government roles, promotes the principles enlisted in the

Executive Order, provides recommendations to the Governor regarding artificial

intelligence, and coordinates statewide use of artificial intelligence); MD. DEP’T OF INFO.

TECH., *Memorandum from the Governor’s AI Subcabinet*,

<https://doit.maryland.gov/SiteAssets/Pages/default/2025%20Maryland%20AI%20Enablement%20Strategy%20%26%20AI%20Study%20Roadmap.pdf> (last visited Apr. 10, 2025)

(finding the AI Subcabinet recently published an “AI Enablement Strategy & AI Study

Roadmap” to promote responsible, ethical, and productive use of artificial intelligence.

<sup>70</sup> *See* S.B. 818, 2024 Leg., 446th Reg. Sess. (Md. 2024). S.B. 182, 2024 Leg., 446th Reg.

Sess. (Md. 2024) (regulating the use of facial recognition technology by law enforcement

agencies).

<sup>71</sup> Fitzgerald, *supra* note 5.

### III. ISSUE

#### A. Major Legal Issues That Arise from Artificial Intelligence Use in Employment Decisions

Two major legal issues may arise when employers use artificial intelligence in employment decision-making processes. First, artificial intelligence may discriminate against certain employees and job candidates through bias.<sup>72</sup> For example, in 2014, Amazon's artificial intelligence recruitment tool showed bias against women, penalizing resumes that included women's clubs and colleges.<sup>73</sup> Ultimately, the recruiting engine was discarded due to these technological flaws.<sup>74</sup> Similar issues with "algorithmic fairness"<sup>75</sup> could lead to violations of federal laws.<sup>76</sup> This includes Title VII of the Civil Rights Act of 1964, which prohibits employers and businesses from using selection processes that disproportionately impact particular groups;<sup>77</sup> the American with Disabilities Act (ADA), which prohibits businesses from discrimination against employees on the basis on disability;<sup>78</sup> or the Age Discrimination in Employment Act (ADEA), which prevents age discrimination against employees.<sup>79</sup>

Second, the use of artificial intelligence also gives rise to data privacy issues.<sup>80</sup> For example, Clearview AI, a startup that provides facial recognition

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<sup>72</sup> Kales, *supra* note 5.

<sup>73</sup> Jeffrey Dastin, *Insight – Amazon Scraps Secret AI Recruiting Tool That Showed Bias Against Women*, REUTERS (Oct. 10, 2018 at 8:50 P.M.), <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G/>.

<sup>74</sup> *Id.*

<sup>75</sup> Fitzgerald, *supra* note 5.

<sup>76</sup> Kales, *supra* note 5.

<sup>77</sup> *Id.*

<sup>78</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e17 (as amended); *Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (May 18, 2023) (providing guidance that the use of automated systems could violate Title VII by creating a disparate impact).

<sup>79</sup> Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (1990); *see also* U.S. DEP'T OF JUSTICE, CIV. RTS. DIV., ALGORITHMS, ARTIFICIAL INTELLIGENCE, AND DISABILITY DISCRIMINATION IN HIRING 2–5 (providing guidance on how artificial intelligence and algorithmic bias can violate the ADA).

<sup>80</sup> Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634; *see, e.g.*, Press Release, EEOC Sues iTutorGroup for Age Discrimination, <https://www.eeoc.gov/newsroom/eeoc-sues-itutorgroup-age-discrimination>; *see also* discussion *infra* Section IV.C.iii.

technology to clients, maintained a database of billions of private photos, which it later sold to government and law enforcement bodies.<sup>81</sup> Such concerns have resulted in greater privacy protections regarding artificial intelligence technology use at both the federal level and state level.<sup>82</sup>

*B. Currently, Maryland Law Is Not Robust Enough to Regulate Artificial Intelligence Effectively and Address Discrimination and Data Privacy Concerns.*

Despite Maryland legislators' and the governor's recent push for artificial intelligence,<sup>83</sup> the foregoing issues comprise significant legal and ethical obstacles in employment decisions.<sup>84</sup> Existing regulation of artificial intelligence in employment decisions in Maryland is restricted to H.B. 1202 and requires greater regulation.<sup>85</sup> However, artificial intelligence is developing at an unprecedented speed, and developers and sellers of artificial intelligence are "crowding out conversations with policymakers around how to govern [artificial intelligence] and to mitigate social consequences."<sup>86</sup> Artificial intelligence implications remain largely unknown to state policymakers, thereby slowing the creation of new laws.<sup>87</sup> In sum, the overall lack of comprehensive regulations governing artificial intelligence in employment decisions creates significant ethical and legal risks for employees in Maryland.

#### IV. SOLUTION

*A. New Maryland Laws Should Directly Address Discrimination and Data Privacy Issues in Artificial Intelligence Technology Use in Employment Decisions.*

To address Maryland's gaps in current artificial intelligence laws, lawmakers can turn to existing regulations in other jurisdictions to address discriminatory impacts and privacy concerns. For example, Illinois enacted

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<sup>81</sup> Terry Gross, *Exposing the Secretive Company at the Forefront of Facial Recognition Technology*, NPR (Sept. 28, 2023, 1:29 P.M.), <https://www.npr.org/2023/09/28/1202310781/exposing-the-secretive-company-at-the-forefront-of-facial-recognition-technology> (transcript).

<sup>82</sup> See discussion *infra* Section IV.

<sup>83</sup> H.D. 622.

<sup>84</sup> Fitzgerald, *supra* note 5.

<sup>85</sup> H.D. 1202.

<sup>86</sup> Fitzgerald, *supra* note 5.

<sup>87</sup> *Id.*

the Biometric Information Privacy Act (BIPA), which protects employer biometric data in the use of artificial intelligence like facial recognition software.<sup>88</sup> In 2024, Illinois amended the Illinois Human Rights Act to prohibit employers from using artificial intelligence tools resulting in discrimination against employees.<sup>89</sup> In 2020, New York City enacted the Automated Employment Decision Tool Law, which mandates employers to inform job candidates of artificial intelligence use in hiring processes and to perform annual audits of recruitment technology that checks for bias in hiring.<sup>90</sup> As of 2024, Colorado is the only state that has passed legislation requiring developers and employers “to use reasonable care to avoid algorithmic discrimination in the high-risk [AI] system.”<sup>91</sup>

Not all proposed legislation has been enacted successfully. In 2020, California legislators failed to pass the Talent Equity for Competitive Hiring (TECH) Act, which would have established criteria for artificial intelligence technology engaging in nondiscriminatory selection processes for hiring and promotions.<sup>92</sup> The TECH Act would have also held sellers accountable for testing their artificial intelligence products.<sup>93</sup> In 2024, Illinois legislators did

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<sup>88</sup> See Biometric Information Privacy Act, 740 ILCS 14/15 (West 2025)

<sup>89</sup> H.D. 3773, 103rd Gen. Assemb., Reg. Sess. (Ill. 2024).

<sup>90</sup> Local Law 144 (2021). The law has created intense debate on the use of artificially intelligence by employers. See Tate Ryan-Mosley, *Why Everyone Is Mad About New York's AI Hiring Law*, MIT TECH. REV. (July 10, 2023), <https://www.technologyreview.com/2023/07/10/1076013/new-york-ai-hiring-law/> (discussing concerns of feasibility of audits); Wright et al., *Null Compliance : NYC Local Law 144 and Challenges of Algorithm Accountability*, FAcT 11, 13 (June 2024), <https://facctconference.org/static/papers24/facct24-113.pdf> (finding that only 18 of 391 employers had posted bias audits in compliance with Local Law 144 and that null compliance hindered the impact of Local Law 144 on algorithmic hiring decision systems). As a result, New York City “modified the law by narrowing the scope to only cover automated employment decision tools that are being used without any human oversight[.]” (statement of Md. Chamber of Commerce), [https://mgaleg.maryland.gov/cmte\\_testimony/2024/ecm/186CoZojis0cMC3h-uUyUWY5kZY2G0TDZ-.pdf](https://mgaleg.maryland.gov/cmte_testimony/2024/ecm/186CoZojis0cMC3h-uUyUWY5kZY2G0TDZ-.pdf).

Most recently, in 2024, New York Governor Kathy Hochul signed the Legislative Oversight of Automated Decision-making in Government Act, which mandates transparency and meaningful human oversight over state agency use of artificial intelligence. S.B. S7543A.

<sup>91</sup> S.B. 24-205, 74th Gen. Assemb., Reg. Sess. (Colo. 2024).

<sup>92</sup> See S.B. 1241, 74th Gen. Assemb., Reg. Sess. (Cal. 2020).

<sup>93</sup> *Id.* Notably, in 2024, the California Privacy Protection Agency commenced formal rulemaking of proposed regulations on the use of artificially intelligent automated decision-making technology, including mandated risk assessments when there is “significant risk to consumers’ privacy” and when there is “a significant decision concerning a consumer or for extensive profiling.” CALIFORNIA PRIVACY PROTECTION AGENCY, DRAFT AUTOMATED DECISIONMAKING TECHNOLOGY REGULATIONS § 7150 (2023), [https://cppa.ca.gov/meetings/materials/20231208\\_item2\\_draft.pdf](https://cppa.ca.gov/meetings/materials/20231208_item2_draft.pdf); see also *Proposed*

not pass the Automated Decision Tools Act, which would have mandated audits and safeguards for employers who use automated decision tools.<sup>94</sup> At the federal level, still pending today, the National Biometric Information Privacy Act of 2020 would have expanded national regulations of the collection, retention, disclosure, and destruction of biometric data for private entities.<sup>95</sup>

Nevertheless, legislators at the state and federal levels have continued to push for more artificial intelligence regulations. As of 2023, thirteen states have enacted some type of biometric information privacy protections.<sup>96</sup> Furthermore, the pending Eliminating Bias in Algorithmic Systems (BIAS) Act of 2024, if enacted, would require federal agencies using artificial intelligence to maintain a civil rights office for combating bias and discrimination.<sup>97</sup>

While Maryland is at the “starting line” regarding the regulation of artificial intelligence,<sup>98</sup> state leaders and lawmakers have demonstrated a greater effort to address artificial intelligence in the 2024 legislative session<sup>99</sup> and the 2025 legislative session.<sup>100</sup> Maryland should follow legislative trends and aim to address the use of artificial intelligence in employment decisions

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*Regulations on CCPA Updates, Cybersecurity Audits, Risk Assessments, Automated Decisionmaking Technology (ADMT), and Insurance Companies*, CALIFORNIA PRIVACY PROTECTION AGENCY (2024), [https://coppa.ca.gov/regulations/ccpa\\_updates.html](https://coppa.ca.gov/regulations/ccpa_updates.html) (noting that the public comment period closed in February 2025).

