

# 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 pleased to present the first issue of the 2025-2026 academic year. As Maryland's premier legal journal, our Staff strives to provide those in the legal profession with thoughtful legal insights to facilitate meaningful discussions surrounding Maryland law.

We begin issue one with a discussion on this year's symposium topic: Maryland's *Voir Dire* Pilot Program. Our first article discusses a robust review of this history and the impact of Maryland's current policy of limited *voir dire*, a process in which the judiciary, rather than the attorneys, questions potential jurors to identify any biases that would make them unfit to serve. Then, the next article on *voir dire* explores the history and tradition of *voir dire* from the Framers' view and how Maryland applies that to the Pilot Program. Next, the issue evaluates the changing case law and statutory laws governing sepulchers and burial rights. Finally, we explore how Maryland transitioned from a feudal province to a modern republic by adopting England's power of contempt, a tool for upholding judicial authority that survived the American Revolution and became a permanent fixture of the state's 1776 Constitution.

The publication then showcases a curated selection of student scholarship, determined by the Editorial Board. A student comment, by Iman Aziz, examines the ongoing debate over Maryland's adherence to the "all-or-nothing" rule in medical malpractice litigation. While Maryland courts currently require a plaintiff to prove that a healthcare provider's negligence was more likely than not the cause of injury or death, this comment analyzes the legal and ethical arguments for adopting a loss-of-chance standard. Finally, issue one presents five recent developments in Maryland law from the Supreme Court and the Appellate Court of Maryland. These essays, written by our Staff Editors, discuss some of Maryland's most significant rulings and their impact on the legal community. For more work from our Staff this year, please visit [ublforum.com](http://ublforum.com) to read our Hot Topics.

This publication reflects the extraordinary work of our Staff Editors, Associate Editors, and Editorial Board. As our academic year began, our Executive Board encouraged our Staff to view every article as an opportunity to sharpen their skills and contribute something meaningful to the legal community. This Staff has gone above and beyond expectations while working to bring this issue to our readers. Thank you to the many faculty members who have encouraged and guided our Staff throughout this issue. Additionally, I would like to thank Mr. Steve Klepper and Mr. David Harak for their mentorship given to *Law Forum*, especially towards this volume's symposium.

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

Sincerely,  
Michaela "Odi" Odian, Editor-in-Chief  
*University of Baltimore Law Forum*, Volume 56, Issue 1

Member, National Conference of Law Reviews

**UNIVERSITY OF BALTIMORE LAW FORUM**

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## ARTICLE

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### THE HISTORY AND TRADITION OF VOIR DIRE: WHY MARYLAND SHOULD EXPAND ITS JURY SELECTION PROCEDURES

By: Dallon Danforth, Esq.<sup>1</sup>

#### I. INTRODUCTION.

In forty-five states, jury selection procedures authorize trial attorneys to explore potential bases for exercising peremptory challenges<sup>2</sup> and Maryland is not among them.<sup>3</sup> In Maryland, *voir dire*<sup>4</sup> procedures are exclusively limited to identifying potential challenges for cause.<sup>5</sup> Maryland is also unique in that the *voir dire* process is almost exclusively conducted by circuit court judges, rather than a party's own counsel.<sup>6</sup> Only with a court's leave may trial attorneys lead the *voir dire* process by directly

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<sup>1</sup> Dallon Danforth, Esq. is an associate at Furman|Honick Law and an alumnus of the University of Baltimore School of Law. He would like to thank the staff members of Volume 56 of the University of Baltimore Law Forum for their thorough assistance in producing this piece. Please note that the opinions and arguments contained herein do not necessarily reflect the views of any associated organization. The purpose of this piece is simply to compare Maryland's current *voir dire* laws to the type of procedures that were likely contemplated when drafting the Sixth Amendment of the United States Constitution. This piece does not ultimately conclude that any one form of *voir dire* is necessarily superior to another. Finally, the author would like to thank the reader for their time and attention to this topic.

<sup>2</sup> *Voir Dire*, Black's Law Dictionary (12th ed. 2024) (explaining a peremptory challenge is "a party's limited number of challenges that do not need to be supported by a reason unless the opposing party makes a prima facie showing that the challenge was used to discriminate on the basis of race, ethnicity, or sex").

<sup>3</sup> See Ian Round, *Maryland Supreme Court Approves Pilot to Expand Lawyers' Role in Voir Dire*, THE DAILY REC. (Sep. 13, 2024), <https://thedailyrecord.com/2024/09/13/md-supreme-court-approves-pilot-to-expand-lawyers-role-in-voir-dire/> (on file with the University of Baltimore Law Forum).

<sup>4</sup> *Dingle v. State*, 759 A.2d 819, 823 (Md. 2000) (explaining that "[v]oir dire [is] the process by which prospective jurors are examined to determine whether cause for disqualification exists").

<sup>5</sup> See MD. CODE ANN., MD. RULES § 2-512(d)(1) (West 2025); *id.* § 4-312(e)(1) (West 2025); see also *Collins v. State*, 205 A.3d 1012, 1030 (Md. 2019) ("In Maryland, voir dire's sole purpose is to elicit specific cause for disqualification, not to aid in the intelligent use of peremptory strikes.").

<sup>6</sup> See MD. CODE ANN., MD. RULES § 2-512(d)(1) (West 2025); *id.* § 4-312(e)(1) (West 2025).

questioning members of the venire, and even if granted, such questioning cannot be used for any purpose relating to potential peremptory challenges.<sup>7</sup> In terms of both scope and form, Maryland’s *voir dire* laws remain an outlier on a national level.<sup>8</sup>

Maryland’s *voir dire* process, aptly described as “limited *voir dire*” by the Supreme Court of Maryland,<sup>9</sup> came to an inflection point in 2024 when the Maryland General Assembly<sup>10</sup> and the Supreme Court of Maryland<sup>11</sup> considered expanding Maryland’s *voir dire* laws in terms of both scope and form. In lieu of entering final decisions on the matter, the Supreme Court of Maryland implemented a temporary “Pilot Program for Expanded Voir Dire,”(hereinafter referred to as the “Pilot Program”) whereby a select number of circuit court judges were authorized to employ five new forms of expanded *voir dire* procedures to gather data from which future amendments to Rules 2-512 and 4-312, if any, will rely.<sup>12</sup>

This pivotal moment presents a rare opportunity to amend Maryland’s laws to more closely comport with the history and tradition of the Sixth Amendment right to an impartial jury.<sup>13</sup> Although the constitutionality of *voir dire* procedures is not reviewed under a strict “history and tradition” standard *per se*, the Supreme Court of the United States consistently emphasizes and incorporates historical and traditional factors while analyzing issues pertaining to the right to an impartial jury.<sup>14</sup> As such, any discussion relating to the means of achieving an impartial jury

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<sup>7</sup> See *id.* § 2-512(d)(1); *id.* § 4-312(e)(1).

<sup>8</sup> See Round, *supra* note 3.

<sup>9</sup> Pearson v. State, 86 A.3d. 1232, 1235 (Md. 2014).

<sup>10</sup> See S.B. 827, 2024 Leg., 446th Sess. (Md. 2024) (cross-filed with H.B. 1079, 2024 Leg., 446th Sess. (Md. 2024)).

<sup>11</sup> STANDING COMM. OF RULES OF PRAC. AND PROC., TWO HUNDRED AND TWENTY-SECOND REPORT, MD. CT. (2024), <https://www.courts.state.md.us/sites/default/files/rules/reports/222ndreport.pdf> (on file with the University of Baltimore Law Forum).

<sup>12</sup> MD. JUDICIARY, *Expanded Voir Dire Pilot* (2025), <https://www.courts.state.md.us/sites/default/files/import/lawyers/pdfs/voirdirepacket.pdf> (on file with the University of Baltimore Law Forum) (Maryland Rule § 2-512 governs *voir dire* procedures in civil cases, whereas Maryland Rule § 4-312 is the criminal analog).

<sup>13</sup> See *infra* Parts III-V; U.S. CONST. amend. XI (explaining that *voir dire* is not a separate and distinct constitutional right in and of itself but is instead considered the procedural means required to achieving the ends of an impartial jury as guaranteed by the Sixth Amendment).

<sup>14</sup> See, e.g., Pena-Rodriguez v. Colorado, 580 U.S. 206, 210–11 (2017); J.E.B. v. Ala. ex rel. T.B., 511 U.S. 127, 128, 155 (1994); Batson v. Kentucky, 476 U.S. 79, 99 n.22 (1986); Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 508, 509 n.8 (1984); Ham v. South Carolina, 409 U.S. 524, 528 (1973). See generally Swain v. Alabama, 380 U.S. 202 (1965) (analyzing whether a prosecutor was utilizing peremptory challenges in discriminatory practices).

warrants reflection on the historical and traditional underpinnings of that same right.<sup>15</sup>

To that end, Part II of this article briefly explores the potential future of expanded *voir dire* in Maryland through the context of the experimental Pilot Program.<sup>16</sup> Part III presents a pertinent history of jury selection in the colonial United States through the early nineteenth century, demonstrating the particular context and sociopolitical considerations surrounding the ratification of the Sixth Amendment.<sup>17</sup> Part IV then analyzes the judicial history of *voir dire* laws in Maryland specifically, as well as the analytical shortcomings in early decisions that have since tainted the resulting progeny upholding limited *voir dire*.<sup>18</sup> Part V explains how the *voir dire* procedures studied by the Pilot Program would, if adopted, more closely comport with the Framers' intentions when drafting the Sixth Amendment.<sup>19</sup> In particular, Part V explains that: (1) early American laws promoted the meaningful exercise of peremptory challenges; (2) colonial Americans specifically rejected court-led *voir dire*; and (3) colonial Americans generally considered attorney-led *voir dire* to be the most effective method of protecting the right to an impartial jury.<sup>20</sup> From this perspective, this article ultimately concludes that Maryland should adopt expanded *voir dire* procedures in order to more faithfully execute and achieve the requirements of a "fair and impartial jury" as contemplated by the Framers at the time of ratifying the Sixth Amendment.<sup>21</sup>

For the purposes of this article, the label of "expanded *voir dire*" refers to jury selection procedures that vary in terms of both scope and form when compared to Maryland's current laws.<sup>22</sup> In this context, the scope of *voir dire* refers to a litigant's ability to probe for information relating to the exercise of either challenges for cause *and* peremptory challenges, or challenges for cause exclusively.<sup>23</sup> The form of *voir dire* refers to any procedures that vary from strict court-led *voir dire*, regardless of whether

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<sup>15</sup> See, e.g., *Pena-Rodriguez*, 580 U.S. at 210–11; *J.E.B.*, 511 U.S. at 128, 155; *Batson*, 476 U.S. at 99 n.22; *Press-Enterprise Co.*, 464 U.S. at 508, 509 n.8; *Ham*, 409 U.S. at 528. See generally *Swain*, 380 U.S. 202 (analyzing whether a prosecutor was utilizing peremptory challenges in discriminatory practices, which if found would prevent an impartial jury).

<sup>16</sup> See *infra* Part II.

<sup>17</sup> See *infra* Part III.

<sup>18</sup> See *infra* Part IV.

<sup>19</sup> See *infra* Part V.

<sup>20</sup> See *infra* Section V.C.

<sup>21</sup> See *infra* Part VI.

<sup>22</sup> MD. JUDICIARY, *Expanded Voir Dire Pilot* (2025), <https://www.courts.state.md.us/sites/default/files/import/lawyers/pdfs/voirdirepacket.pdf> (on file with the University of Baltimore Law Forum).

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

such procedures would also expand the scope of questioning to account for peremptory challenges.<sup>24</sup> Since neither concept is mutually exclusive of the other, and in fact the two overlap quite frequently, this article uses the term “expanded *voir dire*” to generally describe either one or both instances.<sup>25</sup>

It is important to note that this article does not assume or otherwise conclude that Maryland’s current *voir dire* procedures are constitutionally deficient. The only conclusion advanced by this article is that the Framers understood the right to an “impartial jury” to protect the type of expansive *voir dire* procedures utilized in colonial America,<sup>26</sup> which Maryland’s current laws do not reflect.<sup>27</sup> This article also does not address the relative merits between expanded and limited *voir dire*, for which there is a legitimate debate.<sup>28</sup> Instead, the only policy rationale underlying this analysis is the general presumption that the better of two laws more closely comports with the original intentions of applicable constitutional provisions.<sup>29</sup> This article ultimately suggests that Maryland law could more closely resemble the original intent of the Sixth Amendment by embracing expanded *voir dire* procedures.<sup>30</sup>

## II. THE FUTURE OF EXPANDED VOIR DIRE IN MARYLAND’S PILOT PROGRAM.

“In anticipation of potential changes to Rules 2-512 and 4-312,” the Supreme Court of Maryland enacted Rule 16-310 on September 14, 2024.<sup>31</sup> Rule 16-310 authorized the Supreme Court to implement an expanded *voir*

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

<sup>25</sup> See *infra* Parts II-VI; see also MD. JUDICIARY, *Expanded Voir Dire Pilot* (2025), <https://www.courts.state.md.us/sites/default/files/import/lawyers/pdfs/voirdirepacket.pdf> (on file with the University of Baltimore Law Forum) (using “expanded *voir-dire*” as another term for are more attorney-led *voir dire*).

<sup>26</sup> See, e.g., *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 210–11 (2017); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 128, 155 (1994); *Batson v. Kentucky*, 476 U.S. 79, 99 n.22 (1986); *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 508, 509 n.8 (1984); *Ham v. South Carolina*, 409 U.S. 524, 528 (1973). See generally *Swain v. Alabama*, 380 U.S. 202 (1965) (analyzing whether a prosecutor was utilizing peremptory challenges in discriminatory practices, which if found would prevent an impartial jury).

<sup>27</sup> See *infra* Section III.C.1.

<sup>28</sup> See *infra* Parts II-VI.

<sup>29</sup> See *infra* Part III.

<sup>30</sup> See *infra* Parts II-VI.

<sup>31</sup> MD. CODE ANN., MD. RULES § 16-310 (West 2025); see also STANDING COMM. OF RULES OF PRAC. AND PROC., TWO HUNDRED AND TWENTY-SECOND REPORT, MD. CT., at 2 (2024), <https://www.courts.state.md.us/sites/default/files/rules/reports/222ndreport.pdf> (on file with the University of Baltimore Law Forum) (listing the Maryland Rule amendments the Supreme Court of Maryland approved).

*dire* Pilot Program for three (3) express purposes.<sup>32</sup> First, the Pilot Program will be used to “study the effects of expanded voir dire on the effectiveness and efficiency of jury selection, case management, juror satisfaction, public perception of the trial process, court operations, and related concerns.”<sup>33</sup> Second, any data collected through the Pilot Program will be used to “inform efforts of the Standing Committee on Rules of Practice and Procedure and the Supreme Court [of Maryland] to consider whether amendments to Rules 2-512 and 4-312 are appropriate.”<sup>34</sup> Third, if amendments to Rules 2-512 and 4-312 are considered appropriate, that the data produced by the Pilot Program will be used to “develop guidance and education to assist courts, attorneys, and litigants in the implementation of expanded voir dire statewide.”<sup>35</sup>

With respect to the first enumerated purpose, Rule 16-310 is silent as to the varying types of expanded *voir dire* procedures that are authorized to occur within the scope of the Pilot Program.<sup>36</sup> However, the Maryland Judiciary has officially recommended five different forms of expanded *voir dire* procedures to be utilized within the scope of the Pilot Program: (1) traditional court-led *voir dire* with additional questions to aid in the intelligent exercise of peremptory strikes; (2) individual juror *voir dire* at the bench or outside the trial courtroom; (3) attorney-led *voir dire* of a panel; (4) written questionnaires containing *voir dire* questions; and (5) limited opening remarks before the beginning of *voir dire*.<sup>37</sup>

The experimental methods proposed by the Judiciary already signify a material shift towards a more historical and traditional approach to jury selection.<sup>38</sup> Substantively, the Judiciary’s recommendations sought to change the current *voir dire* process in terms of both scope and form. Proposed method one, for example, plainly seeks to expand the scope of Maryland’s *voir dire* laws by authorizing questions designed to promote “the intelligent exercise of peremptory strikes.”<sup>39</sup> However, under method

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<sup>32</sup> See MD. CODE ANN., MD. RULES § 16-310 (West 2025).

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

<sup>34</sup> *Id.*

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

<sup>36</sup> See *id.*

<sup>37</sup> See MD. JUDICIARY, *Expanded Voir Dire Pilot* (2025), <https://www.courts.state.md.us/sites/default/files/import/lawyers/pdfs/voirdirepacket.pdf> (on file with the University of Baltimore Law Forum) (explaining that the Maryland Judiciary has not recommended these alternative *voir dire* procedures in any order of preference or priority, nor has the Judiciary officially endorsed the adoption of any such procedure).

<sup>38</sup> See *infra* Part III.

<sup>39</sup> MD. JUDICIARY, *Expanded Voir Dire Pilot* (2025), <https://www.courts.state.md.us/sites/default/files/import/lawyers/pdfs/voirdirepacket.pdf> (on file with the University of Baltimore Law Forum).

three, which is the “attorney-led voir dire of a panel,” only *voir dire procedures* would be modified, while the limited scope of *voir dire* remains the same.<sup>40</sup> However, it should be noted that the Judiciary’s proposed recommendations do not present an exhaustive list of the potential forms of expanded *voir dire* that may be adopted following the the Pilot Program.<sup>41</sup> Therefore, any potentially adopted form of expanded *voir dire* is not limited by the Judiciary’s express recommendations and indeed may mirror any form of *voir dire* procedures utilized throughout history or otherwise.<sup>42</sup> In either event, the precise future of Maryland’s jury selection laws is uncertain and, given this uncertainty, reflecting on the history and tradition of *voir dire* is a valuable step in determining the future of Maryland’s jury trials.<sup>43</sup>

### III. THE HISTORY OF VOIR DIRE IN THE UNITED STATES.

#### A. *English Origins and Colonial Oppression.*

Like many aspects of American law, the United States inherited the jury trial from English common law.<sup>44</sup> From the fourteenth to the eighteenth centuries, lawyers in English jury trials “had little control over jury selection.”<sup>45</sup> This limitation arose from the fact that English common law did not provide for any form of *voir dire* into a panel of prospective jurors.<sup>46</sup> Although litigants retained the right to challenge individual venire members either with or without cause, any such challenge was based solely on extrajudicial information and was not the product of any form of pretrial questioning.<sup>47</sup> Even if the right to challenge was exercised—which it rarely

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<sup>40</sup> *See id.*

<sup>41</sup> *See id.*

<sup>42</sup> *See* STANDING COMM. OF RULES OF PRAC. AND PROC., TWO HUNDRED AND TWENTY-SECOND REPORT, MD. CT., at 2 (2024), <https://www.courts.state.md.us/sites/default/files/rules/reports/222ndreport.pdf> (on file with the University of Baltimore Law Forum).

<sup>43</sup> *See infra* Part III.

<sup>44</sup> *See* Richard Lempert, *The American Jury System: A Synthetic Overview*, 90 CHI-KENT L. REV. 825, 827 (2015) (“The colonies’ English heritage meant that at the time the Constitution was drafted, jury trial was a familiar way of resolving legal disputes. . . .”); *see also* Wanling Su and Rahul Goravara, *What is a Jury?*, 103 N.C.L. REV. 969, 1000 (2025) (explaining that American jury trials are based on English common law).

<sup>45</sup> April Anderson, *Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies as Seen in Practitioners’ Trial Manuals*, 16 STAN J.C.R. & C.L. 1, 3 (2020).

<sup>46</sup> *See id.* at 3–4 (explaining that at common law, there was no pretrial questioning of jurors).

<sup>47</sup> *See id.* at 4.

was<sup>48</sup>—early English juries were purposefully packed with jurors who were selected due to their loyalty to the Crown and bias against a defendant.<sup>49</sup>

In the absence of meaningful *voir dire* procedures, “corruption was rampant in the forming of juries, and the extent to which biased jurors served in criminal trials was a scandal.”<sup>50</sup> When criminal defendants communicated their grievances regarding the corrupt juries, Lord Chief Justice Coke openly embraced the fact that local sheriffs, who were then tasked with assembling said venire panels, were merely fulfilling a duty to the Crown by collecting jurors who would “favor the king” while deciding a case.<sup>51</sup> When trial attorneys raised similar challenges in later history, English courts again “roundly rejected lawyers’ attempts to question jurors in order to decide their peremptory challenges.”<sup>52</sup>

The English practice of packing juries while also denying any meaningful form of pretrial *voir dire* permeated into colonial America.<sup>53</sup> When the threat of the American Revolution became imminent, the practice of securing packed juries while denying *voir dire* was most commonly utilized in the trials of alleged American insurgents.<sup>54</sup> In such cases, “it became the policy of the Crown . . . to secure jurors favorable to the Crown . . . and to deny defendants an effective opportunity to ferret out biased jurors.”<sup>55</sup> When colonial loyalty to the Crown waned over time, and it became increasingly difficult for the British Empire to secure “loyal” jurors, Britain struggled to convict colonial defendants in both political and

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<sup>48</sup> See *id.* at 7 (explaining that infrequent use of challenges is attributed to a common cultural concern that attempting to strike a prospective juror would offend the individual and therefore taint the jury pool if the challenge was rejected).