<sup>94</sup> H.R. 5116, 103rd Gen. Assemb., Reg. Sess. (Ill. 2024).

<sup>95</sup> See S. 4400, 116th Cong. (2020).

<sup>96</sup> See generally SEC. INDUS. ASS'N, GUIDE TO U.S. BIOMETRIC PRIV. L.: A REFERENCE GUIDE TO STATE L. ON BIOMETRIC INFO. AND RELATED LEGIS. TRENDS (2023), <https://www.irisid.com/wp-content/uploads/2023/11/SIA-Guide-US-Biometric-Privacy-Laws-web-FINAL-c.pdf>.

<sup>97</sup> See S. 3478, 118th Cong. (2023).

<sup>98</sup> Dwight A. Weingarten, *Maryland's New Artificial Intelligence Advisor Starts as Legislator Calls for Privacy Law*, THE HERALD-MAIL (Dec. 5, 2023, 4:59 A.M.) (statement by Nishant Shah, artificial intelligence advisor), <https://www.heraldmillmedia.com/story/news/state/2023/12/05/maryland-is-at-starting-line-artificial-intelligence-advisor-says/71765907007/>.

<sup>99</sup> Sam Janesch, *Maryland Lawmakers Set Sights on Addressing Artificial Intelligence, Including Government Use*, BALT. SUN (Jan. 8, 2024), <https://www.baltimoresun.com/2024/01/08/maryland-lawmakers-set-sights-on-addressing-artificial-intelligence-including-government-use/>

<sup>100</sup> See, e.g., H.D. 1331, 2025 Leg., 447th Reg. Sess. (Md. 2025) (protecting Marylanders from decisions made by companies using high-risk artificial intelligent systems, including employment decisions); S.B. 0936, 2025 Leg., 447th Reg. Sess. (Md. 2025) (requiring reasonable care standard for the prevention of algorithmic discrimination in high-risk artificial intelligence systems); H.D. 1255, 2024 Leg., 446th Reg. Sess. (Md. 2024) (prohibiting employers from using automated employment decision tools when screening applicants unless subject to a yearly impact assessment).

through new legislation. In doing so, Maryland can proactively protect employees from discrimination and data privacy violations.

*B. Maryland Legislators Must Revisit Previous Proposals or Create New Legislation That Prioritizes Artificial Intelligence Research.*

Currently, Maryland has an artificial intelligence advisor, Nishant Shah, who oversees the state's artificial intelligence strategy and partakes in the development of ethical guidance and coordination with federal leaders.<sup>101</sup> While Shah's team is drafting guidance, Shah has not yet called for new legislation in light of emerging research.<sup>102</sup>

Instead, mandated research may be an alternative legislative solution. At least twelve state laws have enacted laws requiring government and government entities to increase their understanding of artificial intelligence and its implications.<sup>103</sup> Experts in task forces, advisory boards, commissions, and councils will report artificial intelligence findings and recommendations in various subjects, including employment.<sup>104</sup>

Congress recently introduced similar laws. The Jobs of the Future Act of 2024 would require the Secretary of Labor and the Director of the National Science Foundation to work with stakeholders and jointly report the growth and impact of artificial intelligence in the workforce.<sup>105</sup> In addition, the CREATE AI Act of 2024 would establish the National Artificial Intelligence Research Resource ("NAIRR"), a national research infrastructure that would provide resources, data, and tools so that researchers and students can conduct safe and reliable artificial intelligence research.<sup>106</sup>

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<sup>101</sup> Press Release, *Governor Moore Announces Major Action to Rebuild State Government and Modernize Maryland Department of Information Technology Services and Operations*, OFF. OF GOVERNOR WES MOORE (Aug. 16, 2023), <https://governor.maryland.gov/news/press/pages/governor-moore-announces-major-action-to-rebuild-state-government-and-modernize-maryland-department-of-information-technolo.aspx>.

<sup>102</sup> Weingarten, *supra* note 98.

<sup>103</sup> Lawrence Norden & Benjamin Lerude, *States Take the Lead on Regulating Artificial Intelligence*, BRENNAN CTR. FOR JUST. (Nov. 6, 2023), <https://www.brennancenter.org/our-work/research-reports/states-take-lead-regulating-artificial-intelligence>.

<sup>104</sup> *Id.*

<sup>105</sup> Press Release, *Soto, Chavez-DeRemer, Blunt Rochester, Garbarino Introduce Bipartisan Jobs of the Future Act of 2023*, DARREN SOTO (Jul. 6, 2023), <https://soto.house.gov/media/press-releases/soto-chavez-deremer-blunt-rochester-garbarino-introduce-bipartisan-jobs-future>; *see also* S.B. 5031, 118th Cong. (2023).

<sup>106</sup> Press Release, *Booker, Heinrich, Young, Rounds Introduce Bipartisan, Bicameral Bill to Expand Access to Artificial Intelligence Research*, CORY BOOKER (Jul. 28, 2023), <https://www.booker.senate.gov/news/press/booker-heinrich-young-rounds-introduce-bipartisan-bicameral-bill-to-expand-access-to-artificial-intelligence-research>; *see also* S.B. 2714, 118th Cong. (2023).

Despite recent state and national support for artificial intelligence research, multiple 2023 and 2024 bills on artificial intelligence research failed to pass the Maryland legislature. These bills included House Bill 1034 (“H.B. 1034”), aimed at establishing an advisory board to investigate the issues pertaining to artificial intelligence across health care, education, transportation, and criminal justice.<sup>107</sup> The advisory board would have also examined the economic, social, and ethical implications of artificial intelligence as well as consulted with experts and the public regarding the adoption of artificial intelligence.<sup>108</sup> Finally, the board would have evaluated current artificial intelligence laws, regulations, and policies and made recommendations for new legislation.<sup>109</sup> The advisory board would have reported its findings and recommendations to the Governor and the General Assembly, and the report would be available to the public.<sup>110</sup>

The state legislature also rejected bills that would have established a commission on artificial intelligence.<sup>111</sup> House Bill 1068 (“H.B. 1068”) would have established the Commission on Responsible Artificial Intelligence in Maryland, staffed by the Department of Legislative Services.<sup>112</sup> The commission would have examined the existing artificial intelligence laws at the local, state, and federal scale to inform best practices and regulations of artificial intelligence in the public sector.<sup>113</sup> The commission would have also reported its findings and recommendations to specific committees of the General Assembly.<sup>114</sup> Similarly, House Bill 1132 (“H.B. 1132”) would have established the Technology and Science Advisory Commission (TSAC), staffed by the Department of Information Technology.<sup>115</sup> TSAC’s duties would have included advising the state agencies on the development and implementation of technology, such as artificial intelligence, and creating a framework for addressing ethical concerns.<sup>116</sup> TSAC would have reported its activities and recommendations to both the Governor and the General Assembly.<sup>117</sup>

In 2024, the state legislature did not pass Senate Bill 1087 (“S.B. 1087”), which would have established the Maryland Artificial Intelligence Advisory

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<sup>107</sup> H.D. 1034, 2023 Leg., 445th Sess. (Md. 2023).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Weingarten, *supra* note 98.

<sup>112</sup> H.D. 1068, 2023 Leg., 445th Sess. (Md. 2023).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> H.D. 1132, 2023 Leg., 445th Sess. (Md. 2023).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

and Oversight Commission.<sup>118</sup> The Commission would offer guidance and recommendations for the use of artificial intelligence in the State.<sup>119</sup> On the other hand, House Bill 1297 (“H.B. 1297”), which mandates the State Department of Education to investigate best practices for the ethical use of artificial intelligence in public schools while ensuring data privacy, is pending but limited to the education context.<sup>120</sup>

Research is essential to clarify legislators’ understanding of artificial intelligence, to better inform state guidance, and to improve policymaking decisions.<sup>121</sup> Maryland should follow state and federal trends to increase artificial intelligence research within the state. By revisiting previous bills or creating new ones, state legislators can establish new research entities that will help maintain transparency and mitigate harmful implications, while also supporting the growing use and benefits of artificial intelligence in employment decisions.

*C. As Maryland leaders and legislators continue to build an understanding of artificial intelligence, employers and businesses should engage in ethical, self-regulatory practices based on general federal guidance.*

The legislature’s lack of understanding regarding the implications of artificial intelligence has led to employers regulating themselves.<sup>122</sup> Employers may implement safeguards to prevent the disclosure of personal data<sup>123</sup> or audit artificial intelligence tools for hiring bias.<sup>124</sup> They may also maintain human involvement during the use of artificially intelligent tools.<sup>125</sup> Employers and businesses may also formally implement artificial intelligence policies and training within the companies to regulate the

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<sup>118</sup> S.B. 1087, 2024 Leg., 446th Reg. Sess. (Md. 2024).

<sup>119</sup> *Id.*

<sup>120</sup> H.D. 1297, 2024 Leg., 446th Reg. Sess. (Md. 2024).

<sup>121</sup> Weingarten, *supra* note 98.

<sup>122</sup> Fitzgerald, *supra* note 5.