<sup>49</sup> See Mac Gutman, *The Attorney-Conduct Voir Dire of Jurors: A Constitutional Right*, 39 BROOK. L. REV. 290, 291–92 (1972) (“The Lord Chief Justices of England from Lord Parnung in the fourteenth century reign of Edward III to Lord Coke were of the opinion that a juror biased against the defendant was *good* for the King. . . .” (emphasis in original text)).

<sup>50</sup> *Id.* at 292; see also WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 389 (John W. Parker and Son, West Strand, 1852) (“[T]o be accused of a crime against the state and to be convicted were almost the same thing.”).

<sup>51</sup> Gutman, *supra* note 49, at 293.

<sup>52</sup> Anderson, *supra* note 45, at 4.

<sup>53</sup> See Randall T. Shepard, *State Court Reform of the American Jury*, 117 YALE L.J. POCKET 166, 166 (March 18, 2008) (explaining procedure of trial by jury “accompanied the early English colonists to North America and took root in the colonial governments”); Anderson, *supra* note 45, at 17–18; see also Gutman, *supra* note 49, at 294 (“Prior to the American Revolution, the Crown’s propensity to favor biased jurors in trial of political significance infected trials in the colonial courts.”).

<sup>54</sup> See Gutman, *supra* note 49, at 294.

<sup>55</sup> See *id.*

quasi-political prosecutions.<sup>56</sup> As a result of “the colonial juries’ increasing refusal to convict colonists of crimes committed against the Crown, Britain eliminated the right to jury trials in particular categories of cases” and, in certain cases where the right to trial by jury remained, ordered “that the trials [shall] be conducted in England” rather than in America.<sup>57</sup> In effect, colonists charged with certain criminal offenses were frequently transported across the Atlantic Ocean and, as a result, were intentionally deprived of their ability to produce both evidence and witnesses in their defense.<sup>58</sup> Predictably, colonial Americans opposed Britain’s continued interference with their access to trial by an impartial jury.<sup>59</sup>

*B. American Expansions of Jury Selection Procedures.*

i. Pre-Revolution Efforts to Obtain Expanded Voir Dire.

Early Americans undertook significant efforts to expand the jury’s function and purpose even before declaring independence from the British Empire.<sup>60</sup> In 1760, the Massachusetts colony sought to further resist the Crown’s oppression by enacting the “Jury Selection Law of 1760.”<sup>61</sup> The Jury Selection Law, which is often recognized as the “first American iteration” of *voir dire*, changed jury selection procedures in Massachusetts in several material aspects.<sup>62</sup> Of relevance to this article, the Jury Selection

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<sup>56</sup> See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 872-74 (1994) (“Hundreds of defendants were convicted of [seditious libel] in England during the seventeenth and eighteenth centuries, but there seem to have been no more than a half-dozen prosecutions and only two convictions in America throughout the colonial period.”); see also Jon. P. McClanahan, *The ‘True’ Right to Trial by Jury: The Founders’ Formulation and its Demise*, 111 W. VA. L. REV. 791, 792 (2009) (explaining seditious libel trial of American insurgent, John Peter Zenger).

<sup>57</sup> McClanahan, *supra* note 55, at 792; see also *id.* at 802–03 (“Under the Administration of Justice Act of 1774 . . . colonists accused of treason would be tried in Britain instead of in America, effectively denying the accused the right to be tried by a jury of his peers.”).

<sup>58</sup> See Alschuler & Deiss, *supra* note 56, at 875.

<sup>59</sup> McClanahan, *supra* note 56, at 792.

<sup>60</sup> See Gutman, *supra* note 49, at 294–95.

<sup>61</sup> *Id.* at 294 n.15 (explaining that the Jury Selection Law of 1760 is also referred to as “[a]n Act for Better Regulating the Choice of Petit Jurors”).

<sup>62</sup> See *id.*; see also Colin P. Saltry, *What’s (Who You) Love got do with it?: Should Sexual Orientation be a Permissible Basis for Peremptory Challenges?*, 51 CT. REV. 36, 37 (2015) (explaining Massachusetts’ jury process including, who qualifies as a juror, interviewing jurors to determine if they will be fair and impartial, and peremptory challenges attorneys may take and a judge’s role to approve them).

Law specifically “allow[ed] the accused to thoroughly examine the character and biases of prospective jurors” in advance of trial.<sup>63</sup>

Moreover, such pre-trial questioning, as well as the selection of the panel of prospective jurors, was conducted in the open, public forum of local town meetings, where members of the public could aid in the jury selection process, absent court participation.<sup>64</sup> Naturally, similar *voir dire* procedures modeled after the Massachusetts Jury Selection Law “spread from New England to the rest of the colonies” until, over the course of the following fourteen years, the practice of questioning prospective jurors for the purpose of exercising peremptory challenges was a recognized element of the American criminal justice system.<sup>65</sup>

As a result of Massachusetts’s Jury Selection Law, colonial Americans were able to use information obtained through the judicial process in order to engage in the intelligent exercise of peremptory challenges for the first time in the history of the United States.<sup>66</sup> In 1774, the British Parliament passed an Act overturning the Jury Selection Law and, in doing so, re-vested the jury selection process “entirely in the court.”<sup>67</sup> The American colonies declared independence from the British Empire only two years later.<sup>68</sup>

## ii. The Framers’ Contemplation of Expanded Voir Dire.

When the colonists declared independence from the British Empire, the Framers were largely concerned with reclaiming the sociopolitical

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<sup>63</sup> Gutman, *supra* note 49, at 294; *see also* Ann Hopkins, *Mens Rea and the Right to Trial by Jury*, 76 CALIF. L. REV. 391, 396 n.28 (1988) (“Under the Massachusetts law, the sheriff chose prospective jurors from a list compiled at town meetings by colonists who screened jury candidates for character and bias.”).

<sup>64</sup> *See* Gutman, *supra* note 49, at 294; *see also* Tracy L. Treger, *One Jury Indivisible: A Group Dynamics Approach to Voir Dire*, 68 CHI.-KENT L. REV. 549, 553 (1992) (explaining how Massachusetts used open town meetings where the community could interview prospective jurors for biases).

<sup>65</sup> Saltry, *supra* note 62, at 37; Gutman, *supra* note 49, at 296–99; *see also* Shepard, *supra* note 53, at 167 (“All twelve of the Revolutionary-era state constitutions enshrined the right to jury trial in criminal prosecutions.”).

<sup>66</sup> *See* Treger, *supra* note 64, at 553 (“When the sheriff’s jury list was presented, the defense could use the information to exercise challenges.”); *see also* Randolph G. Adams, *New Light on the Boston Massacre*, 47 AM. ANTIQUARIAN SOC’Y 259, 328-29 (1937) <https://www.americanantiquarian.org/sites/default/files/proceedings/44806960.pdf> (on file with the University of Baltimore Law Forum) (noting that, due to the Jury Selection Law of 1760, “the examination of jurors is now more in the hands of the people than ever before”).

<sup>67</sup> Gutman, *supra* note 49, at 294–95.

<sup>68</sup> THE DECLARATION OF INDEPENDENCE para. 17 (U.S. 1776).

protections made possible through an impartial jury.<sup>69</sup> So much so that, “among the numerous grievances against King George III listed in the Declaration of Independence was the complaint that he ‘deprive[d] us, in many cases, of the benefits of trial by Jury.’”<sup>70</sup> With the goal of securing impartial juries at the forefront of consideration, the United States’ early legal system was “strongly influenced by its British ancestry” and, in doing so, the framers created new laws designed to prevent what they considered to be unfair British control.<sup>71</sup>

In early constitutional conventions, the “Crown’s propensity for biased jurors” was a subject of frequent discussion.<sup>72</sup> Unlike many points of debate in the constitutional conventions, securing the right to an impartial jury was generally “the most consistent point of agreement between the Federalists and Anti-Federalists.”<sup>73</sup> Although the Framers “considered the right to a jury trial to be of the utmost importance to American citizens, there was little guidance provided on how the right to a jury trial should be

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<sup>69</sup> See McClanahan, *supra* note 56, at 803 (“[T]he Founders staunchly believed that juries played an essential role in the success of a democracy, by protecting against governmental overreaching, by enabling citizens to participate in the democratic process, and by operating as a central figure in the administration of justice.”); see also Alschuler & Deiss, *supra* note 56, at 871 (“The framer’s enthusiastic support for the jury stemmed in large measure from the role that juries had played in resisting English authority before the Revolution.”).

<sup>70</sup> Shepard, *supra* note 53, at 165 (quoting THE DECLARATION OF INDEPENDENCE para. 17 (U.S. 1776)) (especially relevant to this Article is the fact that the Declaration of Independence was signed by Justice Samuel Chase; a Maryland native, a Maryland attorney, and a Baltimore City judge prior to his appointment to the Supreme Court of the United States. As explained more fully in Part IV, Justice Chase’s rejection of expanded *voir dire* functionally embodies Maryland’s fundamental misconception about the *voir dire* process as provided by the Sixth Amendment).

<sup>71</sup> McClanahan, *supra* note 56, at 792.

<sup>72</sup> Gutman, *supra* note 49, at 296 n.22.

<sup>73</sup> See Alschuler & Deiss, *supra* note 56, at 871; JOHN R. VILE, THE DECLARATION OF INDEPENDENCE: AMERICA’S FIRST FOUNDING DOCUMENT IN U.S. HISTORY AND CULTURE, 67–68 (2019) (explaining that the overwhelming agreement to secure impartial juries is evidenced, in part, by the language of the Fifth Resolution from the Declaration and Resolves of the First Continental Congress); Richard L. Perry, & John C. Cooper, *Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights*, AM. BAR ASS’N 267, 272, 288 (1952) (explaining the Fifth Resolution provided that “[t]he respective colonies are entitled to . . . the great and inestimable privilege of being tried by their peers of the vicinage.” If the “inestimable privilege” to be tried by one’s peers of the vicinage should be afforded any meaning, it could only be afforded the meaning that the Framers would have understood in the context of British oppression: as a shield of democracy made possible through robust *voir dire* procedures and the intelligent exercise of peremptory challenges); see also McClanahan, *supra* note 56, at 804 (“During the Constitutional Convention, the protection of the right to trial by jury had widespread support among both Federalists and Anti-Federalists. . . .”).

implemented.”<sup>74</sup> Of course, with respect to obtaining an “impartial jury” as proscribed by the Sixth Amendment (and Article Twenty-One of the Maryland Declaration of Rights), the Framers also failed to include any clarifying language in either the Constitution or the Bill of Rights.<sup>75</sup> Yet, like much of the Constitution’s original language, the lack of procedural guidance for obtaining an impartial jury was the product of design rather than substantive rejection.<sup>76</sup>

As explained by Alexander Hamilton in *The Federalist* Number 83, the Framers recognized that it “would be extremely difficult, if not impossible, to suggest any general regulation [for regulating juries] that would be acceptable to all the States in the Union.”<sup>77</sup> Instead, as Hamilton explained more generally, the Constitution’s omission of certain procedural mechanisms should not be interpreted as a rejection of those same procedures.<sup>78</sup> Rather, many aspects of the Constitution, including but not limited to the Sixth Amendment right to an impartial jury,<sup>79</sup> must be interpreted and legislated according to the “Founders’ conception” of those rights at the time of each provision’s ratification.<sup>80</sup> Therefore, any procedural mechanisms associated with the Sixth Amendment right to an impartial jury must be interpreted according to how the Framers understood those procedures leading up to and during the ratification of the Sixth Amendment.<sup>81</sup>

In the context of *voir dire*, the Founders understood the very real necessity for expansive and meaningful pretrial questioning.<sup>82</sup> It is axiomatic that, having lived through the British Empire’s pattern of judicial

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<sup>74</sup> McClanahan, *supra* note 56, at 793.

<sup>75</sup> *See id.* at 804.

<sup>76</sup> *See id.* (“[T]he specifics of the right [to trial by jury] were not well delineated in the Constitution or in the Bill of Rights. . . . Such flexibility may well have been by design. . . .”).

<sup>77</sup> THE FEDERALIST NO. 83 (Alexander Hamilton).

<sup>78</sup> *See generally id.* (concluding that the U.S. Constitution ensures judicial fairness and preserves liberty).

<sup>79</sup> *See generally* Ramos v. Louisiana, 590 U.S. 83 (2020) (analyzing the Sixth Amendment right to a unanimous conviction according to how the Framers would have understood that right at the time of ratification).

<sup>80</sup> McClanahan, *supra* note 56, at 805; *see also* Ramos, 590 U.S. at 90 (“Wherever we might look to determine what the term ‘trial by an impartial jury trial’ meant at the time of the Sixth Amendment’s adoption [we must look to] the common law, state practices in the founding era, or opinions and treatises written soon afterward. . . .”).

<sup>81</sup> *See* McClanahan, *supra* note 56, at 805 (“[I]f a jury is to be a ‘safeguard to liberty’ or the ‘palladium of free government’ as the Founders so intended, one must endeavor to understand the Founders’ conception of the jury, so that the jury is equipped with the powers necessary to carry out this vision. Among the most important functions of the jury are as protector against government overreaching. . . .”).

<sup>82</sup> *See id.*

misconduct against the American colonists, the Framers would have appreciated the sociopolitical benefits of questioning members of the venire in order to exercise intelligent pretrial challenges.<sup>83</sup> Moreover, after having witnessed the successful expansion of *voir dire* procedures following the Massachusetts Jury Selection Law of 1760, as well as the British Empire's subsequent opposition to that success, the Framers would not only understand but also greatly value the type of expanded *voir dire* procedures that protected the colonists against British oppression:

The words "impartial jury" unquestionably import a fundamental change in the English challenges rules. [The Framers] contemplated a far broader area of objectionable bias, clearly including non-specific biases and prejudices, as well as those implied from prior and pre-existing juror-defendant relations. Moreover, it cannot be disputed that the proponents of the sixth amendment "impartial tribunal" clause contemplated the *voir dire* as a critical stage of trial.<sup>84</sup>

The Framers' implicit incorporation of expanded *voir dire* is further evidenced by the language and debates accompanying Proposition Seven of the proposed amendments to the Constitution by the Select Committee of the House of Representatives during the first session of the First United States Congress.<sup>85</sup> Proposition Seven, in pertinent part, read that "[t]he trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage with the requisite of unanimity for conviction, the right of challenges and other accustomed requisites. . . ."<sup>86</sup> After consideration, the Senate rejected Proposition Seven in its original form.<sup>87</sup> Still, the House of Representatives insisted upon its content and returned an amended version of Proposition Seven which, even post-amendment, secured the right to challenge members of the venire.<sup>88</sup>

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<sup>83</sup> See *supra* Sections III.A-B.

<sup>84</sup> Gutman, *supra* note 49, at 296.

<sup>85</sup> Ramos v. Louisiana, 590 U.S. 83, 97 n.39 (2020).

<sup>86</sup> See *generally id.* (explaining that expanded *voir dire*, the right to a unanimous conviction, was also not explicitly contained in any part of the Constitution. In 2020, the Supreme Court assessed the history and tradition surrounding the Sixth Amendment in order to conclude that all criminal convictions in the United States require a unanimous verdict. A similar analysis in the context of expanded *voir dire* should, predictably, yield a similar conclusion).

<sup>87</sup> Gutman, *supra* note 49, at 297.

<sup>88</sup> See *id.* (citing JOURNAL OF THE HOUSE OF REPRESENTATIVES, compiled by THE FIRST CONGRESS PROJECT, Washington D.C.).

The re-insertion of the amended Proposition Seven prompted congressional debate on precisely how specific the right to an impartial jury should be guaranteed.<sup>89</sup> Those who opposed Proposition Seven's particularity argued that the Article III right to "trial by jury" necessarily include the *voir dire* rights "incidental to the trial by jury secured by the laws of the several states."<sup>90</sup> The laws of the several states, at the time most relevant to the Framers, included the expansive *voir dire* procedures modeled after the Massachusetts Jury Selection Law of 1760.<sup>91</sup> James Madison, who opposed Proposition Seven's particularity, further argued that the right to challenge jurors is an essential part of the right to a jury trial.<sup>92</sup> Ultimately, it was the opponents of Proposition Seven's particularity that prevailed in the drafting of the Sixth Amendment.<sup>93</sup> Yet those opponents prevailed not because the Framers rejected meaningful *voir dire* procedures, but because they embraced expansive *voir dire* as a necessary and, therefore, implicit element of the right to an impartial jury.<sup>94</sup>

It is also widely recognized that, "by the time of the revolution, the necessity of attorney-conducted *voir dire* was of utmost concern to most thinking Americans."<sup>95</sup> After all, the Framers recognized, and indeed recommended, these procedures as an "inestimable privilege" during the debates of the First Constitutional Convention.<sup>96</sup> Taken together, the Framers must have "conceived of the jury as a 'bulwark against the unjust use of governmental power,'" to the extent that the Sixth Amendment's use of the term "impartial jury" should be understood to incorporate the expansive *voir dire* procedures that were necessarily depended on by colonial Americans.<sup>97</sup>

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<sup>89</sup> *See id.*; *see also* Anderson, *supra* note 45, at 18 n.108 ("During the ratification debates, George Mason and Patrick Henry complained about the omission of challenges. . . . In its first session, Congress considered protecting the right to challenge jurors in a draft of proposed amendments.").

<sup>90</sup> Gutman, *supra* note 49, at 297.

<sup>91</sup> *See id.*

<sup>92</sup> Ramos v. Louisiana, 590 U.S. 83, 97 n.39 (2020).

<sup>93</sup> *See id.* at 83.

<sup>94</sup> *See id.*

<sup>95</sup> Gutman, *supra* note 49, at 295.

<sup>96</sup> Perry & Cooper, *supra* note 73, at 267, 272, 288.

<sup>97</sup> James H. Gold, *Voir Dire: Questioning Prospective Jurors on Their Willingness to Follow the Law*, 60 IND. L.J. 163, 165 (1984) ("It has also been suggested that political trials in the colonial era, in which the fate of dissidents was often decided by juries composed of those sympathetic to the Crown, created a hostility in this country to restrictive jury selection practices."); *see also* McClanahan, *supra* note 56, at 793 (quoting William E. Nelson, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 172 (1964)) (explaining a right to a jury trial is important to the founder fathers but how to implement it is not specified other than the jury must protect the people of an overreaching government); Steven A. Engel, *The Public's Vicinage Right: A Constitutional*

Beyond the contentious history and debates surrounding the ratification of the Sixth Amendment, early American legal decisions further established the degree to which the Sixth Amendment was intended to support an expansive exercise of intelligent peremptory challenges.<sup>98</sup>

C. *Early Precedent.*

When the Sixth Amendment was ratified in 1791,<sup>99</sup> the only federal guidance relevant to the right of pretrial *voir dire* was the Sixth Amendment's general goal of obtaining an "impartial jury."<sup>100</sup> Federal action in the judicial and legislative branches throughout the early 1800s helped to clarify the ambiguity of that goal.<sup>101</sup> During this period, the "most important change in peremptory challenges was not their availability or numbers, but the expansion of the pretrial *voir dire* examination."<sup>102</sup> Such action further confirmed the general understanding that the Sixth Amendment was designed to facilitate liberal *voir dire* procedures.<sup>103</sup>

i. The Impeachment Trial of Justice Samuel Chase.

In 1800, James Thompson Callender, a Republican, was charged under the Alien and Sedition Act based on his publication of a book entitled *The Prospect Before Us*, which was explicitly critical of Federalist President John Adams.<sup>104</sup> Callender's arrest and subsequent prosecution were popular issues at the time, largely due to rising anti-Republican sentiment throughout the general public.<sup>105</sup>

Aware of the hostile political landscape surrounding Callender's prosecution, Callender's defense counsel proposed to the court that he should be allowed to directly "question the individual jurors on their

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*Argument*, 75 N.Y.U. L. REV. 1658, 1673 ("History is important not simply for its own sake but because it reveals the assumptions on which our legal institutions are based."); Gutman, *supra* note 49, at 296 ("[T]he words 'impartial tribunal' unquestionably important a fundamental change in the English challenge rules.").