<sup>123</sup> Markel et al., *AI and Employee Privacy: Important Considerations for Employers*, REUTERS (Sept. 29, 2023), <https://www.reuters.com/legal/legalindustry/ai-employee-privacy-important-considerations-employers-2023-09-29>.

<sup>124</sup> Hilke Schellmann, *Auditors Are Testing Hiring Algorithms for Bias, but There’s No Easy Fix*, MIT TECH. REV. (Feb. 11, 2021), <https://www.technologyreview.com/2021/02/11/1017955/auditors-testing-ai-hiring-algorithms-bias-big-questions-remain/>.

<sup>125</sup> Jovana Davidovic, *On the Purpose of Meaningful Human Control of AI*, FRONTIERS IN BIG DATA (Jan. 9, 2023), <https://www.frontiersin.org/journals/big-data/articles/10.3389/fdata.2022.1017677/full>.

handling of private information in decision-making practices.<sup>126</sup> Nevertheless, this self-regulatory framework does not supersede federal, state, or local laws pertaining to the use of artificial intelligence in employment practices.<sup>127</sup>

In addition to self-regulation, employers should also refer to federal guidance concerning the legal and ethical use of artificial intelligence. Although there are no federal enforcement measures directly regulating artificial intelligence use, the federal government has provided additional guidance informing employers and employees of legal issues presented by artificial intelligence use.<sup>128</sup> The Biden Administration<sup>129</sup> and various federal agencies<sup>130</sup> have provided helpful guidance.

#### i. The Biden-Harris Administration

In 2022, the Biden-Harris Administration released a “blueprint” website<sup>131</sup> and white paper<sup>132</sup> describing constitutional artificial intelligence use. Therein, the administration outlined five principles guiding the design and implementation of automated systems while providing protections to Americans.<sup>133</sup> These principles addressed: (1) safe and effective systems, (2) algorithmic discrimination protections, (3) data privacy, (4) notice and explanation, and (5) human alternatives, considerations, and fallback.<sup>134</sup>

In February 2023, former President Biden signed Executive Order 13985, directing federal agencies to focus on addressing algorithmic discrimination through automated systems and technology.<sup>135</sup> In October 2023, Biden also issued Executive Order 14110 regarding the “safe, secure, and trustworthy

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<sup>126</sup> Melissa Heikkiläarchive, *AI companies Promised to Self-Regulate One Year Ago*.

*What’s Changed*, MIT TECH. REV. (July 22, 2024),

<https://www.technologyreview.com/2024/07/22/1095193/ai-companies-promised-the-white-house-to-self-regulate-one-year-ago-whats-changed/>.

<sup>127</sup> Lena Kemp, *Navigating the AI Employment Bias Maze: Legal Compliance Guidelines and Strategies*, AM. BAR ASS’N (Apr. 10, 2024),

[https://www.americanbar.org/groups/business\\_law/resources/business-law-today/2024-april/navigating-ai-employment-bias-maze/](https://www.americanbar.org/groups/business_law/resources/business-law-today/2024-april/navigating-ai-employment-bias-maze/).

<sup>128</sup> *Id.*

<sup>129</sup> *See infra* Section IV.C.i.

<sup>130</sup> *See infra* Section IV.C.ii.

<sup>131</sup> BLUEPRINT FOR AN AI BILL OF RIGHTS: MAKING AUTOMATED SYSTEMS WORK FOR THE AMERICAN PEOPLE (Oct. 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf>.

<sup>132</sup> *See id.*

<sup>133</sup> BLUEPRINT FOR AN AI BILL OF RIGHTS: MAKING AUTOMATED SYSTEMS WORK FOR THE AMERICAN PEOPLE, *supra* note 131.

<sup>134</sup> *Id.*

<sup>135</sup> Exec. Order No. 14901, 88 Fed. Reg. 10825, 10831 (Feb. 22, 2023).

development and use of artificial intelligence.”<sup>136</sup> The order included new standards for artificial intelligence safety and security, calls for Congress to protect Americans’ privacy with bipartisan data privacy legislation, and calls for agencies to address algorithmic bias.<sup>137</sup> The order also directed the development of best practices to mitigate harms and maximize benefits for U.S. workers and to promote innovative and responsible use of artificial intelligence in private and public sectors.<sup>138</sup>

Since then, under Executive Order 13985, several federal agencies convened in January 2024 to discuss the intersection of artificial intelligence and civil rights.<sup>139</sup> Representatives also shared updates on policies, guidance, and resources, and pledged continued internal and external collaboration to prevent harm to the public from artificial intelligence use.<sup>140</sup>

#### ii. Trump-Vance Administration

In January 2025, President Donald Trump revoked the Biden-Harris Administration’s Executive Order 14110 and signed Executive Order 14179.<sup>141</sup> The new order aims to strengthen the United States’s global leadership in Artificial Intelligence and to promote “human flourishing, economic competitiveness, and national security.”<sup>142</sup> Nevertheless, the Trump-Vance Administration’s “wave of layoffs . . . combined with looming budget cuts” have affected federal agencies’ research on artificial intelligence.<sup>143</sup>

#### iii. Federal Agency Guidance

Multiple federal agencies have provided guidance regarding artificial intelligence use. In 2023, leaders of the Consumer Financial Protection Bureau (CFPB), the Department of Justice (DOJ)’s Civil Rights Division, the Equal Employment Opportunity Commission (EEOC), and the Federal Trade

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<sup>136</sup> Exec. Order No. 14110, 88 Fed. Reg. 75191 (Nov. 1, 2023).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Press Release, *Readout of Justice Department’s Interagency Convening on Advancing Equity in Artificial Intelligence*, OFF. OF PUB. AFFS. (Jan. 11, 2024), <https://www.justice.gov/opa/pr/readout-justice-departments-interagency-convening-advancing-equity-artificial-intelligence>.

<sup>140</sup> *Id.*

<sup>141</sup> Exec. Order No. 14179, 90 Fed. Reg. 8741 (Jan. 31, 2025).

<sup>142</sup> *Id.*

<sup>143</sup> Jackie Davalos, *Trump’s Funding Cuts Threaten America’s AI Competitiveness*, BLOOMBERG (Mar. 3, 2025, 10:03 AM), <https://www.bloomberg.com/news/articles/2025-03-03/trump-s-funding-cuts-threaten-america-s-ai-competitiveness?embedded-checkout=true>.

Commission (FTC) released a joint statement regarding each agency's enforcement of the responsible use of automated systems.<sup>144</sup> The statement informed Americans of the risk of unlawful outcomes from the use of automated systems, including discrimination, bias, and violations of federal law.<sup>145</sup> In 2024, referencing to the joint statement, the Deputy Attorney General Lisa O. Monaco affirmed the DOJ's "tough stance" in prosecution against the misuse of artificial intelligence, including the amplification of biases and discriminatory practices.<sup>146</sup> In 2022, the DOJ had also issued guidance on artificial intelligence and disability discrimination in hiring decisions for public and private employers.<sup>147</sup>

The EEOC, which maintains its own research through its Artificial Intelligence and Algorithmic Fairness Initiative,<sup>148</sup> has also provided guidance on algorithmic fairness and violations of the ADA<sup>149</sup> and Title VII<sup>150</sup> through artificial intelligence use. The EEOC has also recently engaged in litigation regarding discriminatory artificial intelligence use.<sup>151</sup> In 2023, the EEOC settled its first artificial intelligence discrimination lawsuit regarding violations of Title VII and the ADEA.<sup>152</sup> There, iTutorGroup Inc. paid \$365,000 for its AI hiring selection tool that automatically rejected female applicants over 55 years old and male applicants over 60 years old.<sup>153</sup>

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<sup>144</sup> ROHIT CHOPRA ET AL., JOINT STATEMENT ON ENFORCEMENT EFFORTS AGAINST DISCRIMINATION AND BIAS IN AUTOMATED SYSTEMS 1 (2023), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/joint-statement-enforcement-efforts-against-discrimination-bias-automated-systems>.

<sup>145</sup> *Id.* at 3.

<sup>146</sup> Lisa O. Monaco, Deputy Attorney General, Deputy Attorney General Lisa O. Monaco Delivers Remarks at the University of Oxford on the Promise and Peril of AI (Feb. 14, 2024), (<https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-university-oxford-promise-and> (speech by Lisa O. Monaco, deputy attorney general).

<sup>147</sup> *See supra* note 79, at 1.

<sup>148</sup> *EEOC History: 2020—2024*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (2023), <https://www.eeoc.gov/history/eeoc-history-2020-2024> (last visited Mar 27, 2025).

<sup>149</sup> *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees*, EEOC (May 12, 2022), <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>.

<sup>150</sup> Press Release, *EEOC Releases New Resource on Artificial Intelligence and Title VII*, EEOC (May 18, 2023), <https://www.eeoc.gov/newsroom/eeoc-releases-new-resource-artificial-intelligence-and-title-vii>.

<sup>151</sup> *See, e.g.*, EEOC v. iTutorGroup, Inc., et al., Civil Action No. 1:22-cv-02565; Mobley v. Workday, Inc., 3:23-cv-00770, (N.D. Cal. Feb 21, 2023) ECF No. 1.

<sup>152</sup> Press Release, *iTutorGroup to Pay \$365,000 to Settle EEOC Discriminatory Hiring Suit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Sept. 11, 2023), <https://www.eeoc.gov/newsroom/itutorgroup-pay-365000-settle-eeoc-discriminatory-hiring-suit>.