<sup>98</sup> See U.S. CONST. amend. VI; *infra* Section III.C.

<sup>99</sup> Crawford v. Washington, 541 U.S. 36, 46 (2004).

<sup>100</sup> U.S. CONST. amend. VI; see *supra* Section III.B.

<sup>101</sup> See Anderson, *supra* note 45, at 8–9, 20.

<sup>102</sup> *Id.* at 20.

<sup>103</sup> See *id.*; see also Gold, *supra* note 97, at 165 ("Following the Revolution, courts in this country greatly expanded the right of litigants to have jurors questioned and excused for prejudice.").

<sup>104</sup> See Gutman, *supra* note 49, at 301 (citing United States v. Callender, 25 F. Cas. 239, 239 (1800)).

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

political views” to intelligently exercise his peremptory challenges.<sup>106</sup> In particular, Callender’s counsel proposed the following question: “Have you formed or delivered any opinion concerning the book called the ‘Prospect Before Us,’ from which the charges in the indictment were extracted?”<sup>107</sup> Justice Samuel Chase, presiding over the trial as Chief Justice of the Third Circuit, denied defense counsel’s request to present the question either directly or via the court.<sup>108</sup>

Prior to trial, Justice Chase directed the sheriff to ensure that the venire panel consisted only of members of the Federalist party; those who would likely be hostile to Callender’s defense.<sup>109</sup> Justice Chase himself was also a devout Federalist by this point in his life.<sup>110</sup> Despite acknowledging the significant effect that political bias can have on a criminal trial, Justice Chase refused to grant defense counsel’s requests for *voir dire* questions directed specifically towards that end.<sup>111</sup>

Despite the court’s best efforts to secure a favorable jury, a prospective juror named John Bassett admitted to having read *The Prospect Before Us*.<sup>112</sup> Justice Chase, acknowledging the issue, asked Bassett the following question: “Have you ever formed and delivered an opinion concerning this indictment?”<sup>113</sup> In response, Bassett conceded that, due to his political beliefs, he could not objectively interpret Callender’s statements as published in *The Prospect Before Us*.<sup>114</sup> Defense counsel, of course, moved to strike Bassett from the jury based on his preconceived political biases, but Justice Chase “ruled him to be a proper juror” notwithstanding his admitted preconceptions.<sup>115</sup> Bassett ultimately sat on the jury that, perhaps unsurprisingly, convicted Callender of violating the Alien and Sedition Act.<sup>116</sup>

In 1804, the House of Representatives overwhelmingly voted in favor of impeaching Justice Chase, primarily based on his interference with

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

<sup>107</sup> A. EVANS, REPORT OF THE TRIAL OF THE HONORABLE SAMUEL CHASE 13, 31 (1805).

<sup>108</sup> *See id.*

<sup>109</sup> *See* Terence J. Lau, *Judicial Independence: A Call for Reform*, 9 NEV. L.J. 79, 96-97 (2008).

<sup>110</sup> *Id.* at 89.

<sup>111</sup> *Id.* Had the right to expanded *voir dire* been codified at the time of Callender’s trial, perhaps the verdict, and certainly the jury, may have been different. *See id.*

<sup>112</sup> *See* Gutman, *supra* note 49, at 301–02.

<sup>113</sup> S. SMITH & T. LLOYD, TRIAL OF SAMUEL CHASE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT 116 (1805).

<sup>114</sup> *See* Gutman, *supra* note 49, at 302.

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

<sup>116</sup> *See* United States v. Callender, 25 F. Cas. 239, 258 (1800) (stating Callender received a fine in the amount of \$200 and remained incarcerated until the last day of the Adams’ administration in 1801); Lau, *supra* note 109, at 97.

the *voir dire* process during the Callender trial.<sup>117</sup> At his impeachment hearings, counsel for Justice Chase argued, based on English precedent rejecting expanded *voir dire*, that Chase's conduct in the Callender trial was justified:

[C]ounsel's inquiry into a juror's biases was not a right secured by the common law of England, and as the common law was now the law of the states (and the law of the federal circuits), the court could assume the selection of jurors and could question jurors or not as it saw fit.<sup>118</sup>

The official charged with overseeing Justice Chase's impeachment trial denounced the Justice's reliance on the English *voir dire* procedures.<sup>119</sup> He declared before Congress in no uncertain terms that "the English courts' denial of counsel's right to question jurors was *not* the law of the United States."<sup>120</sup> Justice Chase, however, was ultimately acquitted by the Senate due to the Constitutional issues associated with impeaching a sitting Justice for conduct that, although objectionable, did not amount to an indictable offense.<sup>121</sup>

The attempted impeachment of Justice Chase marks the first and only time, to date, that a Supreme Court Justice has ever been charged with impeachment.<sup>122</sup> The federal government's willingness to impeach Justice Chase due to his conduct in the Callender trial directly underscores the wide scope of *voir dire* procedures that were understood to be granted by the Sixth Amendment shortly after its inception.<sup>123</sup>

Moreover, Justice Chase's affiliation with the State of Maryland is of unique relevance to this article. Chase was born in Somerset County, Maryland, in 1741.<sup>124</sup> By the age of eighteen, Chase was already studying law in Annapolis, and by age twenty, he was admitted to the Maryland State

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<sup>117</sup> Gutman, *supra* note 49, at 302; see Lau, *supra* note 109, at 94-95 ("[T]he House, without debate, voted the impeachment of Justice Chase along party lines, seventy-three to thirty-two. . . . The three most important charges concerned Justice Chase's handling of the treason trial of John Fries, the sedition trial of James Callender, and his 1803 speech in Baltimore."). In particular, Justice Chase's interference with the Callender trial was the basis of count three of the eight-count articles of impeachment filed by the House of Representatives. Gutman, *supra* note 49, at 302; see Lau, *supra* note 109, at 94-95.

<sup>118</sup> Gutman, *supra* note 49, at 302.

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

<sup>120</sup> *Id.* (emphasis added).

<sup>121</sup> See *id.* at 302; Lau, *supra* note 109, at 100-02.

<sup>122</sup> Lau, *supra* note 109, at 86.

<sup>123</sup> See *id.*

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

Bar.<sup>125</sup> Four years later, Chase was elected to the General Assembly, where he directly influenced Maryland's legal landscape for the following twenty years.<sup>126</sup> At the conclusion of his political career, Chase returned his focus to the practice of law where, despite his extensive involvement in the Constitutional Conventions, he emerged as "one of the leading opponents of the adoption of the United States Constitution."<sup>127</sup>

Notwithstanding his opposition to the Constitution, or perhaps because of it, Chase was appointed to the bench of the Baltimore City criminal court in 1788, and by 1791, he was appointed to "chief justice of the general court in Maryland."<sup>128</sup> Chase served as Maryland's chief justice for five consecutive years prior to his nomination to the Supreme Court of the United States, during which time he was further able to directly influence Maryland law.<sup>129</sup> As is explored more fully in Part IV, Justice Chase's impact on early Maryland law likely contributed to the subsequent rejection of expanded *voir dire* in Maryland.<sup>130</sup> With respect to the Callender trial specifically, Justice Chase's denial of expanded *voir dire* embodies Maryland's early departure from an otherwise generally understood rule of law at that time.<sup>131</sup>

Justice Chase's conduct during the Callender trial was, in effect, identical to the English practices utilized prior to the American Revolution.<sup>132</sup> Just as the House of Representatives condemned Chase's conduct in the Callender trial, the Framers and American revolutionaries rejected the same conduct while drafting the Sixth Amendment to the Constitution that Chase so openly opposed.<sup>133</sup>

In the years leading up to and immediately following Chase's impeachment trial, jurisdictions throughout the United States continued to adopt what Maryland would today consider expanded *voir dire* in terms of both scope and form.<sup>134</sup> By 1807, the trial of Aaron Burr forced the Supreme Court of the United States to comment on the state of *voir dire* directly.<sup>135</sup>

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<sup>125</sup> See Richard B. Lillich, *The Chase Impeachment*, 4 AM. J. LEGAL HIST. 49, 51 (1960).

<sup>126</sup> See Lau, *supra* note 109, at 87.

<sup>127</sup> See *id.* at 87–88 (citing Richard E. Ellis, *Book Review of James Haw et al., Stormy Patriot: The Life of Samuel Chase*, 48 J.S. HIST. 101, 102 (1982)).

<sup>128</sup> *Id.* at 88.

<sup>129</sup> *Id.* at 89.

<sup>130</sup> See *infra* Part IV.

<sup>131</sup> See *supra* Part II and Section III.A.

<sup>132</sup> See *supra* Section III.A.

<sup>133</sup> See *supra* Section III.C.

<sup>134</sup> See, e.g., *State v. Norris*, 2 N.C. 429, 431 (1796); *State v. Doherty*, 2 Tenn. 80, 83–87 (1806); *Blake v. Millsbaugh*, 1 Johns 316, 318 (1806).

<sup>135</sup> See *supra* Section III.C.2.

## ii. The Treason Trial of Aaron Burr.

In 1807, Aaron Burr was charged with treason after having assembled a group of armed soldiers on a Kentucky island, which, according to the prosecution, was done with “the intent to lead a rebellion in the Western Territory.”<sup>136</sup> Chief Justice John Marshall—who participated in the impeachment trial of Justice Chase only three years earlier—presided over Burr’s trial.<sup>137</sup> Prior to trial, Burr’s counsel argued, based on the Sixth Amendment right to an impartial jury, that defense counsel ought to be permitted to engage in “an extensive voir dire of potential jurors.”<sup>138</sup> Importantly, defense counsel went so far as to note its intent to obtain information even on matters unrelated to a juror’s “ill will” towards Burr.<sup>139</sup> Unlike Justice Chase, Chief Justice Marshall granted the request for expanded *voir dire*.<sup>140</sup> Citing the Callender trial for guidance, the Chief Justice concluded that:

[T]he voir dire examination cannot be confined to a single question concerning the juror’s knowledge of the fact in issue. Instead, a line of inquiry must be pursued with a twofold purpose: first, to determine whether any juror harbors political antipathy towards Burr, or has formed any other impressions from which he might impute treasonable designs to Burr; and second, to inquire as to how deeply these antipathies and impressions are held, and whether they would infect the jurors’ judgment.<sup>141</sup>

In granting the request, the Chief Justice also specifically permitted counsel to directly question the venire themselves—another form of what would be expanded *voir dire* under Maryland law.<sup>142</sup> In both substance and form, Chief Justice Marshall vindicated the Sixth Amendment’s conception of *voir dire* by granting counsel’s request.<sup>143</sup>

Marshall’s granting of expanded *voir dire* in the Burr trial became a highly persuasive precedent in the formation of *voir dire* procedures in

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<sup>136</sup> Gutman, *supra* note 49, at 306.

<sup>137</sup> United States v. Burr, 25 F. Cas. 55, 56 (1807).

<sup>138</sup> Gold, *supra* note 97, at 165; Gutman, *supra* note 49, at 306.

<sup>139</sup> See Anderson, *supra* note 45, at 20 (noting that defense counsel generally requested a “careful inquiry into the juror’s opinions,” rather than information relating only to detrimental biases as is required for a challenge for cause).

<sup>140</sup> Gold, *supra* note 97, at 165.

<sup>141</sup> Gutman, *supra* note 49, at 7.

<sup>142</sup> See *id.*

<sup>143</sup> See *id.*

other states.<sup>144</sup> As time progressed, courts throughout the United States “permitted questioning that went beyond exploring a challenge for cause, accepting that voir dire should inform peremptory challenges.”<sup>145</sup>

Maryland, however, was not among such states.<sup>146</sup> Instead, Maryland’s highest court did not address the limits of Maryland’s *voir dire* procedures until 1905, far later than most other states.<sup>147</sup> In doing so, Maryland has departed from the precedent and analysis relied upon by nearly every other state and the federal government, and as a result, arrived at a different outcome.<sup>148</sup>

#### IV. THE ERROR OF MARYLAND’S VOIR DIRE PRECEDENT.

In the early 1900s, Maryland resident Henry J. Handy was charged with the premeditated and deliberate murder of his wife.<sup>149</sup> According to the State, Handy murdered his wife in a state of provocation after learning that she had “allowed and encouraged improper attentions” from another man.<sup>150</sup> Unbeknownst to Handy, his actions set the stage for Maryland to first establish its limited *voir dire* procedures.<sup>151</sup>

Handy was charged and tried in the Circuit Court for Wicomico County.<sup>152</sup> Prior to trial, the court conducted the *voir dire* process by propounding “the usual questions” upon the venire.<sup>153</sup> Handy’s counsel objected to the process in two respects.<sup>154</sup> First, Handy’s counsel argued that he should be permitted to directly question the prospective jurors after the court concludes that each juror was qualified to sit on the jury—i.e., not

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<sup>144</sup> See, e.g., *State v. Godfrey*, Brayt. 170, 170 (Vt. 1817) (explaining that a party is “permitted to ask a Juror if he has formed his opinion in order to enable him to decide upon his peremptory challenges”); *Commonwealth v. Knapp*, 10 Pick. 477, 488 (Mass. 1830) (adopting attorney-led *voir dire*); *Reynolds v. States*, 1 Ga. 222, 224-25 (1846) (noting that counsel cannot be limited to asking *voir dire* questions relating to the personal knowledge of a prospective juror); see also *Anderson*, *supra* note 45, at 21–22 (“*Burr* changed the rules in a challenge for cause alleging prejudice. But in practice, the new, expanded voir dire questioning also enabled peremptory challenges.”); *Gutman*, *supra* note 49, at 307-08 n.54 (outlining additional instances of *Burr*’s precedent in shaping *voir dire* procedures).

<sup>145</sup> *Anderson*, *supra* note 45, at 22.

<sup>146</sup> See *supra* Part I.

<sup>147</sup> See *infra* Part IV.

<sup>148</sup> See *infra* Part IV.

<sup>149</sup> See *Handy v. State*, 60 A.452, 453 (Md. 1905) (noting the exact date of Handy’s crime is not specified in the court’s opinion or any available record).

<sup>150</sup> *Id.* at 454.

<sup>151</sup> *Id.* at 455.

<sup>152</sup> *Id.* at 453.

<sup>153</sup> See *id.*

<sup>154</sup> See *id.*

disqualified for cause.<sup>155</sup> Second, Handy's counsel argued that the trial court should specifically ask a prospective juror named Charles Workman whether he was a married man, such that counsel could "enlighten themselves as to the propriety of exercising the right of peremptory challenge."<sup>156</sup> The trial court rejected counsel's arguments and overruled his objections accordingly.<sup>157</sup> Following the trial, Handy was convicted of murder in the first degree and was sentenced to receive the death penalty.<sup>158</sup>

Handy appealed his conviction to the Supreme Court of Maryland, where he specifically challenged the trial court's rulings during the *voir dire* process.<sup>159</sup> The Supreme Court of Maryland framed the issues as follows:

The right claimed under the first exception, is the absolute and unqualified right of the prisoner's counsel, after a juror upon his *voir dire* has been by the Court declared to be competent, to interrogate him at pleasure, and without the intervention of the Court, for the purposes of determining whether the right of peremptory challenge shall be exercised; while under the second exception the claim is that the Court is bound to put to the juror any question which counsel may request the Court to put, under the ruling on the first exception.<sup>160</sup>

The court began its analysis by noting that the questions were a matter of first impression for the court, as there was "no statute in this State upon the subject," and there was no other intra-jurisdictional case "in which either of these questions has been decided or presented."<sup>161</sup> From this position, the court examined the issues in accordance with the practices recognized under *English* law.<sup>162</sup> In particular, the court cited *Regina v. Stewart*, to support the position that, although a litigant indeed possessed the right to challenge prospective jurors, "he is not entitled to ask a juryman questions for the purpose of eliciting whether it would be expedient to

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<sup>155</sup> *Handy*, 60 A. at 453.

<sup>156</sup> *Id.*

<sup>157</sup> *See id.*

<sup>158</sup> *See id.*

<sup>159</sup> *See id.* (explaining Handy also challenged an unrelated evidentiary issue that arose during trial, but the majority of the *Handy* opinion concerns the contours of the *voir dire* process and the decision is primarily cited for those holdings).

<sup>160</sup> *Id.*

<sup>161</sup> *Handy*, 60 A. at 453.

<sup>162</sup> *See id.* ("The practice in the Courts of England is well settled.").

exercise such right.”<sup>163</sup> The court further relied on *Rex v. Edmonds*, for which the central holding was that a trial court did not commit reversible error by refusing to allow defense counsel to obtain proof of a juror’s hostility to the defendant “by questions put to the jurymen themselves.”<sup>164</sup> In both instances, and in other English authorities cited to by the court, the Supreme Court of Maryland took no issue with the implications of such holdings.<sup>165</sup> Rather than rejecting the English practice as the Framers and American colonists did, the court embraced it.<sup>166</sup>

After presupposing the validity of the English approach, the court proceeded by noting the select decisions of other state courts had similarly followed the English practice.<sup>167</sup> The court specifically cited to the relevant decisions of first impression from Alabama, Mississippi, New Jersey, and Texas, but failed to acknowledge the analogous decisions of any state in the Fourth Circuit or any other state that arrived at the opposite holding.<sup>168</sup> For example, the court relied on *Bales v. State*, a case in which Alabama’s highest court also relied on English precedent, to support the conclusion that the court will not ask jurors if they are biased in favor of freeing a defendant.<sup>169</sup> As of 2025, every single one of the states cited in the *Handy* opinion has since abandoned the English practice and adopted expanded *voir dire* procedures in its place.<sup>170</sup>

The most concerning analytical shortcoming of the *Handy* opinion is that the court did not acknowledge, discuss, or otherwise account for the Framers’ intentions at the time of ratifying the Sixth Amendment right to an impartial jury.<sup>171</sup> Had the court done so, it would have been confronted with

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<sup>163</sup> *Id.* (quoting *Regina v. Stewart*, (1845) 1 Cox C. C. 174 (Eng.)) (noting the defendants were indicted for the alleged larceny of goods belonging tradesmen. One defendant sought to ask each potential juror “where he was a member of an association for the prosecution of parties committing frauds on tradesmen.” The English court rejected the proposition and the Supreme Court of Maryland saw no issue with this result when deciding *Handy*).

<sup>164</sup> *See id.* (quoting *Rex v. Edmonds*, (1821) 106 Eng. Rep. 1009; 4 Barnw. & Ald. 490 (KB)) (noting defendant’s counsel motioned for a new trial due to juror bias however, Chief Justice Abbott affirmed Lord Chief Baron’s refusal to grant the motion because “[t]here was no offer to prove such an expression by any extrinsic evidence, . . . [and counsel cannot] obtain the proof by questions put to the jurymen themselves).

<sup>165</sup> *See id.* at 453.

<sup>166</sup> *See id.*

<sup>167</sup> *See Handy*, 60 A. at 453.

<sup>168</sup> *See id.* at 453-54.

<sup>169</sup> *Id.* at 453.

<sup>170</sup> *See* ALA. R. CRIM. P. § 18.4 (2012); MISS. CODE ANN., § 13-5-69 (2024); MISS. R. CRIM. P. 18.4(d) (2023); N.J. STAT. ANN. § 2B:23-10 (2025); TEX. CODE. CRIM. PROC. ANN. art. 35.

<sup>171</sup> *See Handy*, 60 A. at 453. However, the same right under Article XXI of the Maryland Declaration of Rights is interpreted *in pari materia* with the federal analog and, even once the Sixth Amendment was incorporated against the states, Maryland’s *voir dire* laws

the knowledge that the Framers drafted the Amendment with the intention of incorporating the type of expansive *voir dire* procedures understood by the Framers as a necessary safeguard against oppressive government.<sup>172</sup> Under this analysis, the *Handy* court would have likely been obligated to put forth sufficient justification for rejecting the type of *voir dire* procedures contemplated by the Framers.<sup>173</sup> Of course, the *Handy* court did not analyze the history and tradition of the Sixth Amendment right to an impartial jury, and so the court did not address or otherwise contemplate the relative merits of expanded versus limited *voir dire*.<sup>174</sup> Based on this analytical oversight, the *Handy* court upheld the trial court's *voir dire* rulings.<sup>175</sup>

The *Handy* decision established two fundamental principles of Maryland law: (1) that neither parties nor their counsel have the right to directly conduct the *voir dire* process; and (2) that, in any event, the questions presented during *voir dire* must be exclusively related to the exercise of challenges for cause.<sup>176</sup>

These principles have not been modified or abridged in any significant manner since the *Handy* decision more than one hundred years ago, notwithstanding a series of direct challenges to that end.<sup>177</sup> Nearly every subsequent decision defending the validity of Maryland's limited *voir dire* scheme has explicitly relied on the *Handy* decision to support its continued existence.<sup>178</sup> In those years, no opinion defending the *Handy* decision has ever once accounted for the Framers' understanding of the

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remained unchanged. *See generally* *Duncan v. Louisiana*, 391 U.S. 145 (1968) (incorporating the Sixth Amendment right to an impartial jury against the state governments through the Fourteenth Amendment); *Handy*, 60 A. 452 (noting at the time, the Sixth Amendment right to an impartial jury was not yet incorporated against the States).