<sup>153</sup> *Id.*

With regards to data privacy, in 2023, the National Institute of Standards and Technology division of the U.S. Department of Commerce published its Artificial Intelligence Risk Management Framework.<sup>154</sup> This framework informs Americans of the potential risks of artificial intelligence use, including privacy and discrimination issues.<sup>155</sup> The framework also establishes guidance for safe, reliable, and trustworthy standards of artificial intelligence use.<sup>156</sup>

Despite the increasing artificial intelligence use amongst employers, regulations and understanding of relevant technology are slow to fruition.<sup>157</sup> As such, Maryland employers should balance self-regulatory practices and policies and federal guidance to ensure compliance with state and federal laws. Adherence will ensure that employers are cautious and do not engage in unlawful conduct while maintaining the benefits of artificial intelligence use in employment decisions.

## V. CONCLUSION

The use of artificial intelligence is a highly debated issue affecting both the private and public sectors in Maryland.<sup>158</sup> In the digital age, businesses and employers state and nationwide have increasingly implemented artificially intelligent technology to produce efficient employment decisions.<sup>159</sup> However, while businesses, leaders, and lawmakers call for greater artificial intelligence use, Maryland requires more robust and comprehensive legislation to address discrimination and privacy concerns arising its use.<sup>160</sup> The implementation of more laws and greater research will help Maryland thoroughly investigate and responsibly balance the benefits and minimize the harms of artificial intelligence. In doing so, Maryland can safely lead in the nation's overall objective to advance artificial intelligence.<sup>161</sup>

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<sup>154</sup> See NAT'L INST. OF STANDARDS AND TECH., ARTIFICIAL INTEL RISK MANAGEMENT FRAMEWORK (AI RMF 1.0) (2023), <https://nvlpubs.nist.gov/nistpubs/ai/nist.ai.100-1.pdf>.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Fitzgerald, *supra* note 5.

<sup>158</sup> Katie Shepherdd & Erin Cox, *Maryland Looks to Harness AI for Government Use with Executive Order*, WASH. POST (Jan. 8, 2024, 5:26 P.M.), <https://www.washingtonpost.com/dc-md-va/2024/01/08/maryland-ai-government-wes-moore/>.

<sup>159</sup> McKendrick, *supra* note 2.

<sup>160</sup> Kales, *supra* note 4.

<sup>161</sup> Exec. Order No. 14110, 88 Fed. Reg. at 75191.

## RECENT DEVELOPMENT

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### ***SYED V. LEE*: A VICTIM HAS A RIGHT TO REASONABLE NOTICE OF A VACATUR MOTION HEARING, TO ATTEND IN PERSON, AND TO BE HEARD DURING THE HEARING.**

**By: Marisa Basignani**

The Supreme Court of Maryland held that an entry of nolle prosequi (“nol pros”) after an order to vacate a conviction did not moot an appeal of that order by the victim’s representative. *Syed v. Lee*, 488 Md. 537, 582, 322 A.3d 578, 604 (2024). The court then held that Maryland law guarantees a victim or their representative the right not only to reasonable notice and in-person attendance of a hearing on a motion to vacate, but also the right to be heard during the proceeding. *Id.* at 593, 628, 322 A.3d at 611, 632.

During the 2019 legislative session, the Maryland General Assembly passed a statute allowing a motion to vacate a conviction if “certain conditions” are met. After an investigation revealed information that met several of those conditions in Adnan Syed’s 2000 conviction for murder, the Baltimore City State’s Attorney filed a motion to vacate his conviction. Prior to filing in early September 2022, Assistant State’s Attorney Becky Feldman notified Young Lee, the victim’s brother and a California resident, of her intention to file the motion. Ms. Feldman then filed the motion and, on Friday, September 16, attended an *in camera* hearing concerning off-the-record evidence from the investigation, where the court also scheduled the vacatur hearing for the following Monday. Ms. Feldman immediately informed Mr. Lee of the scheduled hearing via email, included a link to join the hearing remotely, and requested that he notify her if he intended to join. After receiving no response, Ms. Feldman reached out again the day before the hearing when Mr. Lee responded that he would attend remotely.

However, on the morning of the vacatur hearing, Mr. Lee filed a motion to postpone, stating that the victim’s family preferred to attend in person. After considering Ms. Feldman’s notice to Mr. Lee, the court allowed Mr. Lee to make a statement but ultimately denied the motion to postpone, reasoning that attendance via Zoom satisfied the statutory requirements protecting a victim’s rights to notice and attendance. The court granted the motion to

vacate and issued a Vacatur Order instructing the State's Attorney to either set a date for a new trial or "enter a nol pros within 30 days . . . ."

Mr. Lee entered an appeal of the Vacatur Order on September 28, and the State's Attorney nol prossed the vacated charges on October 11. In November, the Appellate Court of Maryland reversed the trial court's denial of Mr. Lee's motion to postpone, holding that he received insufficient notice of the vacatur hearing and that "functionally requir[ing]" him to attend via Zoom violated his rights as the victim's representative. The court also held that Mr. Lee had no right to be heard at a vacatur hearing. In June 2023, both parties filed petitions for writ of *certiorari*, and the Supreme Court of Maryland granted both.

The parties brought several questions before the Supreme Court of Maryland: (1) was Mr. Lee's appeal of the Vacatur Order rendered moot by the entry of nol pros, (2) must a court give a victim the opportunity to speak at a vacatur hearing, (3) was the notice provided to Mr. Lee sufficient to satisfy the statutory requirement, (4) is a victim's right to attend such a hearing satisfied by remote video attendance, and (5) must a victim show prejudice if appealing an order based on a victim's rights violation? *Syed*, 488 Md. at 578, 322 A.3d at 601.

First, the court necessarily addressed the mootness question and held that the nol pros did not moot Mr. Lee's appeal. *Syed*, 488 Md. at 578, 322 A.3d at 602. The court described a nol pros as a state action dismissing "pending charges . . . it does not intend to prosecute" and explained that the broad discretionary power of a prosecutor to enter a nol pros is not without limits. *Id.* at 579–80, 322 A.3d at 602. According to the court, Maryland's laws and public policy concerns support a constraint on a prosecutor's nol pros power as a vehicle to preserve crime victims' rights. *Id.* Specifically, "the state may not enter a nol pros 'to alter a final judgment . . .'" *Id.* at 580, 322 A.3d at 603 (quoting *State v. Simms*, 456 Md. 551, 555, 175 A.3d 681 (2017)). In citing *Simms*, the court established that because the trial court violated Mr. Lee's rights, the Vacatur Order was unlawful and did not vacate the charges. *Syed*, 488 Md. at 580, 322 A.3d at 604. The court concluded that the conviction remained as a final judgment, effectively voiding the State's Attorney's authority to enter a nol pros. *Id.* at 583, 322 A.3d at 604. The court was concerned that a prosecutor could easily subvert a victim's appeal through an entry of nol pros, creating a barrier for victims' rights appeals to final judgments. *Id.* at 584, 322 A.3d at 605.

The court then examined the language and intent of the vacatur statute and held that Maryland law provides victims a right to speak at a vacatur hearing. *Syed*, 488 Md. at 593–94, 322 A.3d at 610–11. While the statute itself is silent on a victim’s right to participate in a vacatur hearing, the court reasoned that the absence of such language indicated the legislature’s “belief” that it was “already covered” by existing Maryland law. *Id.* at 595–96, 322 A.3d at 612 (citing MD. CODE ANN., CRIM. PROC. § 8-301.1 (2021)). The court asserted that it must read the vacatur statute and the section of the Criminal Procedure Article outlining a victim’s right to address the court at a sentencing or disposition hearing together. *Syed*, 488 Md. at 596, 322 A.3d at 613 (citing MD. CODE ANN., CRIM. PROC. § 11-403 (2024)). Section 11-403 includes the “alteration of a sentence” in its definition of a sentencing hearing, and the court reasoned that vacating a conviction effectively changes the sentence. *Syed*, 488 Md. at 597, 322 A.3d at 613 (citing MD. CODE ANN., CRIM. PROC. § 11-403 (2024)).

This expansive reasoning placed a vacatur hearing firmly within the bounds of a sentencing hearing. *Syed*, 488 Md. at 597, 322 A.3d at 613. Therefore, § 11-403 applied to Mr. Lee’s appeal and gave him the right to be heard. *Id.* The court then expanded its reasoning even further to include the right to address the merits of the motion to vacate. *Id.* at 613, 322 A.3d at 623. In preventing a victim from addressing the merits, a court “undermines a victim’s ability to have meaningful input” and reduces the value of the right to participate. *Id.*

Next, the court discussed the victim’s right to notice and to attend the hearing and affirmed the appellate court’s holding, reasoning that courts must afford a victim the right to attend such a hearing in person. *Syed*, 488 Md. at 618, 322 A.3d at 625. The court again looked closely at the vacatur statute’s language and determined that because the General Assembly drafted the statute in 2019, pre-pandemic, it did not intend “attendance” to encompass a remote option as it is understood today. *Id.* at 618–19, 322 A.3d at 626. The court then stated that while the statute does not require reasonable notice to the victim, “reasonableness is implicit” in this context. *Id.* at 624, 322 A.3d at 629.

Finally, the court held that the trial court’s error violated Mr. Lee’s rights; therefore, the error was prejudicial and not harmless. *Syed*, 488 Md. at 625, 322 A.3d at 630. The court agreed with Mr. Lee’s argument that depriving a

victim of their rights at a hearing in which they are not a party and have little influence automatically prejudices the victim by virtue of the deprivation itself. *Id.* at 627, 322 A.3d at 631.

Justice Hotten dissented strongly, joined by Justices Booth and Battaglia. *Syed*, 488 Md. at 630, 322 A.3d at 633 (Hotten, J., dissenting). The dissent asserted that this case “exists as a procedural zombie” and stated that the doctrine of nol pros must be independent of judicial interference. *Id.* The dissent argued that the Majority incorrectly interpreted the court’s precedent in *Simms*, which focused not on how a nol pros affects a victim’s rights but on a criminal defendant’s rights to a fair trial. *Id.* at 632, 322 A.3d at 634. According to the dissent, the Majority over-emphasized a victim’s guaranteed rights, which must be “tempered by the superior rights of a criminal defendant who is a party.” *Id.* at 633, 322 A.3d at 635. The dissent stridently asserted that the Majority misconstrued precedent and relied on cases involving very narrow circumstances that were not present here. *Id.* at 639, 322 A.3d at 638.