<sup>172</sup> *See supra* Part III.

<sup>173</sup> *See generally Handy*, 60 A. 452 (outlining the legal reasoning of an court-led *voir dire*).

<sup>174</sup> *See id.* at 453-454 (noting although the *Handy* decision was delivered prior to the incorporation of the Sixth Amendments against the states, no subsequent decision has ever sought to correct the issue and so the error remains traceable to *Handy*'s shortcomings).

<sup>175</sup> *See generally Handy*, 60 A. 452 (explaining the court's reasoning that it holds the power to lead the attorney's through *voir dire*).

<sup>176</sup> *See id.* at 453-454.

<sup>177</sup> *See Whittemore v. State*, 134 A. 322, 322-23 (Md. 1926); *Adams v. State*, 88 A.2d. 556, 559-60 (Md. 1952); *Collins v. State*, 205 A.3d. 1012, 1030 (Md. 2019).

<sup>178</sup> *See Robson v. State*, 291 A.3d. 230, 248 n.21 (Md. 2023) (noting the lineage of cases starting with *Handy*, 60 A. at 453-54, "through its well-considered and express reaffirmation in" *Whittemore*, 134 A. at 323-24, "to its definitive culmination in" *Davis v. State*, 633 A.2d 867, 873-75 in (Md. 1993), affirming the decision of the court in *Davis v. State*, 611 A.2d 1008, 1010 (Md. Ct. Spec. App. 1992)).

Sixth Amendment right to an impartial jury.<sup>179</sup> As a result, the *Handy* progeny suffers from the same analytical shortcomings that plagued the *Handy* decision itself; failing to account for the history and tradition surrounding the Sixth Amendment, failing to reject the English practice as the Framers did, and failing to vest the right to conduct *voir dire* in the respective parties rather than the court.<sup>180</sup>

Now, as the Supreme Court of Maryland and the General Assembly contemplate material changes to the limited *voir dire* rules set forth in *Handy*,<sup>181</sup> the history and tradition of *voir dire* should be considered when enacting any such changes, if at all.<sup>182</sup>

## V. HISTORICAL ANALOGS TO EXPANDED VOIR DIRE.

If Maryland decides to expand its *voir dire* procedures, any related changes can, and should, more closely align with the history and tradition of *voir dire* as understood at the time of drafting the Sixth Amendment.<sup>183</sup> Based on the Maryland Judiciary's proposed experimental procedures for the 2025 Pilot Program, Maryland may already be considering a more historical variation to *voir dire* procedures.<sup>184</sup>

### A. *Facilitating the Intelligent Exercise of Peremptory Challenges Aligns with the Colonial Understanding of Voir Dire Procedures.*

The most obvious change contemplated by Rule 16-310 is the general repurposing of Maryland's *voir dire* laws to allow "the parties to obtain information that may provide guidance for the use of peremptory challenges."<sup>185</sup> As explained more fully in Part III above, the Framers and other American colonists generally understood that the *voir dire* process was best utilized by facilitating the intelligent exercise of preemptory challenges.<sup>186</sup> Additionally, the sociopolitical goals achieved through the

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<sup>179</sup> See generally *Handy*, 60 A. 452 (Md. 1905) (noting the absence of the court's reference to the Framers and its overall support from English precedence).

<sup>180</sup> See *id.* at 453.

<sup>181</sup> See *supra* Parts I-II.

<sup>182</sup> See *infra* Part V.

<sup>183</sup> See *infra* Section V.A.

<sup>184</sup> MD. JUDICIARY, *Expanded Voir Dire Pilot* (2025), <https://www.courts.state.md.us/sites/default/files/import/lawyers/pdfs/voirdirepacket.pdf> (on file with the University of Baltimore Law Forum).

<sup>185</sup> MD. CODE ANN., MD. RULES § 16-310 (West 2025).

<sup>186</sup> See *supra* Part III; see also Hopkins, *supra* note 63, at 396 ("In 1774, Parliament passed an act that placed jury selection in the hands of the court, a move designed to counteract the

use of traditional expanded *voir dire* are the same today as they were then: to protect the accused from an authoritarian government.<sup>187</sup> To the extent that expanded *voir dire* would continue to benefit defendants today, the judiciary should embrace its restoration, not as a matter of procedural refinement, but as a reaffirmation of the constitutional safeguards envisioned by the Framers.<sup>188</sup> Amending the scope of *voir dire* in Maryland to account for peremptory challenges would achieve just that.

*B. Colonial America Rejected Court-Led Voir Dire.*

In the event that Rule 16-310's Pilot Program does not lead to the repurposing of *voir dire* in Maryland, the reforming of *voir dire* procedures alone would still serve the original aims of the Sixth Amendment.<sup>189</sup> From its inception, the Sixth Amendment was designed to protect the accused from arbitrary state power by ensuring access to an impartial jury.<sup>190</sup> In colonial America, this principle was only ever achieved through locally administered jury selection procedures that deliberately excluded centralized judicial oversight.<sup>191</sup> Instead, jurors were selected by town officials or community representatives who directly participated in the *voir dire* process.<sup>192</sup> Thus, the idea of court-led *voir dire* was necessarily incompatible with the type of procedures that the colonists recognized as a defense to oppressive English rule.<sup>193</sup>

To that extent, Rule 16-310's emphasis on empowering parties to obtain information relating to the exercise of peremptory challenges echoes the most important historical functions of American *voir dire*.<sup>194</sup> Even if the Pilot Program does not materially reconfigure the scope of *voir dire* in Maryland, the potential shift away from predominantly court-led *voir dire* indicates a closer alignment with the Framers' understanding of the right to an impartial jury as a "fundamental safeguard of individual liberty."<sup>195</sup>

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Massachusetts Jury Selection Law which attempted to put control of jury selection in the hands of the colonists.").

<sup>187</sup> See *supra* Part III.

<sup>188</sup> See *supra* Section III.C.

<sup>189</sup> See *supra* Section III.C.

<sup>190</sup> See *supra* Section III.C.

<sup>191</sup> See *supra* Section III.B.

<sup>192</sup> See *supra* Section III.B.

<sup>193</sup> See *supra* Section III.C.

<sup>194</sup> See *supra* Part III.

<sup>195</sup> *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 210 (2017) (citing THE FEDERALIST NO. 83 (A. Hamilton)) ("In the era of our Nation's founding, the right to a jury trial had existed and evolved for centuries, through and alongside the common law. The jury was considered a fundamental safeguard of individual liberty.").

C. *The Framers Embraced Attorney-Led Voir Dire.*

As explained in Part II, the Maryland Judiciary recommended five potential forms of expanded *voir dire*, one of which is the “attorney-led *voir dire* of a panel.”<sup>196</sup> Of all of the procedures recommended by the Judiciary, attorney-led *voir dire* most closely comports with the history and tradition of the Sixth Amendment, given the Framers’ concern with preventing executive overreach into the judicial process.<sup>197</sup>

This concern was neither incidental nor temporary, and instead reflected a broader colonial understanding that the efficacy of the jury trial depended on the accused’s ability to meaningfully participate in the jury selection process, absent any guesswork in the exercise of challenges.<sup>198</sup> To the Framers, juries were not negligible mechanisms of the judicial process, but active mouthpieces of the community that were more effectively formed by attorney-led *voir dire* rather than court-led *voir dire*.<sup>199</sup> As a result, the proper scope of *voir dire* contemplated by the Framers would have included the right for the individual parties themselves to conduct the *voir dire* process in order to more effectively produce a more “impartial jury.”<sup>200</sup> Therefore, modifying Maryland’s *voir dire* laws to grant litigants the right to conduct the *voir dire* process would more accurately reflect the Framers’ intention when drafting the Sixth Amendment.<sup>201</sup>

## VI. CONCLUSION.

Maryland’s current *voir dire* laws stand in stark contrast to the historical and constitutional foundations from which the American jury trial system was built.<sup>202</sup> As demonstrated throughout this article, the Sixth Amendment guarantee of an “impartial jury” was not conceived in a vacuum, but in direct response to centuries of judicial abuse, executive overreach, and otherwise manipulated juries under the English rule.<sup>203</sup> The Framers, guided by colonial resistance and revolutionary ideals, understood that the efficacy of the jury system depended on the accused’s ability to

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<sup>196</sup> MD. JUDICIARY, *Expanded Voir Dire Pilot* (2025), <https://www.courts.state.md.us/sites/default/files/import/lawyers/pdfs/voirdirepacket.pdf> (on file with the University of Baltimore Law Forum).

<sup>197</sup> See *supra* Part III.

<sup>198</sup> See *supra* Part III.

<sup>199</sup> See *supra* Part III.

<sup>200</sup> Gutman, *supra* note 49, at 295 (“[B]y the time of the revolution, the necessity of attorney-conducted *voir dire* was of utmost concern to most thinking Americans.”).

<sup>201</sup> See *supra* Section III.C.

<sup>202</sup> See *supra* Section III.C.

<sup>203</sup> See *supra* Section III.C and Parts IV-V.

participate in the *voir dire* process by asking questions relating to the intelligent exercise of peremptory challenges, including by and through their respective counsels.<sup>204</sup>

Maryland's continued reliance on the *Handy* progeny—without accounting for the historical and constitutional context of the Sixth Amendment—has resulted in a *voir dire* framework that remains susceptible to the issues that the Framers sought to cure through the Sixth Amendment.<sup>205</sup> The Supreme Court of Maryland's implementation of Rule 16-310 represents a rare opportunity to correct these shortcomings and, in doing so, better secure these constitutional rights for the people of Maryland.<sup>206</sup> Even if the Pilot Program does not result in a material change to existing law, the reformation of *voir dire* procedures alone, specifically in the form of attorney-led *voir dire*, would also aid in preserving the constitutional safeguards originally envisioned by the Framers.<sup>207</sup>

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<sup>204</sup> See *supra* Parts II-III.

<sup>205</sup> See *supra* Part V.

<sup>206</sup> See *supra* Parts I-V.

<sup>207</sup> See *supra* Parts III-V.

## ARTICLE

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### MARYLAND'S VOIR DIRE REFORM: THE 2025 PILOT PROGRAM AND THE PATH TOWARD FAIRER JURIES

By: David Harak, Esq.  
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#### ABSTRACT.

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The phrase *voir dire* means “to speak the truth” in French.<sup>2</sup> In the American judicial system *voir dire* is the process of asking potential jurors questions to determine whether the juror can be fair and impartial.<sup>3</sup> The right to a fair and impartial jury is guaranteed by the U.S. Constitution and the Maryland Declaration of Rights.<sup>4</sup> When a potential juror answers a *voir dire* question in a way that reveals a bias that constitutes a “specific cause for disqualification” the judge dismisses (or strikes) that juror “for cause.”<sup>5</sup>

However, what happens if a potential juror fails to admit, or is unaware of, a bias? That’s where peremptory challenges are *supposed* to come in.<sup>6</sup> Peremptory challenges allow the parties to reject (or strike) a potential juror “for a real or imagined partiality that is less easily designated or demonstrable than that required for a challenge for cause.”<sup>7</sup> A “partiality that is less easily designated or demonstrable than that required for a challenge for cause” is synonymous with an implicit bias that would affect the juror’s ability to be fair and impartial.<sup>8</sup> In most jurisdictions, peremptory challenges are exercised after lawyers have had the opportunity to inquire about potential jurors’ backgrounds and experiences through direct one-on-one questioning with individual jurors, questionnaires, attorney conducted *voir dire*, and/or other methods of ferreting out implicit biases.<sup>9</sup>

Unfortunately, for approximately 120 years, Maryland law has “limited” the purpose of *voir dire* to questions that are intended to discover

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<sup>2</sup> *Voir Dire*, BLACK’S LAW DICTIONARY (12th ed. 2024).

<sup>3</sup> *Dingle v. State*, 759 A.2d 819, 823 (Md. 2000).

<sup>4</sup> U.S. CONST. amend. VI. In the criminal context, the right to a fair and impartial is guaranteed by the 6<sup>th</sup> Amendment to U.S. Constitution and Article 21 of Maryland Declaration of Rights. *Id.*; MD. DECL. OF RTS., art. 21.

Whereas in the civil context, the 7<sup>th</sup> Amendment and Article 23 guarantee the right to a jury. U.S. CONST. amend. VII; MD. DECL. OF RTS., art. 23.

However, there is a plethora of caselaw from the United States Supreme Court and lower courts that litigants have a right to a fair and impartial jury in both the criminal and civil contexts. *See* *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994) (“We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.”) (citing *Powers v. Ohio*, 499 U.S. 400 (1991); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Georgia v. McCollum*, 505 U.S. 42 (1992)).

<sup>5</sup> *See* David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 245-46 (1980).

<sup>6</sup> *See id.* at 246 (“Theoretically, after the attorneys have exercised their peremptory challenges, those jurors who were most biased will have been eliminated, and the resulting jury will be relatively impartial.”); *Gilchrist v. State*, 667 A.2d 876, 882 (Md. 1995).

<sup>7</sup> *See* Suggs & Sales, *supra* note 5, at 246 (quoting *Swain v. Alabama*, 380 U.S. 202, 220 (1965)).

<sup>8</sup> *Id.* (quoting *Swain*, 380 U.S. at 220).

<sup>9</sup> *See* Suggs & Sales, *supra* note 5, at 246-47.

a “specific cause for disqualification.”<sup>10</sup> Maryland’s system of limited *voir dire* falls outside the norm of practically every other state and commonwealth in the nation.<sup>11</sup> Limited *voir dire* prohibits lawyers and litigants from proposing or posing questions aimed at uncovering implicit biases.<sup>12</sup> Moreover, limited *voir dire* forces the “unintelligent” exercise of peremptory challenges, inevitably leading some lawyers to exercise peremptory challenges on unconstitutional bases.<sup>13</sup>

Over the last three decades, there have been various unsuccessful efforts to realign the scope of *voir dire* in Maryland to match that of the federal courts and nearly a unanimity of the states.<sup>14</sup> In September of 2024, however, the Maryland Supreme Court<sup>15</sup> adopted Maryland Rule 16-310, which created the Pilot Program “to implement the use of expanded *voir dire*” in multiple jurisdictions throughout Maryland and to study the effects of expanded *voir dire*.<sup>16</sup> The Pilot Program launched on January 1, 2025, and “sunsets” on January 1, 2026.<sup>17</sup>

This article seeks to explain the history of “limited *voir dire*” in Maryland, the problems associated with Maryland’s *voir dire* system, and the importance of Maryland’s Pilot Program as the first meaningful step towards improving Maryland’s jury selection process.<sup>18</sup>

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<sup>10</sup> *Pearson v. State*, 86 A.3d 1232, 1235 (Md. 2014) (citing *Washington v. State*, 40 A.3d 1017, 1020 (Md. 2012) (citations omitted)); *Handy v. State*, 60 A. 452, 452 (Md. 1905) (rejecting expanded *voir dire* and establishing limited *voir dire*).

<sup>11</sup> David Harak, *Fixing Maryland’s Current System of Judicially Imposed “limited voir dire” is Necessary to Protect the Constitutional Right to a Fair Jury Trial*, TRIAL REP., Fall 2023, at 26, 31 (Dec. 8, 2023), [https://mgaleg.maryland.gov/cmte\\_testimony/2024/jud/1YveMQ11zMt2URJaxcwQwhygeZI559n8Q.pdf](https://mgaleg.maryland.gov/cmte_testimony/2024/jud/1YveMQ11zMt2URJaxcwQwhygeZI559n8Q.pdf) (on file with the University of Baltimore Law Forum) [hereinafter Harak, *Fixing Maryland Voir Dire*].

<sup>12</sup> *See id.* at 26, 28.

<sup>13</sup> *Id.* at 29-30; *see Pearson*, 86 A.3d at 1235 quoting *Washington*, 40 A.3d at 1020 (“Unlike in many other jurisdictions, facilitating ‘the intelligent exercise of peremptory challenges’ is not a purpose of *voir dire* in Maryland.”).

<sup>14</sup> *See, e.g.*, STANDING COMM. ON RULES OF PRAC. AND PROC., ONE HUNDRED EIGHTY-FIFTH REPORT, MD. CT., at 8-9 (2014), <https://www.mdcourts.gov/sites/default/files/rules/reports/185th.pdf> (on file with the University of Baltimore Law Forum).

<sup>15</sup> Formerly known as the Court of Appeals of Maryland. *See* MD. CODE ANN., MD. RULES § 1-101.1 (West 2023).

<sup>16</sup> *Id.* § 16-310.

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

<sup>18</sup> *See infra* Parts II-IV.

## I. VOIR DIRE IN THE AMERICAN COURT SYSTEM - HOW VOIR DIRE AFFECTS THE CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY.

Black's Law Dictionary translates the French phrase "*voir dire*" to mean "to speak the truth."<sup>19</sup> Others have defined this phrase to mean "to see them talk."<sup>20</sup> In the American court system, *voir dire* is the process in which prospective jurors are preliminarily examined prior to being qualified as jurors.<sup>21</sup> The purpose of this preliminary examination is multi-fold.<sup>22</sup> All courts in the United States agree that *voir dire* is necessary to aid trial judges in deciding whether prospective jurors possess a legally disqualifying bias.<sup>23</sup> Moreover, all of the U.S. Federal Courts and nearly all U.S. State Courts also agree that *voir dire*'s other legitimate and intended purpose is to aid attorneys in the intelligent exercise of peremptory challenges.<sup>24</sup> However, Maryland stands as the lone state which limits the scope of *voir dire* to challenges for cause without providing attorneys with the right to individually question prospective jurors.<sup>25</sup>

### A. English Jury Selection.

The right to a trial by jury stretches its roots back through American jurisprudence to England.<sup>26</sup> The word jury comes from the Latin word *jurati* and literally translated means "persons sworn."<sup>27</sup> Juries were initially formed to play the role of inquisitor in a legal action.<sup>28</sup> They were made up of men who not only knew the litigants of a case, but were familiar with the facts of the matter in controversy.<sup>29</sup> This familiarity or "bias" in today's American context is legally improper and, therefore, undesirable.<sup>30</sup>

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<sup>19</sup> BLACK'S LAW DICTIONARY 812 (5th ed. 1983).

<sup>20</sup> Suggs & Sales, *supra* note 5, at 245.

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

<sup>22</sup> *See id.* at 248.

<sup>23</sup> *Id.* at 249 (quoting *Swain v. Alabama*, 380 U.S. 202, 219 (1965)).

<sup>24</sup> *See id.* at 248-49.

<sup>25</sup> Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 31.

<sup>26</sup> Roger Moore, *Voir Dire Examination of Jurors: I. The English Practice*, 16 GEO. L.J. 438, 438 n.\* (1928).

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

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

<sup>29</sup> *Id.* at 439.

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

Surprisingly, throughout much of early English jurisprudence, a biased jury was desirable.<sup>31</sup> The conventional wisdom, from 14<sup>th</sup> century England to early 17<sup>th</sup> century England, was that a juror who was biased against the defendant was *good* for the King.<sup>32</sup> Speaking about this English precept of law, Lord Parnung stated, “certainly if, indicators [persons who have already concluded as to defendant’s guilt] be not there [on the petit jury] it is not well for the King.”<sup>33</sup> To help accomplish this desired juror bias, sheriffs were placed in charge of selecting custom fit juries for each trial.<sup>34</sup>

Accordingly, corruption in the forming of juries in favor of the King was not only prevalent, but it was actually encouraged and intended.<sup>35</sup> John Palgrave, tutor to King Henry VIII, described the criminal jury in the following scenario:

SHERIFF: [The jury is ready my lord, and I am happy to say it will be an excellent jury for the crown, I myself have picked and chosen every man on the panel. There is not a man whom I have not examined carefully. All the jurors are acquainted with (the prisoner). I should not have allowed my bailiff to summon the jury haphazard. The least informed of them have taken great pains to go up and down every nooke and corner in Westminster, they and their wives-and to learn all they could hear concerning his past and present life and conversations. Never had a culprit a better chance of having a fair trial.<sup>36</sup>

English defendants and their barristers voiced their grievances with the scandalous process of jury selection to Parliament.<sup>37</sup> Lord Chief Justice Coke and his fellow members of the English Judiciary felt

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<sup>31</sup> *Id.* at 438 n.\*.