When the court held that the trial court violated Mr. Lee’s rights as a victim, it egregiously expanded a victim’s guaranteed rights well beyond the legislature’s intentions. Such an expansion unnecessarily places the rights of non-party victims above the rights of criminal defendants enshrined in our criminal justice system. While protecting a victim’s rights is a paramount policy, it may also curtail defendants’ rights. If a court permits victims to address the merits, they essentially become a de facto third party against whom a defendant must argue.

## RECENT DEVELOPMENT

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### ***MATTER OF MCCLOY: FIREARM APPLICATIONS ARE EVALUATED BASED ON DISQUALIFYING CRIMES DEFINED BY MARYLAND STATUTES IN EFFECT AT THE TIME OF APPLICATION.***

**By: Caroline Byrd**

The Supreme Court of Maryland held that disqualifying convictions in firearm applications must be evaluated based on Maryland statutes in effect at the time of application. *Matter of McCloy*, 488 Md. 326, 352–53, 321 A.3d 748, 764 (2024). The court additionally held that an applicant’s federal misdemeanor conviction was not a disqualifying crime requiring denial of his firearm application. *Id.* at 353, 321 A.3d at 765. When determining whether prior out-of-state convictions equate to disqualifying crimes under Maryland’s statutes, the court created an expanded “categorical approach.” *Id.* at 346, 321 A.3d at 760–61.

In February of 2021, Mark McCloy (“McCloy”) applied to purchase a firearm in Maryland. State law requires applicants to obtain a handgun qualification license (“HQL”) to buy a firearm in Maryland. The application is contingent on review and approval by Maryland State Police (“MSP”). The MSP has the right to reject HQL applications if the applicant has been convicted of a disqualifying crime or falsely certified that they have not been convicted of a disqualifying crime on the application. During the MSP’s review of McCloy’s application, they discovered McCloy’s federal witness tampering conviction from 1999. Due to this conviction, the MSP denied McCloy’s application. Pursuant to Maryland state law, out-of-state convictions are disqualifying if the MSP can show that there is a comparable and equivalent disqualifying crime in Maryland. McCloy entered a timely appeal of the MSP’s decision.

Once an aggrieved applicant appeals a decision from the MSP, the Office of Administrative Hearings (OAH) conducts a hearing, and an administrative law judge (ALJ) reviews the case. In this hearing, the MSP must meet a preponderance of the evidence burden “that the disapproval was proper.” Ultimately, the ALJ affirmed the MSP’s rejection of the HQL but on different grounds, agreeing with McCloy that the equivalent Maryland statute proposed by the MSP and the federal witness tampering conviction were incomparable. However, the ALJ cited a different disqualifying crime under Maryland law, deeming it equivalent and concluding that McCloy had “falsely represented” his conviction history.

McCloy sought judicial review in the Circuit Court for Queen Anne's County. The circuit court affirmed the ALJ opinion, but again on different grounds. The court agreed with the MSP about the original disqualifying crime and found that the ALJ exceeded its statutory authority by proposing a different analogous statute, violating McCloy's procedural due process.

After another appeal, this time to the Appellate Court of Maryland, the court yet again affirmed the MSP's decision, rejecting both of McCloy's arguments that the federal crime was not analogous and that the Maryland statute could not be comparable because it was enacted after McCloy's conviction. The appellate court, in its decision, fashioned a two-step approach to determining whether the federal offense and the Maryland offense were analogous, ultimately deciding that the offenses were comparable. Finally, McCloy appealed to the Supreme Court of Maryland, who granted *cert.*

The Supreme Court of Maryland framed the issue on review as whether the ALJ properly determined that Mr. McCloy's 1999 conviction constituted a disqualifying crime warranting denial of his firearm application. *Matter of McCloy*, 488 Md. at 339, 321 A.3d at 756. First, the Supreme Court of Maryland reaffirmed that the MSP should assess disqualifying convictions based on the law at the time of application. *Id.* at 343, 321 A.3d at 759. The court cited *Maryland State Police v. McClean*, which established that the MSP must apply the law as it stands at the time of review, not at the time of conviction when assessing whether a prior offense disqualifies an applicant for a carry permit. *Id.* at 341–42, 321 A.3d at 758 (citing *Maryland State Police v. McClean*, 197 Md. App. 430, 14 A.3d 658 (2011)). The court also emphasized that firearm regulations govern present firearm possession and that applying current Maryland law ensures consistency and fairness in evaluating past criminal conduct. *Matter of McCloy*, 488 Md. At 341–42, 321 A.3d at 758.

Next, the court analyzed the criteria for determining whether two statutes constitute equivalent offenses. *Matter of McCloy*, 488 Md. at 344, 321 A.3d at 759. McCloy advocated for a “categorical approach,” arguing that the federal offense must align precisely with the elements of the Maryland offense and cannot cover a broader range of conduct. *Id.* at 344, 321 A.3d at 759. Under this method, he asserted that the federal statute criminalized more behaviors than its Maryland counterpart, making them non-equivalent. *Id.* The MSP, on the other hand, supported the “two-step analysis” introduced by the appellate court, which first compares the elements of both statutes and then determines whether a reasonable person would conclude that they prohibit similar conduct—an argument MSP maintained applied to both the federal and Maryland offenses. *Id.*

Applying the categorical test to McCloy's federal conviction and the proposed Maryland offense, the court agreed with McCloy that the elements of the federal offense sweep more broadly than the Maryland offense. *Matter of McCloy*, 488 Md. at 347-48, 321 A.3d at 761-62. While the court maintained that analysis should end if the compared offense is narrower than its Maryland counterpart, it expanded the categorical approach by introducing an additional step when the offense's elements are broader. *Id.* at 346, 321 A.3d at 760-61. The court's second step requires the MSP to determine whether an applicant's prior conviction satisfies all the elements of a disqualifying Maryland crime. *Id.*

After determining that McCloy's offense was broader than the Maryland crime, the court moved on to the second step in its augmented categorical approach. *Matter of McCloy*, 488 Md. at 349, 321 A.3d at 762. Looking at the facts of the prior conviction, the court determined that McCloy would not have been convicted in Maryland because the Maryland offense applies only to judicial proceedings, whereas McCloy's conviction was for witness tampering in an EEOC proceeding. *Id.* at 349, 321 A.3d at 762-63. Therefore, the court concluded that the facts of the federal conviction do not support a conviction under the Maryland offense. *Id.*

The court briefly explained why it rejected MSP's two-step approach to comparing offenses. *Matter of McCloy*, 488 Md. at 350-52, 321 A.3d at 763-64. While the first step involved comparing statutory elements, the court found the second step to determine whether the offenses "prohibit similar conduct" problematic due to the lack of clear guidance on *just how similar* the offenses must be. *Id.* at 350-51, 321 A.3d at 763-64. Additionally, it argued that the test would require the MSP to investigate the underlying facts of a conviction. *Id.* at 352, 321 A.3d at 764. In such cases, the MSP would have to act as a factfinder to determine the degree of similarity between the statutes, a role beyond its intended function. *Id.*

The *Matter of McCloy* decision impacts how Maryland evaluates firearm applications, reinforcing that disqualifying convictions must be assessed under the law in effect at the time of application. *Matter of McCloy*, 488 Md. at 352-53, 321 A.3d at 764. This ruling enhances procedural consistency and protects applicants from subjective or overly expansive interpretations of out-of-state convictions. Moving forward, the decision will likely lead to greater scrutiny of disqualifying crime determinations and could prompt legislative action to clarify the scope of firearm disqualifications in Maryland.

## RECENT DEVELOPMENT

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### ***STATE V. THOMAS*: “WHAT [MD. R. 4-345(E)] GIVETH, THE RULE MAY TAKETH AWAY,” AS THE CIRCUIT COURT MAY DEFER A MOVANT’S SENTENCING REVISION MOTIONS UNTIL ITS FIVE-YEAR JURISDICTION EXPIRES.**

**By: Travis Mobley**

The Supreme Court of Maryland held, pursuant to Maryland Rule 4-345(e), that the circuit courts lack jurisdiction to revise a petitioner’s sentence after five years from their sentencing date, irrespective of their timely filed motion for revision. *State v. Thomas*, 488 Md. 456, 461, 322 A.3d 32, 34 (2024). Further, the court held that a circuit court’s deferral of a petitioner’s motions for revision is a proper exercise of discretion, as circuit courts are permitted to grant, deny, or defer a motion up to the very end of the five years. *Id.* at 484–86, 322 A.3d at 49–50.

In 2002, Steven Anthony Thomas pleaded guilty to two counts of armed robbery and one count of second-degree burglary. In December 2014, Thomas petitioned for and received a sentence reduction on the first count of armed robbery, which triggered his right to move to modify his sentence under Rule 4-345(e). Thomas’ five-year period to modify his sentence, as prescribed in Rule 4-345(e), was set to expire in December 2019. Thomas’ counsel timely moved for modification in early 2015, to which the court ordered it “be HELD IN ABAYENCE.” In 2017, 2018, and 2019, Thomas’ counsel filed three supplemental motions to revise his sentence, and each time, the court entered – “NOTED. NO ACTION.” The 2018 and 2019 supplemental motions explicitly mentioned the ensuing December 2019 deadline of when the court would lose jurisdiction. Upon a final supplemental motion submitted in 2021, the court entered “SET FOR HEARING” on Thomas’ motion. At the hearing, the court denied Thomas’ motion, concluding it no longer had authority because the five-year deadline had passed.

Thomas appealed to the Appellate Court of Maryland, who reversed and remanded, applying *Schlick I* to reason that the circuit court “retained fundamental jurisdiction over a timely-filed Rule 4-345(e) motion *after* the expiration of the five-year period.” (emphasis added). The State petitioned for writ of *certiorari* to the Supreme Court of Maryland to determine whether

the circuit court may decide the merits of a Rule 4-345(e) motion after the five-year period expired. Thomas similarly cross-petitioned and asked the court to decide whether a circuit court, upon receipt of a timely filed motion for sentencing modification, must exercise its discretion to grant or deny the motion. The court granted both parties' petitions.

First, the Supreme Court of Maryland held that Thomas' timely filed motions were insufficient to extend the circuit court's jurisdiction past the five-year deadline prescribed in Rule 4-345(e) and, in the process, overruled *Schlick I. Thomas*, 488 Md. at 461, 322 A.3d at 33 (citing *Schlick v. State (Schlick I)*, 238 Md. App. 681, 194 A.3d 49 (2018)). Upon examination, the Supreme Court of Maryland stated *Schlick I* assessed a different set of facts than in the present case, so the issue of fundamental jurisdiction was not at issue there. *Thomas*, 488 Md. at 470, 322 A.3d at 40). Therefore, the court took the opportunity to decide the fundamental jurisdiction issue in the present case. *Id.* at 471, 322 A.3d at 41.

In deciding the fundamental jurisdiction issue, the court first examined the Maryland Constitution and applicable statutory provisions to assess what power, authority, and jurisdiction they bestowed upon the circuit courts. *Thomas*, 488 Md. at 471–72, 322 A.3d at 41. The Maryland Constitution and Maryland Courts and Judicial Proceedings § 1-501 express that circuit courts have “all power, authority, and jurisdiction, original and appellate,” conferred by the Constitution and laws. *Id.* at 471–72, n.3, 322 A.3d at 41 (citing MD. CONST. Art. IV, §20(a) (2024) and MD. CTS. & JUD. PROC. § 1-501 (2024)). The court next examined common law and found it supported the principle that the circuit courts' inherent power, or jurisdiction, over its judgments exists only during the term it enters its decisions. *Thomas*, 488 at 474–75, n.5, 322 A.3d at 42–43. The court cited *Czaplinski v. Warden*, that “trial courts have no power to reduce a sentence after the expiration of the term in which it was imposed,” as the turning point that created Rule 4-345(e). *Id.* at 475–78, 322 A.3d at 43–45 (citing *State ex. rel. Czaplinski v. Warden, Md. Penitentiary*, 196 Md. 654, 75 A.2d 766 (1950)). Thus, using the constitutional, statutory, and common law history as support, the court overruled *Schlick I* in favor of a strict application of Rule 4-345(e) and held the timeliness of Thomas' motion did not affect the court's fundamental jurisdiction to decide his motion. *Thomas*, 488 Md. at 480–81, 322 A.3d at 46–47.

The Supreme Court of Maryland then interpreted the plain language of Rule 4-345(e) and found it unambiguously limits the circuit court’s jurisdiction to revise outside of the five years. *Thomas*, 488 Md. at 483, 322 A.3d at 48. Rule 4-345(e) states, “the [circuit] court has revisory power over the sentence except that it may not revise ... after the expiration of five years from the date the sentence originally was imposed ....” *Id.* at 464–65, 322 A.3d at 37 (citing Md. R. 4-345(e) (2024)). The court reasoned that the words “may not,” as defined by the Maryland General Assembly, unambiguously require a strict prohibition on revising a sentence more than five years after its imposition. *Thomas*, 488 Md. at 466, 322 A.3d at 37–38. Therefore, the court interpreted the Rule as inherently jurisdictional rather than a claim-processing rule, which merely provides procedural requirements for courts to abide by. *Id.* at 483, 322 A.3d at 48.

Finally, the Supreme Court of Maryland held the circuit court was within its discretion to defer all four of Thomas’ motions, as circuit courts, upon receipt of a motion, have three options: to defer, to deny, or to grant—all existing for five years after it imposed the original sentence. *Thomas*, 488 Md. at 484, 322 A.3d at 48–49. Rule 4-345(e) does not confine a court’s discretion to just granting or denying a motion, as the third option— a deferral – means the court is unconvinced but does not want to foreclose the possibility by denying. *Id.* at 484, 322 A.3d at 49. The court validated the third option, stating the result remains the same whether the court defers the motion for the full five years or denies it. *Id.* at 485, 322 A.3d at 49. Therefore, the court found the circuit court’s multiple deferrals of Thomas’ motions were a proper exercise of discretion under Rule 4-345(e). *Id.* at 486, 322 A.3d at 50.

Justice Biran concurred, noting that common law empowers circuit judges to revisit a judgment after the five-year limitation has expired but that judges should only exercise that power in “narrow circumstances.” *Thomas*, 488 Md. at 501, 322 A.3d at 59 (Biran, J., concurring). Justice Eaves, joined by Justice Hotten, similarly concurred, emphasizing Rule 4-345(e) limits a court’s jurisdiction to five years, but also dissented, finding the circuit court abused its discretion by failing to rule on Thomas’ motion within the five-year limitation. *Id.* at 510, 518, 322 A.3d at 65, 69 (Eaves, J., concurring in part, dissenting in part). Finally, Justice Watts dissented, proposing an amendment to Rule 4-345(e), which would require a circuit court to rule on a motion after the five-year period when the defense counsel exercised due diligence, and

the facts demonstrate a court failed to consider the motion before the five-year period expired. *Id.* at 519, 520, 322 A.3d at 70 (Watts, J., dissenting).

The *Thomas* decision makes clear that the five-year deadline prescribed in Rule 4-345(e) is not only a strict limitation on the court's jurisdiction but also a potentially fatal limitation on a movant's opportunity to receive a sentencing revision. The decision imports a lesser obligation on the circuit courts and instead requires movants to present a much more compelling case to persuade a court to act. An unpersuaded judge may elect to merely sit back and watch the clock tick as the movant's hopes of seeking freedom earlier than once expected fall in unison with the perpetually descending seconds, minutes, and years of the five-year countdown. Practitioners should be aware of the harsh reality movants face and prepare their clients for what is likely to be a long and uncertain process that may ultimately amount to nothing more than a way to pass the time behind bars.

## RECENT DEVELOPMENT

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### **STATE V. SMITH: GENERAL OBJECTIONS TO AN EXTENDED NARRATIVE AGAINST PENAL INTEREST SUFFICIENTLY PRESERVE A PARTY'S OBJECTION TO INDIVIDUAL STATEMENTS CONTAINED WITHIN THE NARRATIVE.**

**By: Dillan Moore**

The Supreme Court of Maryland held that the trial court, with the assistance of the parties, must redact extended narratives admitted as statements against penal interest. *State v. Smith*, 487 Md. 635, 680, 321 A.3d 52, 78 (2024). The court also held that Smith adequately preserved his objection to the admission of the extended narrative despite the general nature of the objection. *Id.* at 684–85, 321 A.3d at 78.

Law enforcement arrested Lamont Smith (“Smith”), Tony Blake (“Blake”), and Dwight Woods (“Woods”) on August 9, 2019, during a home raid. As part of the evidence against Smith at trial, the prosecution sought to admit a lengthy police interview with Blake (“the Blake interview”). In their motion to admit the Blake interview, the State conceded that some statements within the interview only inculpated Smith but argued that they “were so interwoven” with Blake’s self-incriminating statements that the entire interview was admissible. The trial court accepted the State’s argument, admitted the Blake interview, and published it to the jury despite Smith’s objection to its admission in its entirety. Thereafter, Smith was found guilty of possession and conspiracy to distribute drugs.

Smith appealed on the grounds that the trial court had failed to follow the parsing process specified in *State v. Matusky*, and the Appellate Court of Maryland affirmed, finding that the trial court erred by admitting the entirety of the Blake interview and that Smith had adequately preserved his objection for appeal. The State then petitioned for *certiorari*, which was granted. The question before the Supreme Court of Maryland was whether the appellate court erred in finding that Smith properly preserved his objection.

The Supreme Court of Maryland began by examining an exception to the rule against hearsay: the declaration against penal interest. *Smith*, 487 Md. at 660, 321 A.3d at 66. In Maryland, Rule 5-804(b)(3) states declarations against penal interest are admissible when “(1) the declarant is unavailable; (2) the statement is genuinely against the declarant’s interest; and (3) the proponent demonstrates the statement’s trustworthiness via the circumstances surrounding the statement.” *Id.* at 661–62, 321 A.3d at 67 (citing *State v. Galicia*, 479 Md. 341, 359, 278 A.3d, 131 (2022)).

While hearsay statements suffer from questions of reliability, the court views declarations against penal interest as less likely to have the same faults because it is unlikely that one would make a statement that could potentially expose the declarant to criminal liability unless the statement were true. *Smith*, 487 Md. at 661, 321 A.3d at 67 (citing *State v. Standifur*, 310 Md. 3, 11, 526 A.2d 955, 959 (1987)). Simply put, it is unlikely that people would lie to make statements that are damaging to themselves. *Smith*, 487 Md. At 661, 321 A.3d at 67. However, the court expressed skepticism that the rationale for the rule holds true in the case of codefendants, recognizing that a codefendant may believe it is in their interest to appear cooperative with the investigation for a favorable plea bargain or to minimize the declarant's culpability. *Id.* at 662, A.3d at 67–68 (citing *Standifur*, 310 Md. at 13, 526 A.2d at 960).

To address this potential fault with the hearsay exception for statements against penal interest, both the appellate court and Supreme Court of Maryland turned to *State v. Standifur* and *Williamson v. United States*. *Smith*, 487 Md. at 663–65, 321 A.3d at 68–69. In *Standifur*, the most critical factor of its four-part test was whether the circumstances surrounding the statement could reasonably lead a declarant to understand the statement is against the declarant's penal interest. *Id.* at 664–65, 321 A.3d at 69. (citing *Standifur*, 310 Md. at 17, 526 A.2d at 962). In *Williamson*, the Supreme Court held that for a “statement” to be admitted under the exception, there must be a single discrete utterance that is directly self-inculpatory. *Smith*, 487 Md. at 665–66, 321 A.3d at 70 (citing *Williamson v. United States*, 512 U.S. 594, 604 (1994)).