<sup>32</sup> Max Gutman, *The Attorney-Conducted Voir Dire Of Jurors: A Constitutional Right*, 39 BROOK. L. REV. 290, 291-92 (1973) (quoting Charles L. Wells, *Early Opposition to the Petit Jury in Criminal Cases*, 30 L.Q.R. 97 (1914)).

<sup>33</sup> *Id.* at 292 (quoting Wells, *supra* note 32) (noting that Parnung’s remarks came in the aftermath of Treason Act 1351, 25 EDW. III, 5, c. 3 (1303), which provided that no accusers (indicators) shall serve on the petit jury).

<sup>34</sup> *Id.*

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

<sup>36</sup> *Id.* (citing Wells, *supra* note 32, at 101).

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

that a sheriff's allegiance during jury selection ought to be to his King.<sup>38</sup> Consequently, these grievances were largely ignored.<sup>39</sup>

Many of these concerns were brought to the English High Court's attention in the 1696 conspiracy trial of Peter Cook.<sup>40</sup> Cook was charged with conspiring against William and Mary in favor of King James II.<sup>41</sup> Cook "argued for the right to question jurors on their political biases[.]"<sup>42</sup> "The court denied Cook's right to question, holding that questions concerning a juror's bias would be to the juror's discredit and should not, therefore be allowed."<sup>43</sup> Subsequently, Cook was found guilty and hanged.<sup>44</sup> Shockingly, despite that would trouble any modern day reader, the ruling by the court in Cook's case was never questioned by an English court thereafter.<sup>45</sup>

### *B. Jury Selection in the American Colonies.*

In order to understand the American version of *voir dire* it is necessary to review the pre-American Revolution English method of impaneling juries in the American Colonies, as well as the subsequent reactions the colonists had to this method.<sup>46</sup> Prior to the American Revolutionary War, the Crown of England began to secure Torie<sup>47</sup> jurors, who were favorable to the Crown, in its trials of American insurgents.<sup>48</sup> The Colonial English tribunals denied American insurgent defendants an effective opportunity to rid the jury of these Torie sympathizers.<sup>49</sup>

In 1760, the Colony of Massachusetts passed "An Act for the Better Regulating the Choice of Petit Jurors" in an attempt by colonialists to

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<sup>38</sup> Gutman, *supra* note 32, at 292-93.

<sup>39</sup> WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 230 n.2 (1852).

<sup>40</sup> See Gutman, *supra* note 32, at 293.

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

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 294.

<sup>45</sup> *Id.* at 294 n.14 (citing King v. Edmund, 4 BARN & ALD. REPT. 471 (1820)) (noting that the court in the *Edmund* case reviewed a long line of criminal cases precluding counsel's questioning of non-specific juror bias as improper); see Moore, *supra* note 26, at 442-43.

<sup>46</sup> See Gutman, *supra* note 32, at 294.

<sup>47</sup> "Torie" was a term initially used to describe British citizens who favored the monarchy over political parties that supported democracy later was used to describe citizens of the colonies who loyalty remained with the crown in direct opposition to colonists who preferred the self-rule that could be accomplished through revolution. *Id.* at 294-95.

<sup>48</sup> *Id.*

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

impanel unbiased juries.<sup>50</sup> This piece of legislation, commonly known as the Jury Selection Law, required jurors be chosen by a town meeting.<sup>51</sup> The town meeting format gave the accused the opportunity to examine thoroughly the character and biases of prospective jurors.<sup>52</sup> The Torie loyalists complained that under this new law “the examination of jurors [wa]s now more in the hands of the people than ever before.”<sup>53</sup> In retaliation, Parliament then passed a subsequent act that required juries be selected in court from a list prepared by the sheriff—stripping the selection power away from the town meetings.<sup>54</sup> Accordingly, in order to sit as a juror, the Crown’s sheriff had to be convinced that the citizen was sufficiently biased in favor of the Crown that the verdict desired by the Crown would be a foregone conclusion.<sup>55</sup> This continued to be the way that jurors were selected while the colonies were under the Crown’s control.<sup>56</sup>

When the colonists won their freedom and independence from the Crown of England, disgust with British juror impaneling practices led to the widespread belief that attorney-conducted *voir dire* was necessary in order for there to be fair trials.<sup>57</sup> This strong belief was memorialized in Proposition Seven of the first draft of the proposed Amendments to the Constitution during the first session of the First Congress: “[t]he trial of all crimes . . . shall be an impartial jury of freeholders of the vicinage with the requisite of unanimity for conviction, the right of challenge and other accustomed requisites.”<sup>58</sup>

Some of the drafters of the proposed Amendments, which would later be known as The Bill of Rights, believed that the inclusion of the above noted specific provisions in Proposition Seven was unnecessary because the right to trial by an impartial jury was already guaranteed by Article III of the Constitution—which, in their view, encompassed all the rights incidental to it as articulated by the laws of the

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<sup>50</sup> An Act for the Better Regulating the Choice of Petit Jurors, Prov. St. § 29 (1760) (repealed 1825).

<sup>51</sup> *Id.*; see Gutman, *supra* note 32, at 294.

<sup>52</sup> Gutman, *supra* note 32, at 294.

<sup>53</sup> *Id.* at n.16 (quoting Letter from Dalrymple to Gage, Aug. 26, 1770, ADAMS, NEW LIGHT 72-73 (1958)).

<sup>54</sup> *Id.* at 294-95 (citing 14 GEO III, c. 45 §§7-24 (1774)).

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

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

<sup>57</sup> *Id.* at 295.

<sup>58</sup> Gutman, *supra* note 32, at 297 (quoting JOURNAL OF THE HOUSE OF REPRESENTATIVES, compiled by THE FIRST CONGRESS PROJECT, Washington, D.C.).

states.<sup>59</sup> Addressing this issue at the Virginia debates, James Madison stated:

Where a technical word was used [as in the instance of trial by jury], all the incidents belonging to it necessarily attended it. The right to challenge is incident to the trial by jury, and, therefore as one is secured, so is the other.<sup>60</sup>

The chief concern of the drafters and proponents of Proposition Seven was that if the specifics, of what was at that time deemed to be necessary to have a fair trial, were not specifically enumerated in the Amendment then the federal government could act to tamper with, limit, or extinguish those rights.<sup>61</sup> In the end, the concerns expressed by the drafters and proponents of Proposition Seven were quelled by the inclusion of the following phrase in the Ninth Amendment: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>62</sup>

The inclusion of this phrase in the Ninth Amendment coupled with Section 34 of the Judiciary Act of 1789 which stated: “[t]he laws of several states, except where the constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in trials of common law in the courts of the United States, in cases where they apply[.]” provided further assurances to the proponents of Proposition Seven.<sup>63</sup> Moreover, the inclusion of the “confrontation” and “due process” clauses of the Fifth Amendment were further expressive of the principles that encompassed a defendant’s constitutional right to a fair trial.<sup>64</sup>

### C. *Voir Dire In Early America.*

The basic concept underlying the *voir dire* stage of a trial is the recognition that a juror’s bias, prejudice, preconception, and ignorance can lead the juror to a verdict against a defendant irrespective of what

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<sup>59</sup> *Id.* at 297.

<sup>60</sup> *Id.* (quoting ELLIOT, DEBATES, VIRGINIA 528, 531 (1874)).

<sup>61</sup> *Id.* at 298.

<sup>62</sup> *Id.*; U.S. CONST. amend. IX.

<sup>63</sup> Gutman, *supra* note 32, at 298-99 (quoting Judiciary Act, ch. 20 § 34, 1 Stat. 88 (1789)).

<sup>64</sup> *Id.* at 304 n.43 (citing PARL. ROLLS ii, col. 2 (1357); 5 JOHN WIGMORE, EVIDENCE § 136 *et seq.* (5th ed. 1940) (stating specifically, that all matters weighing against the defendant must be stated in open court and “that no safeguard for testing the value of human statements is comparable to that furnished by cross examination . . .”).

evidence is put forth in a given case.<sup>65</sup> Despite its efforts to assure fairness by ruling on admissibility and its educative, curative, and cautionary instructions, a trial court cannot prevent bias from affecting a juror's deliberations.<sup>66</sup> Patrick Henry, an oft-quoted founder of our nation, argued that he would prefer to be tried by a judge alone than by a jury selected without the right to question and challenge.<sup>67</sup>

Moreover, the right of parties to have a fair jury was so important in early American jurisprudence that Chief Justice John Marshall allowed counsel extensive attorney-conducted *voir dire* in the 1815 treason trial of Aaron Burr.<sup>68</sup> Aaron Burr was accused of treason for allegedly plotting to establish an independent country west of the country's current states in U.S. territory that would later become the future states of Kentucky, Tennessee, Mississippi and newly acquired areas within the Louisiana Purchase and assembling an armed force to carry out this plot.<sup>69</sup> Addressing challenges for cause, Chief Justice Marshall, sitting as the trial judge, wrote:

Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony. He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and by governed by it; but the law will not trust him . . . He will listen with more favor to that testimony which confirms, than to that which would change his opinion[.]<sup>70</sup>

After Chief Judge Marshall allowed Aaron Burr's attorneys to directly question potential jurors about their individual biases, a jury was selected, and a trial was held.<sup>71</sup> The jury acquitted Aaron Burr of all charges.<sup>72</sup>

The principles behind Chief Justice Marshall's decision to allow extensive juror inquiry via attorney-conducted *voir dire* in the *Burr* trial

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<sup>65</sup> *Id.* at 290.

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

<sup>67</sup> *Id.* at 296-97 (quoting ELLIOT, DEBATES, VIRGINIA 528, 541-42 (1874)).

<sup>68</sup> *See* United States v. Burr, 25 F. Cas. 49, 50 (C.C.D. Va. 1807).

<sup>69</sup> *Id.* at 50.

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

<sup>71</sup> *See* Scott Bomboy, *Aaron Burr's trial and the Constitution's treason clause*, NAT'L CONST. CTR. (Sept. 1, 2023), <https://constitutioncenter.org/blog/the-great-trial-that-tested-the-constitutions-treason-clause> (on file with the University of Baltimore Law Forum).

<sup>72</sup> *See id.*

struck a chord with jurists all around the new nation.<sup>73</sup> In fact his reasoning was so compelling that, with the lone exception of South Carolina,<sup>74</sup> every other state that was in existence at the time embraced the practice of allowing attorneys the right to directly question jurors during *voir dire*.<sup>75</sup> In *Sprouse v. Commonwealth*,<sup>76</sup> a Virginia court rejected the English rule of barring a juror from answering questions directed at his bias by holding:

[I]t has been said in some of the English books that [a juror] is not obliged to disclose whether he has or has not, formed and delivered an opinion on the prisoner's case because, as it is alleged, such disclosure would tend to disgrace. . . . This rule certainly was rejected in Burr's case where Justice Marshall allowed counsel an extensive *voir dire* of jurors.<sup>77</sup>

Addressing this same issue in *People v. Bodine*, the Supreme Court of Oneida County, New York, citing the *Burr* case, held:

The feelings of the juror may also be shown, and that whether they amount to positive partiality or ill-will, or not, as his views and opinions also may be, whether mature, absolute or hypothetical. Indeed, any and every fact or circumstances from which bias, partiality or prejudice may be inferred, although weak in degree is admissible on this issue; and counsel's inquiry should by no means be restricted to the isolated question of a fixed and absolute opinion at to guilt or innocence of a prisoner.<sup>78</sup>

Allowing attorney-conducted *voir dire* became an established tenet of what was needed to ensure the right to a fair trial in early America despite the fact that it was a sharp departure from the practice of empaneling juries in England and Canada.<sup>79</sup>

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<sup>73</sup> See Gutman, *supra* note 32, at 302-04.

<sup>74</sup> South Carolina now guarantees the right to attorney-conducted *voir dire* in civil cases but still clings to exclusive judicially-conducted *voir dire* in all criminal cases except for capital cases in which attorneys have the right to conduct *voir dire*. S. C. CODE ANN. § 14-7-1050 (West 1986); *see id.* § 14-7-1100 (West 1986); *id.* § 14-7-1110 (West 1987); S.C. RULE CIV. PROC. 47(a) (West 2026).

<sup>75</sup> Gutman, *supra* note 32, at 307-08 n.54.

<sup>76</sup> *Sprouse v. Commonwealth*, 2 Va. (2 Va. Cas.) 276, 378 (1823).

<sup>77</sup> Gutman, *supra* note 32, at 308 n.54 (quoting *Sprouse*, 2 Va. at 277).

<sup>78</sup> *People v. Bodine*, 1 Denio 281, 308 (1845).

<sup>79</sup> *See id.* at 294, 296.

*D. Voir Dire In Contemporary America and Maryland's Version of Voir Dire.*

Since Chief Justice Marshall's decision in *United States v. Aaron Burr*,<sup>80</sup> *voir dire* in the overwhelming majority of states and the federal courts has served the dual purpose of enabling parties to discover and identify information to either assert a challenge for cause or make use of a peremptory challenge.<sup>81</sup> Today, in every jury trial throughout the country, potential jurors who demonstrate a disqualifying bias are "struck" from the jury pool "for cause."<sup>82</sup> Trial judges have broad discretion in determining whether a juror's *voir dire* responses reveal a disqualifying bias and therefore warrant a successful "for cause" challenge.<sup>83</sup>

In addition to for cause challenges, forty-nine states and all federal courts afford litigants the opportunity to exercise peremptory challenges to excuse a juror even if that juror has not demonstrated a disqualifying bias.<sup>84</sup> Explaining the use of peremptory challenges in *Holland v. Illinois*, the U.S. Supreme Court stated:

Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of 'eliminat[ing] extremes of partiality on both sides', thereby 'assuring the selection of a qualified and unbiased jury.'<sup>85</sup>

In *Swain v. Alabama*, the United States Supreme Court recognized that peremptory challenges are one of the most important rights an accused

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<sup>80</sup> *United States v. Burr*, 25 F. Cas. 49, 50 (C.C.D. Va. 1807).

<sup>81</sup> Gutman, *supra* note 32, at 324 (citations omitted).

<sup>82</sup> *See id.*; Suggs & Sales, *supra* note 5, at 245-46. As later set forth in Section I.E.i., the definition of "disqualifying bias" varies wildly between trial judges and trial courts. *See infra* Section I.E.i.

<sup>83</sup> James H. Gold, *Voir Dire: Questioning Prospective Jurors on Their Willingness to Follow the Law*, 60 IND. L.J. 164, 185 n.123 (1984) (citing Ryan & Neeson, *Voir Dire: A Trial Technique in Transition*, 4 AM. J. TR. ADVOC. 523, 526 (1981)).

<sup>84</sup> *See infra* Section I.D. Arizona is the lone state that has abolished peremptory challenges. *State v. Colorado*, 535 P.3d 941, 942 (Ct. App. 2023). As later set forth in this Section, however, Arizona's abolishment of peremptory challenges is accompanied by a broad protection for litigants to have their counsel directly ask potential jurors extensive questions designed to inform the parties and the judge about both explicit and implicit bias that would affect the juror's ability to be fair and impartial and therefore form the basis of a "for cause" challenge. *See infra* Section I.D.

<sup>85</sup> *Holland v. Illinois*, 493 U.S. 474, 484 (1990) (quoting *Batson v. Kentucky*, 476 U.S. 79, 91 (1986)). Justice Scalia's opinion in *Holland* was also cited by Justice O'Connor in her concurring opinion in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 147 (1994).

has in securing a fair trial.<sup>86</sup> The *Swain* Court reaffirmed its prior holdings in *Lewis*<sup>87</sup> and *Pointer*<sup>88</sup> by ruling that the denial or impairment of the right to peremptory challenges is reversible error, even without a showing of prejudice.<sup>89</sup> Recognizing the importance of a robust *voir dire*, the Court stated that “the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the *voir dire* and facilitates the exercise of challenges for cause by removing the fear of incurring a juror’s hostility through examination and challenge for cause.”<sup>90</sup>

In *Swain*, Justice Byron White stated, “[t]he function of the [peremptory] challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.”<sup>91</sup> As the 5<sup>th</sup> Circuit Court of Appeals later recognized in *United States v. Ledee*, “[p]eremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes.”<sup>92</sup> In *Gentile v. State Bar of Nevada*, the United States Supreme Court explained: “[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by ‘impartial’ jurors. . . .”<sup>93</sup> Finally, in *Mu’Min v. Virginia*, the United States Supreme Court reaffirmed that “[v]oir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges.”<sup>94</sup> Accordingly the United States Supreme Court and lower courts are in agreement that *voir dire* is crucial not only for exercising challenges for cause but also to aid counsel in exercising their peremptory challenges.<sup>95</sup>

In contrast, by creating and adopting what Maryland’s Supreme Court refers to as “limited *voir dire*,”<sup>96</sup> Maryland has abrogated America’s

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<sup>86</sup> See generally *Swain v. Alabama*, 380 U.S. 202 (1965), *overturned on other grounds by* *Batson v. Kentucky*, 476 U.S. 79 (1986) (recognizing that peremptory challenges are one of the most important rights required in a fair trial).

<sup>87</sup> See generally *Lewis v. United States*, 146 U.S. 370 (1892) (holding that the denial of the right to peremptory challenges is reversible error, regardless of prejudice).

<sup>88</sup> See generally *Pointer v. United States*, 151 U.S. 396 (1894) (reaffirming previous decisions and holding that the denial of the right to peremptory challenges is reversible error, regardless of prejudice).

<sup>89</sup> *Swain*, 380 U.S. at 219.

<sup>90</sup> *Id.* at 219-20.

<sup>91</sup> *Id.* at 219.

<sup>92</sup> *United States v. Ledee*, 549 F.2d 990, 993 (5<sup>th</sup> Cir. 1977), *cert. denied*, 434 U.S. 902 (1977).

<sup>93</sup> *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991).

<sup>94</sup> *Mu’Min v. Virginia*, 500 U.S. 415, 431 (1991).

<sup>95</sup> See discussion *supra* notes 86-97.

<sup>96</sup> See discussion *supra* notes 11-13.

historical jurisprudence as to the procedural due process rights that are afforded to parties through *voir dire* in jury trials.<sup>97</sup> Under Maryland's "limited *voir dire*" parties are restricted to *voir dire* questions that are aimed solely at eliciting information that constitutes a disqualifying bias.<sup>98</sup> Maryland's "limited *voir dire*" is explicitly intended to deny parties the right to discover and identify information from each juror that would intelligently inform their use of peremptory challenges.<sup>99</sup> Maryland's adoption of "limited *voir dire*" makes it a glaring outlier to both the federal courts and the overwhelming majority of states.<sup>100</sup>

Although the Maryland Rules specifically afford the trial judge the discretion to enable parties to have their attorneys directly question each juror,<sup>101</sup> Maryland trial court judges almost universally decline to allow attorneys to conduct *voir dire*.<sup>102</sup> In direct contrast, the overwhelming majority of states have concluded that a litigant's fundamental right to a fair jury necessarily requires that the litigant's attorney be afforded the opportunity to directly question jurors during *voir dire*.<sup>103</sup>

Specifically, thirty-eight states<sup>104</sup> have determined that attorney conducted *voir dire* is so vital to enabling parties to have access to the information that a litigant needs to ferret out implicit and explicit bias that they have afforded parties that right by statute, rule or common law.<sup>105</sup> The

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<sup>97</sup> See Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 30-31; see also Pearson v. State, 86 A.3d 1232, 1235 (Md. 2014) (citing Washinton v. State, 40 A.3d 1017, 1020 (Md. 2012)) ("Unlike in many other jurisdictions, facilitating 'the intelligent exercise of peremptory challenges' is not a purpose of voir dire in Maryland.").

<sup>98</sup> See Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 30-31; Pearson, 86 A.3d at 1235.

<sup>99</sup> See Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 30-31; Pearson, 86 A.3d at 1235.

<sup>100</sup> Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 31.

<sup>101</sup> See MD. CODE ANN., MD. RULES § 2-512 (West 2025); *id.* § 4-312 (West 2025).

<sup>102</sup> See Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 31.

<sup>103</sup> Contrast MD. CODE ANN., MD. RULES § 2-512 (West 2025) (allowing "limited" *voir dire* in civil cases), and *id.* § 4-312 (West 2025) (allowing "limited" *voir dire* in criminal cases), with sources cited *infra* note 97 (noting which states allow attorney-led *voir dire*).

<sup>104</sup> Alabama, Alaska, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Idaho, Iowa, Kansas, Louisiana, Massachusetts, Minnesota, Mississippi, Montana, New Hampshire, North Carolina, New Mexico, North Dakota, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming provide either a statutory or civil rule of procedure right to direct questioning of jurors by attorneys during the *voir dire* process. See sources cited *infra* note 105. Nebraska recognizes this as a common law right. See Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 31 n.50.

<sup>105</sup> Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 31.

Full attorney participation is guaranteed in the following states: Connecticut, Hawaii, Idaho, Kansas, Louisiana, Maine, Mississippi, Montana, Nevada, New York, North Dakota, South Dakota, Texas, Vermont, West Virginia, Wisconsin, and Wyoming. See

overwhelming majority of the remaining states that do not explicitly guarantee parties the right to attorney conducted *voir dire* continue to permit attorneys to conduct *voir dire* as a matter of practice.<sup>106</sup>

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CONN. GEN. STAT. ANN. § 51-240(a) (West, 1949); HAWAII REV. STAT. ANN. § 635-27 (West 1972); *State v. Hoagland*, 228 P. 314, 318-19 (Idaho 1925); *Hurt v. Monumental Mining Co.*, 206 P. 184, 185 (Idaho 1922); KAN. STAT. ANN. § 60-247(b) (West 2010); LA CODE CRIM. PROC. ANN. art. 786 (2024); ME. STAT. tit. 15, §1258-A (1966); MISS. CODE ANN. § 13-5-69 (West 1991); MONT. CODE ANN. § 46-16-114 (West 1991); MONT. CODE ANN. § 25-20-47(a) (West 2011); NEV. REV. STAT. ANN. § 175.031 (West 1981); N.Y. CRIM. PROC. LAW § 270.15(1) (McKinney 2024); N.D. RULES CRIM. PROC. Rule 24(a) (West); S.D. CODIFIED LAWS § 15-6-47(a) (West 1967); TEX. CRIM. PROC. CODE ANN. § 35.17 (West 1991); VT. RULES CRIM. PROC. Rule 24(a) (2022); W.VA. CODE ANN. § 56-6-12 (West 1923); WIS. STAT. ANN. § 972.01 (West 2025) (*applying* WIS STAT. ANN. § 805.08(1) (West 2025)); WYO. RULES CIV. PROC Rule 47(c) (West 2017); WYO. RULES CRIM. PROC. RULE 24 (West 2004).

The following states guarantee some attorney participation in addition to trial judge participation: Alabama, Arizona, California, Colorado, Florida, Georgia, Illinois, Indiana, Kentucky, Maine, Minnesota, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, Virginia, Washington, Alaska, Delaware, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, Ohio, Pennsylvania, South Carolina, Tennessee, and Utah. *See* ALA. RULES CIV. PROC. Rule 47(a); ARIZ. REV. STAT. ANN. RULES CRIM. PROC. Rule 18.5(d) (2022); ARIZ. REV. STAT. ANN. RULES CIV. PROC. Rule 47(b)(2) (2022); CAL. CIV. PROC. CODE § 222.5 (West 2018); COLO. REV. STAT. RULES CRIM. PROC. Rule 24(a) (West 2020); FLA. STAT. RULES CRIM. PROC. Rule 3.300(b) (West 1993); FLA. STAT. RULES CIV. PROC. 1.431(b) (2013); GA. CODE ANN § 15-12-134 (West 2020); 725 ILL. COMP. STAT. 5/115-4 (2013); IND. RULES TRIAL PROC. Rule 47(A); KY. RULES CRIM. PROC. RULE 9.38 (West 1996); Me. Rules Unified Crim. Proc. Rule 24(a) (2025); MINN. CT. RULES CRIM. PROC. Rule 26.02 subd. (4) (2025); N.M. RULES CIV. PROC. DIST. CT. § 1-047(A) (2018); N.C. GEN. STAT. ANN. § 9-15(a) (West 2024); OKLA. STAT. ANN. T. 12, Ch. 2, App., Rule 6 (West 2025); OR. REV. STAT. § 136.210 (2024); R.I. GEN. LAWS ANN. § 9-10-14 (West 2022); VA. CODE ANN. § 8.01-358 (1981); WASH. SUPER. CT. CRIM. RULES Rule 6.4(b); Alaska Rules Civ. Proc. Rule 47(a) (2006); Alaska Rules Crim. Proc. Rule 24(a) (2022); ARK. CODE ANN. § 16-33-101 (West 2007); DEL. RULES CRIM. PROC. SUPER. CT. Rule 24(a) (1993); IOWA CT. RULES CIV. PROC. Rule 1.915 (2021); IOWA CT. RULES CRIM. PROC. Rule 2.18 (2024); KY. REF. STAT. & R. SERV. RULES CIV. PROC. Rule 47.01 (West 1953); KY. REF. STAT. & R. SERV. RULES CRIM. PROC. Rule 9.38; MD. CODE ANN., MD. RULES § 2-412(d) (West 2025); *id.* 4-312(d) (West 2025); MASS. GEN. LAWS ch. 234A, § 23 (2023); MASS. RULES CRIM. PROC. Rule 47(a) (1979); Mich. Ct. Rules Civ. Proc. Rule 2.511 (1985); MO. REV. STAT. § 494.480 (1997); N.H. REV. STAT. ANN. § 500-A: 12 (West 2024); N.J. STAT. ANN. § 1:8-3(a) (West 2024); OHIO RULES CRIM. PROC. Rule 24 (2009); 234 PA. CODE § 631 (2015); S. C. CODE ANN. § 14-7-1050 (West 1986); *id.* §§ 14-7-1100 (West 1986) and 14-7-1110 (West 1987); S.C. Rule Civ. Proc. 47(a) (West 2026); TENN. CT. RULES CIV. PROC. Rule 47 (2018); UTAH STATE CT. RULES CIV. PROC. Rule 47 (2011).

<sup>106</sup> *See* Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 31. In Missouri, Arkansas, and Rhode Island, *voir dire* is conducted primarily by attorneys. *See* MO. REV. STAT. § 494.480 (1997); ARK. CODE ANN. § 16-33-101 (West 2007); R.I. GEN. LAWS ANN. § 9-10-14 (West 2022).

Perhaps more importantly, eleven of the twelve states that do not explicitly afford parties the right to attorney conducted *voir dire* do afford parties the right to ask jurors questions that they believe would provide information that will assist them in exercising their peremptory challenges.<sup>107</sup> For example, in Missouri, where attorney conducted *voir dire* is not an explicit right, the purpose of jury selection is “to discover bias or prejudice in order to select a fair and impartial jury.”<sup>108</sup> This goal is achieved “through questions which permit the intelligent development of facts which may form the basis of challenges for cause, and to learn such facts as might be useful in intelligently executing peremptory challenges.”<sup>109</sup> Missouri courts have explicitly held that “[g]reat liberality is allowed in inquiring into attitudes and experiences of the jury panel.”<sup>110</sup> Maryland is the only state that simultaneously fails to protect the right to attorney conducted *voir dire* and limits the scope of *voir dire* questions to questions intended to elicit a specific disqualifying bias.<sup>111</sup>

In 2021, Arizona became the only state to abolish peremptory challenges.<sup>112</sup> By doing so, some might conclude that Arizona has joined Maryland as a state that has adopted “limited *voir dire*” because, without peremptory challenges, the only purpose of *voir dire* is to uncover information that would constitute a disqualifying bias.<sup>113</sup> However, this interpretation would be a fundamentally flawed oversimplification and mischaracterization, as Arizona has several safeguards in place to assure

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In Michigan, Kentucky, and Nevada judges and attorneys are equally involved in the questioning of jurors during *voir dire*. See Mich. Ct. Rules Civ. Proc. Rule 2.511 (1985); KY. REF. STAT. & R. SERV. RULES CIV. PROC. Rule 47.01 (West 1953); KY. REF. STAT. & R. SERV. RULES CRIM. PROC. RULE 9.38 (West 1997); NEV. REV. STAT. ANN. § 175.031 (West 1981). Maryland Rules 2-512 and 4-312 technically permit attorney-conducted *voir dire*, but Maryland trial judges almost universally refuse to permit attorney-conducted *voir dire*. See MD. ANN. CODE, MD. RULES § 2-512 (West 2025); *id.* § 4-312 (West 2025). Some trial judges permit attorneys to ask limited “follow up” questions, but those, too, are severely restricted. See Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 31.

<sup>107</sup> Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 31.

<sup>108</sup> *State v. Skelton*, 851 S.W.2d 33, 35 (Mo. App. 1993) (citing *State v. Smith*, 649 S.W.2d 417, 428 (Mo. banc) *cert. denied*, 464 U.S. 908 (1983)).

<sup>109</sup> *Pollard v. Whitener*, 965 S.W.2d 281, 286 (Mo. Ct. App. 1998) (citing *Skelton*, 851 S.W.2d at 35); see *Kendall v. Prudential Ins. Co. of Am.*, 327 S.W.2d 174, 177 (Mo. 1959) (“The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the Constitution.”).

<sup>110</sup> *State v. Coleman*, 553 S.W.2d 885, 887 (Mo. App. 1977).

<sup>111</sup> Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 31-32.

<sup>112</sup> *State v. Colorado*, 535 P.3d 941, 942 (Ct. App. 2023).

<sup>113</sup> Compare *id.* (abolishing the use of peremptory challenges in Arizona), with *Pearson v. State*, 86 A.3d 1232, 1235 (Md. 2014) (citing *Washington v. State*, 40 A.3d 1017, 1020 (Md. 2012)) (“Unlike in many other jurisdictions, facilitating ‘the intelligent exercise of peremptory challenges’ is not a purpose of *voir dire* in Maryland.”).

that litigants are afforded a fair trial.<sup>114</sup> Chief among these is the right of litigants to have their attorney question jurors about “any subject that might disclose a basis for the exercise of a challenge for cause.”<sup>115</sup> Other safeguards include having jurors complete case specific written questionnaires and having attorneys provide a brief opening statement at the start of the *voir dire* process.<sup>116</sup> Although nothing in the Maryland Rules that predate the Pilot Program specifically prohibit juror questionnaires and other safeguards, tragically given what is now known and accepted about the perils of implicit bias, by practice, Maryland Courts do not routinely employ any of them in the jury selection process.<sup>117</sup>

*E. Bias and Its Effect on Empaneling A Fair and Impartial Jury.*

The difference between explicit bias and implicit bias is that explicit bias refers to a juror’s attitudes and/or beliefs about a person, a group or a thing on a conscious level.<sup>118</sup> As detailed above, explicit bias was well understood by the Colonists and drafters of the U.S. Constitution.<sup>119</sup> Implicit bias, however, is a subconscious preference or prejudice that a juror may not be aware of and that was less studied and understood at the time of the Country’s founding.<sup>120</sup>

i. Peremptory Challenges: A Vital Safety Net to Combat Implicit Bias of Judges and Jurors.

In the nearly two hundred and fifty years that have elapsed since the founding of America, much has been studied and learned about implicit bias.<sup>121</sup> Implicit bias exists within nearly every human being.<sup>122</sup> Since, by definition, implicit bias cannot be appreciated by the person who holds it, any system that is designed to discover and identify its existence must necessarily rely upon the judgement of another person.<sup>123</sup>

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<sup>114</sup> See ARIZ. REV. STAT. ANN., ARIZ. RULES CIV. P. § 47 (West 2025).

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

<sup>116</sup> *Id.*

<sup>117</sup> See *infra* Parts II-IV.

<sup>118</sup> Jeffrey L. Goodman et al., *Uncovering Unconscious Motives*, 20 THE NEB. LAW. 33, 33 (2019).

<sup>119</sup> See *supra* Sections I.B-I.D.

<sup>120</sup> Goodman et al., *supra* note 118, at 34.

<sup>121</sup> See *id.* at 35.

<sup>122</sup> State v. Santiago, 122 A.3d 1, 160 (Conn. 2015).

<sup>123</sup> Goodman et al., *supra* note 118, at 34.

Of course, the person entrusted with discovering and identifying implicit bias in another person also has his or her own implicit biases.<sup>124</sup> No matter how honest a person is, they cannot escape the fact that their judgment is tainted by their own implicit biases.<sup>125</sup> For example, a trial judge and an attorney may not agree that the biases of a particular juror rise to the level of the juror being disqualified, but that analysis is necessarily informed by the implicit biases held by the judge and the attorney.<sup>126</sup> Perhaps this is one of the reasons that the overwhelming majority of American Courts jointly entrust the discovery and identification of implicit bias to both trial judges and the attorneys for the parties through the separately conducted direct questioning of potential jurors and the elimination of jurors through both challenges for cause and peremptory challenges.<sup>127</sup>

When an attorney discovers what they consider to be a disqualifying bias but is unable to convince a trial judge to disqualify the juror, he or she may use a peremptory challenge to strike the juror (except in Arizona).<sup>128</sup> In this way, peremptory challenges ensure that, from the attorney's client's perspective, the jury is made up of fair and impartial jurors.<sup>129</sup> Thus, in a very real sense, *peremptory challenges act as a safety net to combat the possibility that a judge's implicit bias has prevented the judge from recognizing a disqualifying bias in a potential juror.*<sup>130</sup>

As societal understanding of disqualifying bias evolves, an attorney's ability to inquire about bias and the safety net of peremptory challenges become even more critical.<sup>131</sup> Throughout American history, there have been circumstances in which trial judges refused to grant "for cause" challenges to potential jurors based on biases that were not yet recognized by society as "disqualifying."<sup>132</sup> For example, although lawyers for minority clients have always recognized that racial biases of potential jurors are prejudicial to their client's right to a fair trial, early American

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

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

<sup>126</sup> *See id.* (explaining that implicit bias is within everyone, including judicial officers; the legal profession is not exempt from implicit bias, and therefore they make conflicting decisions based on these unknown prejudices); *supra* Section I.D.

<sup>127</sup> *See* sources cited *supra* note 105 and accompanying text.

<sup>128</sup> *See* sources cited *supra* note 105 and accompanying text; *State v. Colorado*, 535 P.3d 941, 942 (Ct. App. 2023).

<sup>129</sup> *See supra* notes 91-95 and accompanying text.

<sup>130</sup> *See Swain v. Alabama*, 380 U.S. 202, 219 (1965), *overturned on other grounds by Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>131</sup> *See id.* at 219-20 (recognizing the critical role that peremptory challenges play in securing in a fair trial).

<sup>132</sup> *See, e.g., Lee v. State*, 165 A. 614, 617 (Md. 1933) (holding that racial prejudice did not constitute a disqualifying bias); *see infra* Section II.B.

jurisprudence failed to recognize that fact.<sup>133</sup> As set forth in detail below, it took centuries for American courts to recognize racism as a disqualifying bias.<sup>134</sup> Similarly, although same sex couples were granted the right to marry by the U.S. Supreme Court in 2015,<sup>135</sup> Maryland did not require trial courts to inquire about potential jurors' biases based on sexual orientation until 2023.<sup>136</sup>

Since trial judges are tasked with making decisions about *voir dire* based on the information available to them at the time of trial, including their understanding of society's definition of "disqualifying bias," trial judges may disagree with attorneys about whether a particular question is intended to elicit information about a disqualifying bias or about whether a juror should be stricken "for cause."<sup>137</sup> Therefore, allowing attorney conducted *voir dire* ensures the ability of parties and their attorneys to identify biases that trial courts and society as a whole have not yet recognized, or may never recognize, as "disqualifying" and to remove such biased jurors from their jury via peremptory challenge.<sup>138</sup>

This vital process not only objectively protects the constitutional right to a fair and impartial jury in society as a whole, it also ensures that parties can be confident that their individual constitutional rights have been protected.<sup>139</sup> The authors have little doubt that society will continue to evolve and additional biases will be identified as unacceptable.<sup>140</sup> For that reason, attorney-conducted *voir dire* designed to elicit information about unrecognized biases is necessary to enable litigants and their attorneys to exercise peremptory challenges based on such biases.<sup>141</sup>

Given the complexity of most cases, it is almost axiomatic that the attorney for each party has a better understanding of what specific potential

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<sup>133</sup> See, e.g., *Lee*, 165 A. at 617; see *infra* Section II.B.

<sup>134</sup> See *Batson v. Kentucky*, 476 U.S. 79, 91 (1986); *infra* Section II.B.

<sup>135</sup> *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

<sup>136</sup> *Muldrow v. State*, 305 A.3d 879, 894 (Md. App. 2023).

<sup>137</sup> See MD. JUDICIARY, *Expanded Voir Dire Pilot* (2025), <https://www.courts.state.md.us/sites/default/files/import/lawyers/pdfs/voirdirepacket.pdf> (on file with the University of Baltimore Law Forum) (citing *Collins v. State*, 158 A.3d 553, 558-59 (Md. 2017); MD. CODE ANN., MD. RULES § 2-512(d)(2) (West 2025); *id.* § 4-312 (West 2025)).

<sup>138</sup> See Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 28.

<sup>139</sup> See *Mitchell v. State*, 321 A.3d 116, 125 (Md. 2023) (citing *Pearson v. State*, 86 A.3d 1232, 1232 (Md. 2014)).

<sup>140</sup> See *infra* Section II.B.

<sup>141</sup> Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 31 ("Allowing attorneys to directly address the entire juror panel through attorney-conducted voir dire will maximize the information they obtain, thereby enabling them to avoid the temptation of relying on generalizations and stereotypes which, if gender or race based, are clearly unconstitutional.").

implicit and explicit biases may exist in a juror that would affect that juror's ability to be fair and impartial in a particular case.<sup>142</sup> That is why the overwhelming majority of states either allow the scope of *voir dire* to include issues that would intelligently inform the attorney in his or her use of peremptory challenges or allow robust attorney conducted *voir dire*.<sup>143</sup> In these jurisdictions, precious judicial resources and time do not need to be spent trying to convince a trial judge that a question that a party wishes to ask goes to a disqualifying bias.<sup>144</sup> The time saved can be better used by the court and the parties to ferret out explicit and implicit bias in potential jurors.<sup>145</sup>

In contrast, a system of *voir dire* that limits questions to those directly designed to elicit a disqualifying bias requires trial judges to engage in mental gymnastics to determine what possible responses jurors could give to proposed questions.<sup>146</sup> Moreover, limited *voir dire* questions asking about specific biases, rely on a juror's self-assessment and then self-disclosure of bias.<sup>147</sup> Maryland's self-created version of what it terms "limited *voir dire*" is inherently flawed because it largely ignores what social science now knows about explicit and implicit bias.<sup>148</sup> A person is not aware of their implicit bias until it is exposed by another.<sup>149</sup> Accordingly, by definition, juror self-assessment is incapable of identifying implicit bias.<sup>150</sup> In addition, a juror may be aware that he or she has an explicit bias but may be too embarrassed and scared to disclose this bias to a person wearing a judicial robe who sits on a dais and is addressed as "Your Honor."<sup>151</sup> As former Utah Trial Judge Fred Howard aptly observed:

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<sup>142</sup> Gutman, *supra* note 32, at 327-28; see Laura Zois, *Voir Dire Pilot Program Update*, TRIAL REP., Summer 2025, at 6 (2025).

<sup>143</sup> See Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 31; sources cited *supra* note 105.

<sup>144</sup> See Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 32 ("Given the demonstrated gains in ferreting out disqualifying bias, even if a small amount of time can be saved by curtailing or eliminating participation by counsel are we willing to live with having a jury that is demonstrably more susceptible to bias?").

<sup>145</sup> See *id.* at 32 (citing NEIL VIDMAR AND VALERIE HANS, *AMERICAN JURIES: THE VERDICT* 89 (Prometheus Books 2007); Kenneth M. Mogill & William R. Nixon, Jr., *A Practical Primer on Jury Selection*, 65 MICH. B. J. 52, 54 (1986)) (explaining that while studies showed that "attorney conducted *voir dire* takes no more time than judge conducted *voir dire*," there have also been situations where attorney-led *voir dire* took less time than similar cases tried in Maryland).

<sup>146</sup> Gutman, *supra* note 32, at 327-28.

<sup>147</sup> Zois, *supra* note 142, at 6.