The court reconciled *Standifur*'s framework and *Williamson*'s definition of “statement” in *State v. Matusky*. *Smith*, 487 Md. 667, 321 A.3d at 71. There, the court incorporated *Williamson* into the *Standifur* framework, noting that *Williamson*'s primary addition was that the “collateral” statements were no longer assured to be admissible. *Id.* at 669, 321 A.3d at 71–72 (citing *State v. Matusky*, 343 Md. 467, 489–90, 682 A.2d 694, 704–05 (1996)). The *Matusky* court explained that the “final inquiry” *Standifur* requires is for the trial court to perform a parsing analysis to determine which statements are contrary to the declarant's interest and which are simply made collateral during the narrative but do not incriminate the declarant. *Smith*, 487 Md. at 668, 321 A.3d at 71 (citing *Matusky*, 343 Md. at 482, A.2d at 701).

Finally, the court examined the admission of the Blake interview. *Smith*, 487 Md. at 670, 321 A.3d at 72. In arguing for its admission in its entirety, the State asserted that the defense waived its right to have the interview parsed because it did not request the redaction of specific parts of the Blake interview. *Id.* The State also argued that it was not the duty of the court to parse the analysis *sua sponte* and rather that it was the duty of the opponent

to the offered evidence to object to portions it believed inadmissible. *Id.* at 670–71, 321 A.3d at 72–73.

The court refuted the State’s assertions. *Smith*, 487 Md. at 672, 321 A.3d at 73–74. The court held that *Matusky*’s test was a requirement imposed on the trial court, not one that the opponent had to request the court to undertake. *Id.* The court clarified that the *Matusky* analysis is specific to extended narratives involving a mix of self-incriminating and self-neutral statements, like the Blake interview. *Id.* The court also examined the cases the State cited in order to counter the State’s assertion that the defense had failed to preserve its objection, saying “if there w[ere] a duty on an opponent . . . there would be at least a whiff of such duty referenced in these cases.” *Id.*

The court’s holding reflected the expansive nature of evidence like the Blake interview while also incorporating the concerns that self-inculpatory statements made by co-conspirators are generally less reliable than most statements against one’s own penal interest. *Smith*, 487 Md. at 676–77, 321 A.3d at 76–77. The court also concluded that such a holding simplifies future issues by ensuring that extensive interviews are analyzed line-by-line at the trial level, with parties having the opportunity to object to individual statements. *Id.* at 681, 321 A.3d at 79.

Justice Biran’s dissent argues the Majority’s holding complicates matters for the trial courts, takes up additional judicial resources, and disadvantages parties without advantage over the usual method of approaching hearsay objections. *See Smith*, 487 Md. at 688, 691–94, 698–700, 321 A.3d at 83–87. (Biran, J., dissenting). Justice Biran says that the Majority’s method gives trial courts the new duty to identify hearsay issues in addition to having to rule on them. *Id.* at 691, 321 A.3d at 85. He expresses concern that by doing so, the parties lose the freedom to *not* object to hearsay in situations that would benefit their position. *Id.* at 690, 321 A.3d at 84.

To best serve the rationale behind the exception for statements against penal interest, the Supreme Court of Maryland has given trial courts the duty to parse out interviews like Blake’s, ensuring that only statements that are truly self-incriminating are admitted. The clarity provided by the *Smith* holding benefits both parties and courts and should simplify proceedings in the future. Practitioners would do well to remember that while this is a duty incumbent on the court in cases like this one, they should still be prepared to advise the court on which statements the party argues should or should not be admissible. Additionally, once the parsing has occurred, parties must object to the admission of specific portions, as is the case for other hearsay statements.

## RECENT DEVELOPMENT

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### **ROVIN V. STATE: WHEN A PROSECUTOR MAKES AN OBJECTIVELY REASONABLE BUT ERRONEOUS INTERPRETATION OF A STATUTE, THEY HAVE PROBABLE CAUSE FOR ARREST AND CANNOT BE HELD CIVILLY LIABLE.**

**By: Odi Odian**

The Supreme Court of Maryland held that a prosecutor’s “objectively reasonable” interpretation of Maryland’s juror intimidation statute was enough to issue an arrest warrant made in good faith and, therefore, cannot be civilly liable for their mistake of law. *Rovin v State*, 488 Md. 144, 156, 321 A.3d 201, 207 (2024). Next, the court decided that true threats are not protected speech and can warrant arrest. *Id.* Finally, Maryland’s juror intimidation statute, Md. Code Ann. Criminal Law Article §9-305 is not “unconstitutionally vague.” *Id.* at 156, 158, 198, 321 A.3d at 207–08, 233.

Ms. Valerie Rovin’s daughter was convicted of driving under the influence. Upset by this, Ms. Rovin sought out the jury foreperson and confronted him at his workplace. Ms. Rovin argued with the foreperson and stated that she would have someone “from Nicaragua [to] ‘take care of’” the foreperson. The foreperson verified that the person from Nicaragua was real, felt threatened by Ms. Rovin’s words, and reported the incident to the police.

The State Attorney’s Office (“State”) advised the officer who responded to the call that Ms. Rovin’s conduct violated Maryland’s juror intimidation statute, which prevents impeding a juror’s duties through threat or force. The District Court Commissioner found probable cause to issue a warrant for Ms. Rovin’s arrest. Ms. Rovin was arrested and placed under house arrest until her trial. The court acquitted Ms. Rovin of her juror intimidation and assault charges at her bench trial. Her threat was not imminent, and the trial court found the juror intimidation statute did not apply to this case because the foreperson completed their jury service before Ms. Rovin threatened them. The trial court held that the juror intimidation statute was prosecuted based on a mistake of law.

Ms. Rovin then brought a civil suit against the prosecutor and the officer, alleging violation of various tort laws and her rights under Article 24 of the Maryland Declaration of Rights. The trial court granted summary judgment in favor of the defendants. The Appellate Court of Maryland reversed, finding Ms. Rovin needed discovery to prove the State acted with gross negligence and malice to override the Maryland Tort Claim Act (“MTCA”), which protects State personnel from civil liability when acting within their State roles.

The Supreme Court of Maryland granted *certiorari* and disagreed because they argued that officers were “not entitled to absolute [Judicial or Prosecutor] immunity[.]” The court remanded the case back to the circuit court to determine if the *Heien v. North Carolina* principle could be applied to grant the officer immunity. In *Heien*, the Court held that an officer who arrests someone based on a “reasonable suspicion” that they violated the law is protected from civil liability. Ms. Rovin then amended her complaint to add more violations of various tort laws and rights under Articles 40 and 26 of the Maryland Declaration of Rights.

The trial court granted summary judgment in favor of the State after the moved for the motion arguing the mistake of law framework under *Heien*, and the appellate court affirmed. Ms. Rovin petitioned the Supreme Court of Maryland for a writ of *certiorari*, which the court granted. The court addressed whether the State may be civilly liable for a wrongful arrest based on a “good faith” warrant and had reasonably relied on the prosecutor’s interpretation, whether the State interpreted the juror intimidation statute reasonably, and whether Ms. Rovin’s words were protected speech. *Rovin*, 488 Md. at 173–74, 321 A.3d 201, 217–18.

The Supreme Court of Maryland refused to apply *Heien* because the facts in *Heien* were distinguishable from those of Ms. Rovin’s case. *Rovin*, 488 Md. at 176, 321 A.3d at 219. *Heien* involved an officer at a traffic stop who arrested another without a warrant, but here, the officer had a warrant from a judicial officer to arrest Ms. Rovin. *Id.* at 176, 321 A.3d at 219 (citing *Heien v. North Carolina*, 574 U.S. 54 (2014)).

The court then analyzed how probable cause can protect State agents from civil liability by applying *United States v. Leon* and *Messerschmidt v. Millender*. *Rovin*, 488 Md. at 185–93, 321 A.3d at 224–29. In *Messerschmidt*, an officer can be protected from civil liability for false arrest if there is probable cause for the arrest proven through a warrant. *Rovin*, 488 Md. at 192, 321 A.3d 201, 229 (citing *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012)). However, while a “warrant is not an absolute shield,” it is given great weight to prove the officer had probable cause to perform the arrest, which results in the plaintiff having a high burden to prove there was no probable cause. *Rovin*, 488 Md. at 181–82, 192, 321 A.3d at 222–23, 228–229. (quoting *Messerschmidt*, 565 U.S. at 547).

Four exceptions to *Messerschmidt*, outlined in *Leon*, remove the officer’s immunity: an affidavit that is known to be false misled the judge; the judge abandoned their “judicial role” and was rubber stamping; the affidavit for the warrant is vague and unreasonable; or the warrant is so lacking that no reasonable officer could believe it was valid. *Rovin*, 488 Md. at 192, 321 A.3d at 229. (citing *United States v. Leon*, 468 U.S. 897, 923 (1984)). The State no longer has immunity if a plaintiff can prove one or more *Leon* exceptions.

*Rovin*, 488 Md. at 192, 321 A.3d at 229. Therefore, the court’s next analysis was whether the State had a reasonable interpretation of the juror intimidation statute that formed the basis for the warrant. *Id.*

The court found the juror intimidation statute ambiguous, but it held that the State’s interpretation of it was reasonable after examining its legislative intent. *Rovin*, 488 Md. at 207, 321 A.3d 201, 238. The term “juror” extends to times when the court selected jurors for a specific term, and their duty did not end until the specific term was over. *Id.* at 207, 321 A.3d at 238. Since the State’s interpretation was homogenous to the legislative history, they had an objectively reasonable interpretation of the statute, the District Court Commissioner had probable cause to issue the warrant, and the officer had no reason to find the warrant unreasonable or lacking. *Id.* at 215, 321 A.3d at 243.