<sup>148</sup> See Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 30-31.

<sup>149</sup> Suggs & Sales, *supra* note 5, at 246; Zois, *supra* note 142, at 6.

<sup>150</sup> Suggs & Sales, *supra* note 5, at 246; Zois, *supra* note 142, at 6.

<sup>151</sup> Fred D. Howard, *Judge-Versus Attorney-Conducted Voir Dire*, 4 UTAH B.J. 13, 14 (1991) (citing *State v. Ball*, 685 P.2d 1055, 1058 (Utah 1980)).

The most characteristic feature of prejudice is its inability to recognize itself. It is unrealistic to expect that any but the most sensitive and thoughtful jurors (frequently those least likely to be biased) will have the personal insight, candor, and openness to raise their hands in court and declare themselves biased. *Voir dire* is intended to provide a tool for counsel and the court to carefully and skillfully determine, by inquiry, whether bias and prejudice, latent as well as acknowledged, will interfere with a fair trial if a particular juror serves in it.<sup>152</sup>

Additionally, there is a plethora of research concluding that a juror's ability to assess his or her own bias is limited.<sup>153</sup> The existence of this research was actually acknowledged by the Maryland Supreme Court in *Collins v. State*, in "A Note on Best Practices" which states: "[r]esearch has produced concerning findings regarding the *voir dire* process. Those findings support the adoption of procedures that encourage disclosure to the greatest extent practicable."<sup>154</sup> Although *Collins* cites four studies, there are numerous other studies that reach equally troubling conclusions regarding judicially conducted limited *voir dire*'s inability to ferret out bias.<sup>155</sup> These studies conclusively establish that attorneys have a better record of ferreting out bias than judges when they have the right to question the entire panel of jurors and follow up with those that they suspect may be biased.<sup>156</sup> "The conclusions of those studies included, among other things, the following:

1. Despite trying their best jurors are not adept at self-assessing their implicit biases.<sup>157</sup>

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<sup>152</sup> *Id.* (citing *Ball*, 685 P.2d at 1058).

<sup>153</sup> *E.g., id.*; Suggs & Sales, *supra* note 5, at 246; Zois, *supra* note 142, at 6.

<sup>154</sup> *Collins v. State*, 158 A.3d 553, 562 (Md. 2017) (first citing Richard Seltzer et al., *Juror Honesty During the Voir Dire*, 19 J. CRIM. JUST. 451 (1991); then citing Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503 (1965) (conducting post-trial interviews of 225 jurors and finding numerous instances of nondisclosure); then citing Neal Bush, *The Case for Expansive Voir Dire*, 2 L. & PSYCHOL. REV. 9, 13-14 (1976); and then citing Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989) (explaining the concept of implicit bias—those biases, sometimes including racial biases, that jurors hold without conscious awareness and control of its impacts on their perception and judgment)).

<sup>155</sup> Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 28; *see, e.g.*, Howard, *supra* note 151, at 14; Suggs & Sales, *supra* note 5, at 246; Zois, *supra* note 142, at 6.

<sup>156</sup> Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 28.

<sup>157</sup> *Id.* (citing *Crawford v. United States*, 212 U.S. 183, 196 (1909)) (recognizing that "[b]ias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence").

2. Jurors are unlikely to admit to biases when they know (and are told) they should not be biased, and people want to believe they can be fair.
3. Juror anxiety provides a disincentive to respond 'yes' to a question which will require further individual questioning.
4. During judge conducted *voir dire* jurors attempted to report not what they truly thought or felt about an issue, but instead what they believed the judge wanted to hear.<sup>158</sup>
5. Since potential jurors look upon the judge as an important authority figure, many are reluctant to displease the judge and therefore tend to respond to the judge's questions with less candor than if the questions are posed by counsel.
6. Attorney participation in the questioning lessens the social distance between questioner and respondents, thus minimizing evaluation apprehension and minimizing the prospective jurors' tendency to try to please the interviewer.<sup>159</sup>
7. Attorneys are more effective than judges in eliciting candid answers from potential jurors and mock jurors change their minds more often when questioned by judges than attorneys.<sup>160</sup>
8. One reason why a short period of attorney conducted *voir dire* after the court's general *voir dire* will contribute to more complete information about the potential jurors is the attorneys' more in-depth knowledge of the case.<sup>161</sup>
9. Juror biases are not likely to be cured by judicial rehabilitation and might backfire by creating the illusion in jurors that they are unbiased.<sup>162</sup>
10. Asking jurors to express impartiality and awareness of their potential biases might have a 'credentialing' effect, or a false sense of security that they have taken care of their biases.
11. Judges usually do not realize that they are seen by jurors as both powerful and fair, and that this attitude on the part of jurors creates

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<sup>158</sup> *Id.* (citing Frank P. Andreano, *Voir Dire: New Research Challenges Old Assumptions*, 95 ILL. B. J. 474, 476 (2007)).

<sup>159</sup> *Id.* (citing Jurywork Systematic Techniques § 2:10 (2016)).

<sup>160</sup> *Id.* (citing Susan E. Jones, *Judge-Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 L. & HUM. BEHAV. 131 (1987)).

<sup>161</sup> *Id.* at 29 (citing United States v. Cleveland, Crim. A. No. 96-207, 1997 WL 2554 at \*3 (E.D. La. Jan. 2, 1997)).

<sup>162</sup> Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 29 (first citing Neil C. Macrae et al., *Out of Mind but Back in Sight: Stereotypes on the Rebound*, 67 J. PERSONALITY & SOC. PSYCHOL. 808 (1994); and then citing B. Keith Payne et al., *Best Laid Plans: Effects of Goals on Accessibility Bias and Cognitive Control in Race-Based Misperceptions of Weapons*, 38 J. EXPERIMENTAL SOC. PSYCOL. 384 (2002)).

an expectation in their minds that they should say they can be fair and impartial, whether or not this is true. Jurors desire to be accepted and approved of by the judge. They want to say the right things to the Judge.<sup>163</sup>

<sup>12.</sup> Judges do not attempt to warm up to jurors, nor should they, as it is not their role in the judicial process. Lacking a black robe and the title your honor, attorneys are far closer to the social level of a juror. Consequently, not constrained by the formalities of their position, attorneys are able to speak to jurors on their level. Attorneys have the ability to positively reinforce juror self-disclosure during *voir dire* by a process of head nodding, mmhmming, eye contact, less physical distance, relaxed posture, and a direct orientation of the interviewers body toward the interviewer. Each of these psychological techniques have been proven to help the comfort level of interviewees. Comfort with their interviewer results in dramatic increases in the willingness of interviewees to accurately disclose their feelings.<sup>164</sup>

<sup>13.</sup> The non-verbal communication of a prospective juror (such as displays of tension, evasion or hostility) is much more revealing when questions are posed by advocates and not by the neutral judge.

<sup>14.</sup> Lawyers, as advocates who have acquired a thorough working knowledge of the details of the case, are in a better position to determine what questions should be posed to veniremen and are better equipped and more inclined to follow up the initial responses of a venireman with the type of probing, ‘individualized’ questions needed to explore and expose prejudices.

<sup>15.</sup> Attorney conducted *voir dire* allows attorneys to share with jurors their own biases. By doing so they let jurors know that it’s okay to have biases as they are a part of every human being’s experience. They can then encourage the jurors to speak freely about their views without lecturing them for admitting their biases. This raises the level of juror comfort and thus juror candor and the prospect of revealing disqualifying biases that a Court can then evaluate.”<sup>165</sup>

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<sup>163</sup> *Id.* (citing Cathy E. Bennett, *Psychological Methods of Jury Selection in the Typical Criminal Case*, 4 CRIM. DEF. 11, 13 (Apr. 1977)).

<sup>164</sup> *Id.* (citing Suggs & Sales, *supra* note 5, at 255).

<sup>165</sup> *Id.* at 28-29.

## ii. The Implicit Bias of Litigants and their Lawyers.

Moreover, implicit biases held by litigants and their attorneys can affect *voir dire* and jury selection.<sup>166</sup> Under Maryland's current system, the only information that parties are guaranteed to know about a potential juror are the juror's: "race, gender, age, education, address, occupation, marital status, and if married the occupation of their spouse."<sup>167</sup> Although the U.S. Supreme Court has ruled that two of these demographics, race and gender,<sup>168</sup> cannot be used by attorneys in their exercise of peremptory challenges, many attorneys may consciously or unconsciously rely upon stereotypes and blind guesses in exercising their peremptory challenges when trying to determine whether to strike a potential juror.<sup>169</sup> If a juror chooses not to answer any question posed during limited *voir dire*, litigants and lawyers may be asked to exercise peremptory challenges based on nothing more than demographics.<sup>170</sup> When litigants and their attorneys are deprived of information about potential jurors, there is an even greater likelihood that explicit and implicit bias will affect their use of peremptory challenges.<sup>171</sup>

By way of example, research on racial disparities has indicated that in general (*i.e.* stereotypically), members of one racial group tend to have less bias against members of their own racial group than members of another racial group.<sup>172</sup> Without the right to elicit meaningful information about the entire jury panel through attorney-conducted *voir dire* that is not limited in its scope to challenges for cause, the availability of this research

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<sup>166</sup> *Id.* at 30.

<sup>167</sup> *Id.* at 30.

<sup>168</sup> Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 29 (first citing *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (prohibiting the use of peremptory strikes on racial grounds); and then citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 147 (1994) (prohibiting gender-based strikes)).

<sup>169</sup> *See id.* at 30-31; Zois, *supra* note 142, at 6.

<sup>170</sup> *See* Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 30; Zois, *supra* note 142, at 6.

<sup>171</sup> *See* Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 30-31 (stating, conversely, that "[a]llowing attorneys to directly address the entire juror panel through attorney-conducted *voir dire* will maximize the information they obtain, thereby enabling them to avoid the temptation of relying on generalizations and stereotypes which, if gender or race based, are clearly unconstitutional"); Zois, *supra* note 142, at 6.

<sup>172</sup> Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 29 (citing Anthony Greenwald & Linda Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 950-51 (2006)); *see, e.g.*, Jonathan Cardi et al., *Do Black Injuries Matter?: 93 Implicit Bias and Jury Decision Making in Tort Cases*, S. CAL. L. REV. 519 (2020).

could tempt attorneys to use race as a factor in exercising strikes in violation of *Batson*.<sup>173</sup>

The existence of this type of racially based research and its unconstitutional use in jury selection was recognized by Supreme Court Justice Stephen Breyer in his concurring opinion in the 2005 case of *Miller-El v. Dretke*<sup>174</sup> as follows:

[T]he use of race – and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before. For example, one jury-selection guide counsels attorneys to perform a “demographic analysis” that assigns numerical points to characteristics such as age, occupation, and marital status – in addition to race as well as gender. Thus, in a hypothetical dispute between a white landlord and an African-American tenant, the authors suggest awarding two points to an African-American venire member while subtracting one point from her white counterpart.<sup>175</sup>

Disturbingly, Justice Breyer then cited an article from the Maryland Bar Journal as “an example of stereotype-usage in jury selection” as follows:

For example, a bar journal article counsels lawyers to “rate” potential jurors “demographically (age, gender, marital status, etc.) and mark who would be under stereotypical circumstances [their] natural *enemies* and *allies*.”<sup>176</sup>

While troubling, Justice Breyer’s observation about Maryland practices is not surprising given that the only information that Maryland litigants have about many potential jurors is the demographic information of

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<sup>173</sup> Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 29 (citing *Batson*, 476 U.S. at 96); V. Starr & M. McCormick, *Jury Selection* 193-200 (3d ed. 2001); Post, *A Loaded Box of Stereotypes: Despite ‘Batson,’ Race, Gender Play Big Roles in Jury Selection*, NAT. L. J. 1, 18 (Apr. 25, 2005) (discussing common reliance on race and gender in jury selection).

<sup>174</sup> *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005).

<sup>175</sup> Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 30 (citing *Miller-El*, 545 U.S. at 270).

<sup>176</sup> *Id.* (first citing *Miller-El*, 545 U.S. at 270; and then citing Gillian Drake, *The Art of Litigating: Deselecting Jurors Like the Pros*, 34 MD. BAR J. 18, 22 (Mar./Apr. 2001)) (emphasis in original).

“race, gender, age, education, address, occupation, marital status, and if married the occupation of their spouse.”<sup>177</sup>

In summary, Maryland’s system of “limited *voir dire*” fails to provide any of the safeguards that are provided to litigants in almost every other state and in the U.S. federal courts.<sup>178</sup> Maryland litigants have very few “rights” when it comes to jury selection.<sup>179</sup> By limiting parties to posing questions that are directly intended to elicit a disqualifying bias, Maryland’s current system is limited in its ability to ferret out and deal with implicit bias.<sup>180</sup> This limited ability to ferret out implicit bias is exacerbated by Maryland’s practice of not allowing attorneys to conduct *voir dire*.<sup>181</sup> Maryland continues to be the only state that limits the scope of *voir dire* to challenges for cause while simultaneously denying parties the right to attorney conducted *voir dire*.<sup>182</sup>

## II. HOW DID WE GET HERE? THE HISTORY OF LIMITED VOIR DIRE IN MARYLAND.

Given all of the research and data demonstrating the superiority of expansive, attorney led *voir dire* at rooting out implicit and explicit bias,<sup>183</sup> one must wonder: *How did Maryland get to a place that deviates from the rest of the Country’s procedural due process norms for voir dire?* In order to understand the impact that Maryland’s “limited *voir dire*” system continues to have on practitioners and litigants alike, it is important to understand the history of Maryland’s caselaw and the development of limited *voir dire*.<sup>184</sup>

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<sup>177</sup> *Id.* at 30.

<sup>178</sup> *Id.* at 28, 32 (citing *Swain v. Alabama*, 380 U.S. 202, 219 (1965), *overruled on other grounds by* *Batson v. Kentucky*, 476 U.S. 79 (1986)) (“Maryland’s doctrine of “limited *voir dire*” is at odds with Federal caselaw, including the U.S. Supreme Court Holding in *Swain v. Alabama*, wherein the Court recognized that peremptory challenges are one of the most important rights an accused has in securing a fair trial.”).

<sup>179</sup> *See id.* at 30-31.

<sup>180</sup> *See id.* at 28.

<sup>181</sup> Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 31; *see supra* Section I.D.

<sup>182</sup> *See supra* Section I.D.; Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 28, 31.

<sup>183</sup> *See supra* Section I.E.

<sup>184</sup> We are not the first to write about the history of limited *voir dire* in Maryland. *See, e.g.*, Nancy S. Forster, *Between a Rock and a Hard Place: Maryland Criminal Defendants, Already Subject to Severely Limited Voir Dire, Now Also Face the Prospect of Anonymous Juries*, 40 U. BALT. L. F. 229 (2010); STANDING COMM. ON RULES OF PRAC. AND PROC., ONE HUNDRED EIGHTY-FIFTH REPORT, MD. CT., at 8-9 (2014), <https://www.mdcourts.gov/sites/default/files/rules/reports/185th.pdf> (on file with the University of Baltimore Law Forum); David A. Harak, *The Historical Argument for Attorney-Conducted Voir Dire*, TRIAL REP., Summer 2019, at 10 [hereinafter Harak,

Over the past twelve decades, Maryland's appellate courts have rigidly insisted that Maryland adhere to the doctrine of "limited" *voir dire*, which was devised and established at a time when very little was known about implicit bias.<sup>185</sup> Nevertheless, over time Maryland's appellate courts have also recognized the evolution of the definition of disqualifying bias and the impacts of implicit biases on jury selection.<sup>186</sup> Rather than simply realigning its limited *voir dire* with the *voir dire* jurisprudence of most the rest of the Country, Maryland appellate courts have attempted to reconcile limited *voir dire* with the evolution of social science by adopting certain "mandatory" *voir dire* questions on a case-by-case basis.<sup>187</sup> As set forth below, this unpredictable and piecemeal expansion of limited *voir dire* causes confusion and inconsistent application of the law and fails to adequately protect the Constitutional right to a fair and impartial jury.<sup>188</sup>

*A. The Development of "Limited Voir Dire" in Maryland.*

Maryland's system of limited *voir dire* dates back to 1905.<sup>189</sup> In 1905, the composition of Maryland jury pools was wildly different than it is today. Women could not serve on Maryland juries.<sup>190</sup> Although Black men were technically "permitted" to serve on juries after ratification of the Civil Rights Act of 1875, Black jurors were frequently excluded from juries as the practical result of discriminatory procedures such as creating jury pools from certain lists that excluded Black men.<sup>191</sup> Despite the profound changes

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*Historical Argument*]; Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 28-31; STANDING COMM. ON RULES OF PRAC. AND PROC., TWO HUNDRED TWENTY-SECOND REPORT, MD. CT. (2024), <https://www.courts.state.md.us/sites/default/files/rules/reports/222ndreport.pdf> (on file with the University of Baltimore Law Forum); *see infra* Part II.

<sup>185</sup> *See supra* Section I.E.

<sup>186</sup> *See infra* Section II.A.

<sup>187</sup> *See infra* Section II.B.

<sup>188</sup> *See infra* Section II.C.

<sup>189</sup> *Handy v. State*, 60 A. 452, 452 (Md. 1905) (rejecting expanded *voir dire* and establishing limited *voir dire*).

<sup>190</sup> Dennis M. Sweeney, *June 1 marks anniversary of having women on Maryland juries*, THE DAILY RECORD (May 31, 2010), <https://thedailyrecord.com/2010/05/31/june-1-marks-anniversary-of-having-women-on-maryland-juries/> (on file with the University of Baltimore) ("A bill to allow women jurors passed both houses and was signed by the governor to take effect on June 1, 1947. As passed, the law exempted 12 counties from its requirements, but finally — for the first time — women would be serving on juries in Maryland and federal courts."); Women's Jury Service Bill, ch. 595, 1947 Md. Laws.

<sup>191</sup> Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 N.W. U. L. REV. 877, 888 n.42 (1999) (first citing *Ware v. State*, 225 S.W. 626, 627-28, 631 (Ark. 1920); and then citing *Montgomery v. State*, 45 So. 879, 882 (Fla. 1908)); *see, e.g., Lee v. State*, 161 A. 284, 288 (Md. 1932).

in the American justice system and society as a whole over the past *twelve decades*, Maryland courts have clung to the principle of limited *voir dire* in selecting Maryland juries.<sup>192</sup>

Maryland's Court of Appeals—now called the Supreme Court of Maryland<sup>193</sup>—first adopted limited *voir dire* in the case of *Handy v. State*.<sup>194</sup> Henry J. Handy was convicted of murdering his wife in the Circuit Court for Wicomico County, Maryland.<sup>195</sup> Handy was sentenced to death.<sup>196</sup> On appeal, Handy argued that the trial court erred in failing to conduct adequate *voir dire* for two reasons.<sup>197</sup> First, the trial judge declined to allow Handy's lawyer to directly question a juror after the judge had completed his questioning.<sup>198</sup> Handy argued that his lawyer should have been permitted to question the juror “for the purpose of determining whether the right of peremptory challenge shall be exercised.”<sup>199</sup> Second, the trial judge declined to ask about the marital status of a juror.<sup>200</sup> Handy argued that the marital status of the juror would “enlighten [Handy] as to the propriety of exercising the right of peremptory challenge” because Handy's justification for murdering his wife was that she had “allowed and encouraged improper attentions” from another man.<sup>201</sup>

As the old adage goes, bad facts make bad law.<sup>202</sup> The *Handy* Court declined to adopt Handy's proposal that litigants be afforded a right to question jurors directly and ruled that the juror's marital status was “clearly immaterial” to the issues in the case.<sup>203</sup> The *Handy* Court declared that *voir dire* in Maryland should be limited as follows:

The judge should either himself conduct the examination, or at least so far conduct it as to confine it to the point under

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<sup>192</sup> See *Pearson v. State*, 86 A.3d 1232, 1235 (Md. 2014) (citing *Washington v. State*, 40 A.3d 1017, 1020 (Md. 2012)) (citations omitted).

<sup>193</sup> See *id.* Maryland's highest court was called the “Court of Appeals” until Maryland voters approved a constitutional amendment in 2022 to change the names of Maryland's appellate courts. The Court of Appeals was renamed as the Supreme Court of Maryland. Maryland's intermediate appellate court was renamed from The Court of Special Appeals to the Appellate Court of Maryland. MD. CODE ANN., MD. RULES § 1-101.1 (West 2023).

<sup>194</sup> *Handy v. State*, 60 A. 452, 454 (Md. 1905).

<sup>195</sup> *Id.* at 453.