Next, the court determined that the officer could believe Ms. *Rovin* intended to threaten the foreperson, making her speech a true threat. *Rovin*, 488 Md. at 219–20, 321 A.3d at 245–46. For speech to fall outside the protection of the First Amendment, it must constitute a true threat, which involves statements or actions that suggest the speaker intends to cause unlawful harm or violence to someone. *Id.* (citing *Counterman v. Colorado*, 600 U.S. 66, 74 (2023)). It does not matter whether the speaker intended to make a threat; rather, it depends on whether the person hearing the speech believes there is a threat. *Rovin*, 488 Md. at 218–19, 321 A.3d at 245. Ms. *Rovin*’s words made the foreperson fearful of potential harm from the Nicaraguan person. *Id.* at 220, 321 A.3d at 245–46. Therefore, Ms. *Rovin*’s words to the foreperson could have amounted to a true threat, which gave the officer probable cause for the arrest. *Id.*

Finally, the court found the juror intimidation statute not to be vague. *Rovin*, 488 Md. at 222, 321 A.3d at 247. A statute becomes unconstitutionally vague when an ordinary person cannot define the requirements of the statute. *Id.* at 221, 321 A.3d at 246. Ms. *Rovin* argues that the juror intimidation statute was unconstitutionally vague because she and the State had different interpretations, which led to her acquittal. *Id.* at 220, 321 A.3d at 246. Ms. *Rovin*’s argument is unconvincing because vagueness is not found through an acquittal. *Id.* at 222, 321 A.3d at 247.

Justice Watts dissented because the court had remanded the case to determine if the *Heien* principle applied. *Rovin*, 488 Md. at 225, 321 A.3d at 249 (Watts, J., dissenting). Watts agreed with the majority that *Heien* did not apply here but argued that the court was incorrect in applying *Messerschmidt* because the circuit court did not consider those principles when granting summary judgment, and it was not cited in the State’s brief. *Id.* at 230–31, 321 A.3d at 252 (Watts, J., dissenting). At the end of her dissent, Watts states,

“[t]his decision will be one of the most impactful decisions of this [c]ourt.”  
*Id.* at 238, 321 A.3d at 257 (Watts, J., dissenting).

The *Rovin* decision extends the MTCA immunity to police officers when they have probable cause for arrest. This ruling encourages police officers to consult prosecutors and rely on their interpretation of the law. However, *Leon* is now binding case law in Maryland, creating a higher bar for a plaintiff to prove a lack of probable cause for wrongful arrests. Also, the court states that the juror intimidation statute was ambiguous at first glance and required an extensive review of the legislative history, which would not be common knowledge to laypeople. Therefore, the Maryland legislature should review the juror intimidation statute and refine the language to avoid further mistakes of law.

## RECENT DEVELOPMENT

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### ***BENNETT V. GENTILE*: MARYLAND REINFORCED THE STRICT PRIVACY RULE REASONING THAT NON-CLIENT BENEFICIARIES MAY NOT BRING MALPRACTICE CLAIMS UNLESS THEY CAN SATISFY THE THIRD-PARTY BENEFICIARY EXCEPTION.**

**By: Emma Tedder**

The Supreme Court of Maryland held the strict privity rule remains the law regarding the ability of beneficiaries to bring a claim against an attorney for malpractice. *Bennett v. Gentile*, 487 Md. 604, 607, 321 A.3d 34, 36 (2024). Additionally, the court ruled that a beneficiary must show the direct purpose of the estate plan was to benefit the non-client beneficiary to meet the third-party beneficiary exception to the strict privity rule. *Id.* at 630, 321 A.3d at 49–50.

Pauline Bennett (“Pauline”), Madelyn Bennett’s (“Madelyn”) mother, retained Attorney Thomas Gentile (“Gentile”) in 2015 to draft her estate plan. The Pauline A. Bennett Revocable Living Trust (“Trust”) was executed by Pauline on October 15, 2015 (“2015 Instrument”). Under the 2015 Instrument, Pauline was the Settlor, Trustee, and Beneficiary. Pauline’s intention under subsection 1.02 was for her to hold her two properties, Fillmore and Wissahican, as trustees. She also signed a deed transferring these properties to herself.

A subsequent subsection stated that Pauline would use the properties as Settlor until her death, except Wissahican, which would be used “solely for the benefit of her daughter Audrey Bennett-Eney” (“Audrey”). The following subsections explained how distributions would be made after Pauline’s death, and that Madelyn would serve as “Successor Trustee” after her death or disability.

In May of 2017, Pauline executed a new trust instrument with the help of Gentile. Audrey was added as Successor Trustee to serve jointly with Madelyn. In 2019, Pauline discovered that Audrey was mismanaging her finances and began to worry about having enough money to pay for her nursing facility. Pauline wanted to sell Wissichican to pay for her care and asked Gentile to amend her estate plans to return Wissichican to her and remove any provisions stating it would go to Audrey. Pauline signed the new trust instrument in November of 2019. On December 31, 2019, Pauline passed away, and Madelyn assumed her role as Successor Trustee. Subsequently, a dispute arose between Audrey and Madelyn about who owned Wissahican.

On April 3, 2020, Madelyn, as trustee, filed a complaint in the Circuit Court for Montgomery County alleging Wissahican belonged to her, not Audrey. The circuit court granted summary judgment in Audrey's favor because the provisions in the 2017 Instrument governed the estate.

After losing Wissahican to Audrey, Madelyn brought claims against Gentile in the circuit court, alleging negligent drafting of the estate, seeking damages as trustee and in a personal capacity. Despite Madelyn describing herself as an intended third-party beneficiary, all claims were resolved in Gentile's favor on summary judgment due to the strict privity rule prohibiting non-client third-party beneficiaries in legal malpractice cases from pursuing claims. Madelyn appealed to the Appellate Court of Maryland, but while it was pending, she petitioned for a writ of *certiorari*, which the Supreme Court of Maryland granted.

The two issues the Supreme Court addressed on appeal were: (1) whether the strict privity rule should be overturned and replaced by the balancing of factors test, and (2) whether the third-party beneficiary exception applied. *Bennett*, 487 Md. at 615, 321 A.3d at 40.

First, the court explained that privity of contract is required to allege a malpractice claim against an attorney. *Bennett*, 487 Md. at 616, 321 A.3d at 41. Maryland follows the strict privity rule, which does not allow non-clients injured by an attorney's work to recover unless they show fraud or collusion. *Id. Nobel v. Bruce* established the strict privity rule in estate planning. *Id.* at 617, 321 A.3d at 42. The *Noble* court supported its strict privity holding through multiple public policies, including "protecting an attorney's duty of loyalty" and "preventing conflicts of interest between attorneys and beneficiaries." *Id.* at 618, 321 A.3d at 42 (citing *Noble v. Bruce*, 349 Md. 730, 741-42, 758, 709 A.2d 1264(1998)).

Furthermore, the court rejected the balancing of factors test used by other jurisdictions. *Bennett*, 487 Md. at 616-17, 321 A.3d at 41. The balancing of factors test considers several factors, such as "foreseeability of harm to the beneficiary," the intent behind the transaction, and the causal connection between the alleged negligent drafting and the beneficiary's injury, to determine whether a non-client has recourse against an attorney who drafted the will. *Id.* The court here ultimately maintained the strict privity rule, rejecting the balancing of factors test because it is broad, unworkable, and likely to produce inconsistent results. *Id.* at 618, 321 A.3d at 42.

The court subsequently analyzed whether *stare decisis* protects the strict privity rule established in *Noble's* estate planning context. *Bennett*, 487 Md. at 620-21, 321 A.3d at 44. Courts may abandon *stare decisis* when a significant change in the law or facts impacts the precedent or when the decision opposes established principles and is obviously erroneous. *Id.* at 621, 321 A.3d at 44. The court decided not to overturn *Noble's* strict privity

rule because there was no showing of clear error and no “significant change in the law or facts.” *Id.* at 622, 321 A.3d at 45.

The court then turned to the recognized exception to the strict privity rule known as the third-party beneficiary exception. *Bennett*, 487 Md. 624, 321 A.3d at 46. The third-party beneficiary exception requires a showing that the client’s intent and clear motive for hiring an estate planning lawyer was to benefit the non-client third party. *Id.* at 625, 321 A.3d at 46. The court noted that being a testamentary beneficiary under *Noble* does not automatically grant a person the right to bring claims against the drafting attorney as a third-party beneficiary. *Id.* at 626, 321 A.3d at 47. When amending the Trust in 2019, Pauline’s primary goal was to ensure she had enough money to pay for her nursing facility and to prevent Audrey from inheriting the Trust property. *Id.* at 631, 321 A.3d at 50. Pauline then decided Madelyn would receive anything left, which the court interpreted as merely incidental to removing Audrey as a beneficiary. *Id.* at 631, 321 A.3d at 50. In conclusion, there was no evidence to overcome the inference that Pauline executed her estate plan to benefit herself; therefore, the third-party beneficiary exception was not met. *Id.* at 628–29, 321 A.3d at 48.

The *Bennett* decision further established the strict privity rule in Maryland. The court clarified that they do not intend to replace the strict privity rule with the balancing of factors test. For beneficiaries, pursuing a malpractice claim against an attorney remains quite difficult. Beneficiaries may experience unjust outcomes and have no recourse against attorneys as a result. However, the rule protects attorneys from being overwhelmed with malpractice claims if there are multiple beneficiaries. The strict privity rule may incentivize testators to choose competent attorneys and review the distributions in their estate plan, since beneficiaries will most likely have no recourse if the attorney commits malpractice.