<sup>196</sup> *Id.*

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

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Handy*, 60 A. at 453.

<sup>201</sup> *Id.* at 453-54.

<sup>202</sup> Sepehr Shahshahani, *Hard Cases Make Bad Law? A Theoretical Investigation*, 51 J. LEGAL STUD. 133, 133 (2022).

<sup>203</sup> *Handy*, 60 A. at 454 (citing *Gillespie v. State*, 48 A. 32 (Md. 1900)).

examination, and not permit it to take so wide a range as to entrap an unwary juror into letting fall some expression not seriously and understandingly made, and from which it may be afterwards argued that he was not an impartial juror in the case. The juror should be treated with the utmost fairness in the examination, and not be subjected to the rigid cross-questioning sometimes indulged in in cross-examining a witness who is testifying in the case.<sup>204</sup>

Following *Handy*, Maryland appellate courts insisted that no litigant had any right to ask any question that would assist them in “exercis[ing] intelligently and legally” their peremptory strikes.<sup>205</sup>

In 1926, Richard Reese Whittemore was convicted of murdering a prison guard during an attempted escape from the Maryland State Penitentiary.<sup>206</sup> Whittemore was sentenced to death by hanging by the Criminal Court of Baltimore City.<sup>207</sup> On appeal, Whittemore argued that the trial court had erred in refusing to allow him to question a potential juror about the potential juror’s age and his former occupation.<sup>208</sup> Whittemore argued that “conceivably, [the potential juror] may have been a former penitentiary guard, and because of that fact unfitted to render an impartial verdict on a charge of murder of a guard by a prisoner.”<sup>209</sup> The *Whittemore* court rejected that argument on the assumption that “if any such ground for doubting a juror’s fitness should be known, or feared, a question directed to that ground specifically would not only be proper, but in this case would *probably* have been asked [by the trial judge].”<sup>210</sup> The *Whittemore* court left no room for doubt in announcing:

The rule is, then, that questions not directed to a specific reason for disqualification and exclusion by the court may be refused in the court’s discretion. The nature and extent of the examination are to be decided by the court in each case in its

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<sup>204</sup> *Id.* (quoting *Stagner v. State*, 9 Tex. App. 440, 451 (1880)).

<sup>205</sup> See *infra* Section II.D. Interestingly, *Handy* marked a departure from a precedent set just 5 years earlier in *Gillespie v. State*, 48 A. 32, 33 (Md. 1900). In *Gillespie*, the Court of Appeals “conced[ed] the right of the accused to ask pertinent and proper questions on the *voir dire* in order to exercise intelligently and legally . . . their right to strike from the list. . . .” *Id.*

<sup>206</sup> *Whittemore v. State*, 134 A. 322, 322 (Md. 1926).

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

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 323-24.

<sup>210</sup> *Id.* at 324 (emphasis added).

discretion, and on appeal the ruling will not be interfered with, unless there has been a clear abuse of that discretion.<sup>211</sup>

In the wake of *Handy* and *Whittemore*, Maryland trial courts were tasked with determining whether a requested *voir dire* question was “directed to a specific reason for disqualification” of a potential juror.<sup>212</sup> If the question was not specifically aimed at uncovering a disqualifying bias, the judge could choose, in his<sup>213</sup> discretion, not to ask it.<sup>214</sup> Unsurprisingly, the definition of “disqualifying bias” varied widely between Maryland trial judges and evolved rapidly during the twentieth century.<sup>215</sup> Moreover, because trial judges were vested with wide discretion in determining whether or not a particular question was aimed at a disqualifying bias, trial judges inevitably injected *their own biases* in asking, or refusing to ask, questions of potential jurors.<sup>216</sup> As a result, biased jurors were permitted to sit on juries and litigants had no way to know whether a biased juror was deciding their case or not.<sup>217</sup>

*B. The Evolution of Disqualifying Biases and the Expansion of Limited Voir Dire on a Case-by-Case Basis.*

As time went on and social science developed the collective understanding of bias and partiality, however, Maryland’s appellate courts were forced to recognize that some trial judges improperly limited certain types of *voir dire* questions because of the trial judge’s own beliefs about what constituted a disqualifying bias. Unlike most states that recognized that the purpose of *voir dire* is to allow questions designed to reveal disqualifying bias *and* other information that would assist litigants in exercising peremptory challenges,<sup>218</sup> Maryland insisted that *voir dire* be limited with certain “mandatory” exceptions to the trial court’s

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<sup>211</sup> *Id.* (first citing *Handy v. State*, 60 A. 452, 454 (Md. 1905); and then citing *Tex. & Pac. Ry. Co. v. Hill*, 237 U.S. 208, 214 (1915)).

<sup>212</sup> *See Curtis v. State*, 243 A.2d 656, 658 (Md. Ct. Spec. App. 1968).

<sup>213</sup> Maryland did not have a female judge until the appointment of Hon. Kathryn J. DuFour in 1955. *Kathryn J. DuFour*, MD. STATE ARCH.: MD. WOMEN’S HALL OF FAME, <https://msa.maryland.gov/msa/educ/exhibits/womenshallfame/html/dufour.html> (on file with the University of Baltimore Law Forum) (last visited Jan. 8, 2026).

<sup>214</sup> *Id.* (first citing *Whittemore*, 134 A. at 324; and then citing *Day v. State*, 234 A.2d 894 (Md. Ct. Spec. App. 1967)).

<sup>215</sup> *See infra* Section II.B.

<sup>216</sup> *See Harak, Fixing Maryland Voir Dire*, *supra* note 11, at 27-28, 32.

<sup>217</sup> *See infra* Section II.B.

<sup>218</sup> *Pearson v. State*, 86 A.3d 1232, 1235 (Md. 2014) (citing *Washinton v. State*, 40 A.3d 1017, 1020 (Md. 2012)) (“Unlike in many other jurisdictions, facilitating ‘the intelligent exercise of peremptory challenges’ is not a purpose of *voir dire* in Maryland.”).

discretion.<sup>219</sup> This rigid application of “limited *voir dire*” combined with the inconsistent and ever-changing definition of disqualifying bias led to a plethora of appellate decisions reviewing a trial court’s refusal to ask *voir dire* questions and the emergence of various categories of “mandatory questions.”<sup>220</sup>

i. The Belated Recognition of Racism as a Disqualifying Bias in Maryland.

The most disturbing example of limited *voir dire* enabling biased jurors to decide cases without any ability for litigants to ask questions that would allow them to utilize peremptory challenges to strike biased jurors is found in Maryland’s prolonged refusal to adopt racial bias as a “mandatory” area of inquiry. Indeed, Maryland did not even acknowledge the existence of racism as a *potentially* disqualifying bias until 1959.<sup>221</sup>

In *Aldridge v. United States* (1931), the United States Supreme Court recognized “the right to examine jurors on the *voir dire* as to the existence of a disqualifying state of mind” including “racial or religious prejudices.”<sup>222</sup> The Supreme Court pointed out that multiple states had reversed convictions for failure to inquire about racial prejudice during *voir dire* including Florida, Mississippi, and North Carolina.<sup>223</sup> The *Aldridge* court rejected the government’s argument that allowing inquiry as to racial prejudice during *voir dire* would be “injurious” to the “administration of the law[.]”<sup>224</sup> The Supreme Court stated: “We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.”<sup>225</sup>

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<sup>219</sup> *See id.* at 1234-35.

<sup>220</sup> *See id.* at 1235-36 (first citing *Yopps v. State*, 198 A.2d 264, 267, *cert. denied*, 379 U.S. 922 (1964); and then citing *Perry v. State*, 686 A.2d 274, 280–81 (1996), *cert. denied*, 520 U.S. 1146 (1997)).

<sup>221</sup> *See Brown v. State*, 159 A.2d 895, 897 (Md. 1959).

<sup>222</sup> *Aldridge v. United States*, 283 U.S. 308, 313 (1931) (first citing *Potter v. State*, 216 S.W. 886 (Tex. Crim. App. 1919); then citing *People v. Reyes*, 5 Cal. 347, 349 (1855); then citing *Watson v. Whitney*, 23 Cal. 375, 379 (1863); then citing *People v. Car Soy*, 57 Cal. 102 (1880); and then citing *Horst v. Silverman et al.*, 55 P. 52 (Wash. 1898)).

<sup>223</sup> *Id.* at 312-13 (first citing *Pinder v. State*, 8 So. 837, 838 (Fla. 1891); then citing *Hill v. State*, 72 So. 1003 (Miss. 1916); and then citing *State v. McAfee*, 64 N. C. 339 (1870)).

<sup>224</sup> *Id.* at 314-15.

<sup>225</sup> *Id.* at 315.

Maryland's high court, however, disagreed that racial prejudice constituted a disqualifying bias.<sup>226</sup> In *Lee v. State* (1933), the Court of Appeals affirmed a trial court's refusal to ask the following question in a case where a Black man was accused of murder: "Do you regard negroes as your social equal[.]"<sup>227</sup> The Court of Appeals reaffirmed "that a white juror is not disqualified to sit in a case . . . because he thinks his race superior to another, or does not believe in the social equality of white and colored races."<sup>228</sup> In a holding that would shock the conscience of anyone who reads it today, the *Lee* court held that "think[ing] [a] race superior to another" was not a disqualifying bias and that Mr. Lee "was furnished a jury . . . qualified to give him a fair trial which was all he had a right to ask."<sup>229</sup> Moreover, because Maryland limited the purpose of *voir dire* questions to "the existence of cause for disqualification, and [was] not permitted for any other purpose[.]" Mr. Lee was deprived of the opportunity to utilize his peremptory challenges to exclude racist jurors.<sup>230</sup>

In *Corens v. State* (1946), the Court of Appeals explained that "any circumstances which may reasonably be regarded as rendering a person unfitted for jury service may be made the subject of questions and a challenge for cause" but that the determination of such "circumstances" is "left to the sound discretion of the court in each particular case."<sup>231</sup> Given that racial prejudice and segregation were acceptable facets of life in 1946, it is likely that a significant portion of trial judges viewed racial bias as acceptable rather than a disqualifying bias.<sup>232</sup>

It was not until 1959, in *Brown v. State*, that the Court of Appeals even recognized that racism could be a "disqualifying bias" and established some limited rights with respect to *voir dire* questions "as to the bias or prejudice which jurors might have . . . and as to whether the jury could give the defendant as fair and impartial a trial as they could a white man."<sup>233</sup> "*Brown* required a trial judge to propound a criminal defendant's requested *voir dire* question when it was designed to uncover racial bias '[s]o long as race prejudice exists, even in a relatively few persons.'"<sup>234</sup>

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<sup>226</sup> See *Lee v. State*, 165 A. 614, 617 (Md. 1933).

<sup>227</sup> *Id.* at 617.

<sup>228</sup> *Id.* (first citing *State v. Casey*, 11 So. 583 (La. 1892); and then citing *State v. Green*, 129 S.W. 700 (Mo. 1910)).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* (quoting *State v. Welsh*, 154 A. 51 (Md. 1931)).

<sup>231</sup> *Corens v. State*, 45 A.2d 340, 343 (Md. 1946).

<sup>232</sup> See generally *id.*, 45 A.2d 340 (illustrating Maryland's limited *voir dire* doctrine during an era when racial prejudice and segregation were accepted facets of life).

<sup>233</sup> *Brown v. State*, 159 A.2d 895, 897 (Md. 1959).

<sup>234</sup> *Hernandez v. State*, 742 A.2d 952, 958 (Md. 1999) (quoting *Brown*, 159 A.2d at 898) (citations omitted).

Between 1959 and 1976, the Court of Appeals issued multiple opinions in cases involving challenges to a trial court's *voir dire* regarding racial bias.<sup>235</sup> *Contee v. State*, *Humphreys v. State*, and *Tunstall v. State* all involved rulings requiring trial courts to inquire about a potential juror's racial prejudice "without identifying any particular, racially-charged circumstance that would warrant the requested *voir dire* question."<sup>236</sup>

In 1976, however, Maryland's appellate courts "began to limit the application of the rule first articulated in *Brown*" and started once again affirming trial court decisions refusing to ask about racial bias during *voir dire*.<sup>237</sup> In *Thornton v. State* (1976), the court held:

In the absence of some special circumstance warranting an inquiry as to racial prejudice, such examination is not mandated. To hold otherwise would allow the defendant in every case to bypass the discretion of the trial judge and use a blind scatter shot in hopes of having a pellet find some degree of prejudice in a prospective juror.<sup>238</sup>

The *Thornton* court recognized the absurdity of "limited" *voir dire* and its inability to reveal bias as follows: "To require a prospective juror under oath to say he is without prejudice would indeed leave us with a dearth of honest venire persons or, possibly, only with jurors who are too insensitive to recognize their own biases."<sup>239</sup> In other words, the *Thornton* court acknowledged that jurors are likely unwilling to admit or unable to recognize their own prejudice, making "limited *voir dire*" questions about racial bias essentially worthless.<sup>240</sup> Unfortunately, the *Thornton* court failed to recognize that *voir dire* questions aimed at uncovering information about a juror's *background and experience* (as opposed to a direct question about a juror's racial prejudice) could assist litigants in determining whether or not to utilize a peremptory challenge to remove a juror who hinted at racial prejudice.<sup>241</sup> Instead, in many cases, litigants continued to have no ability to uncover racism and utilize peremptory challenges to strike racist jurors.

Following the *Thornton* decision, trial courts regularly refused to ask questions directed at uncovering racial bias in the absence of what the

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<sup>235</sup> See *id.* at 956-58 (first citing *Contee v. State*, 165 A.2d 889 (Md. 1960); then citing *Humphreys v. State*, 175 A.2d 777 (Md. 1961); and then citing *Tunstall v. State*, 280 A.2d 275 (Md. Ct. Spec. App. 1971)).

<sup>236</sup> *Id.* at 958 (citing *Tunstall*, 280 A.2d at 277).

<sup>237</sup> *Id.* at 969.

<sup>238</sup> *Thornton v. State*, 355 A.2d 767, 773 (Md. Ct. Spec. App. 1976).

<sup>239</sup> *Id.* at 773.

<sup>240</sup> See *supra* Part I.

<sup>241</sup> Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 29; see *supra* Section I.E.

trial judge considered to be “special circumstances.”<sup>242</sup> As a result, Maryland’s appellate courts reviewed cases to determine whether “special circumstance[s] warranting an inquiry as to racial prejudice” existed.<sup>243</sup> In *Holmes v. State*, the court held that such special circumstances existed when “the complainant and the witnesses for the State are of a different race than the defendant, and the crime involves victimization of another person and the use of violence.”<sup>244</sup> In *Bowie v. State*, the Court of Appeals reversed a trial court’s refusal to inquire about racial prejudice because “[a]ll but one of the victims and most of the witnesses for the State were white. On the other hand, appellant is an African–American. Moreover, this case involves the violent victimization of other persons.”<sup>245</sup>

In 1995, the Court of Appeals issued an opinion in what it called “the first occasion that we have had to address the situation where *voir dire* into racial or ethnic bias was requested in a case which did not involve interracial violence.”<sup>246</sup> Finally recognizing the Supreme Court’s 1931 opinion in *Aldridge*, the Court of Appeals “embraced, in total, the *Aldridge* analysis” and held that “the refusal to ask a *voir dire* question on racial or ethnic bias or prejudice under the circumstances of this case constituted reversible error.”<sup>247</sup>

In *Hernandez v. State*, the Court of Appeals explained the importance of the *Aldridge* analysis as follows:

The *Aldridge* analysis, as noted, hinged the necessity of inquiry into racial bias, not on the notion that the factual circumstances of the case generate the issue, but on the possibility of “the bias of the particular jurors who are to try the accused.” *Aldridge*, 283 U.S. at 314, 51 S.Ct. at 473, 75 L.Ed. at 1058. As the Court stated, “if any one of [the jurors] was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit.” *Id.* Because the focus of *Aldridge* is on the possible bias of the individual jurors and not on the factual circumstances of the case, our embrace of the *Aldridge* analysis in *Hill* was simultaneously a rejection

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<sup>242</sup> See, e.g., *Hernandez v. State*, 742 A.2d 952, 959 (Md. 1999) (citing *Holmes v. State*, 501 A.2d 76, 80-81 (Md. Ct. Spec. App. 1985), *rev’d on other grounds*, 528 A.2d 1279 (Md. 1987)).

<sup>243</sup> *Thornton*, 355 A.2d at 773.

<sup>244</sup> *Holmes*, 501 A.2d at 81.

<sup>245</sup> *Bowie v. State*, 595 A.2d 448, 455 (Md. 1991).

<sup>246</sup> *Hill v. State*, 661 A.2d 1164, 1168 (Md. 1995).

<sup>247</sup> *Id.* at 1169 (citing *Aldridge v. United States*, 283 U.S. 308, 314 (1931)).

of the “special circumstances” limitation that had developed in both federal and Maryland case law.<sup>248</sup>

The *Hernandez* Court went on to explain that “not requiring ‘special circumstances’” as a prerequisite to inquiring about racial prejudice on *voir dire* “facilitates the ultimate disposition of cases” because trial judges “need not concern themselves over whether the facts of the case meet the special circumstances standard” and “the burden of making the inquiry ordinarily will be slight, particularly in comparison to the expenditure of resources involved in a new trial.”<sup>249</sup> In other words, according to the Court of Appeals, expanding Maryland’s “limited *voir dire*” to require inquiry regarding racial prejudice would facilitate jury selection and result in fewer appeals about whether a trial judge improperly limited *voir dire*.<sup>250</sup>

It is difficult for the modern-day reader to accept the reality that Maryland’s “limited *voir dire*” essentially ensured that, for decades, jurors who possessed explicit and/or implicit racial biases served on juries that affected the rights of people of color.<sup>251</sup> Had Maryland shed the shackles of “limited *voir dire*” while simultaneously embracing the right to attorney conducted *voir dire* many of these biased jurors would have been identified and stricken from juries.<sup>252</sup>

## ii. Other Mandatory Voir Dire Questions.

Racial bias was not the only type of bias that Maryland’s appellate courts recognized as a “disqualifying bias” that warranted “mandatory” *voir dire* during the twentieth and early twenty-first century.<sup>253</sup> Recently, in *Muldrow v. State*, Judge Getty summarized the various areas of mandatory inquiry as follows:

[J]urors’ bias against the defendant’s race, ethnicity, or cultural heritage; jurors’ religious affiliations if they would prevent them from reaching a fair verdict; jurors’ tendency to give undue weight to the testimony of police officers; any “strong feelings” the jurors have toward the crime charged,

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<sup>248</sup> *Hernandez v. State*, 742 A.2d 952, 960 (Md. 1999).

<sup>249</sup> *Id.*

<sup>250</sup> *See id.*

<sup>251</sup> *See Harak, Fixing Maryland Voir Dire, supra* note 11, at 29-31; *supra* Section I.E.

<sup>252</sup> *See Harak, Fixing Maryland Voir Dire, supra* note 11, at 29-31; *supra* Section I.E.

<sup>253</sup> *See infra* Section II.B.ii; *supra* Section I.E.

[ ] jurors' bias against defense witnesses, [ ] and jurors' bias in favor of the State's witness,[ ].<sup>254</sup>

In *Muldrow*, the court adopted another “mandatory” area of inquiry, holding that “where the evidence presented may arouse bias against homosexuality among the jurors, and the court is aware of this possibility, it must inquire with the jury pool about such bias.”<sup>255</sup> Most recently, in *Mitchell v. State*, Maryland’s high court adopted another area of “mandatory” inquiry explaining: “A trial court must ask prospective jurors a question designed to uncover disqualifying bias concerning a child-witness where it is reasonable to conclude that: (1) potential jurors may be inclined to believe or disbelieve the child’s testimony based solely on the child’s age; and (2) the child’s testimony will be important to the case.”<sup>256</sup>

### C. *Inconsistent Caselaw 1993-2014.*

Over the past three decades, many judges and lawyers have (thus far unsuccessfully) advocated for the expansion of Maryland’s “limited *voir dire*” to allow questions aimed at uncovering information that would inform the “intelligent exercise of peremptory challenges.”<sup>257</sup> These advocates point out the various ways expanding Maryland’s “limited *voir dire*” protects the constitutional right to a fair and impartial jury.<sup>258</sup> They also explain the obvious benefit to judicial economy and trial judges: *If Maryland’s “limited voir dire” is expanded, trial judges will no longer be tasked with the mental gymnastics of determining whether a question is intended to elicit a disqualifying bias or not and litigants will no longer be forced into the long appellate process to remedy trial court’s rulings refusing to allow questions to be asked on the basis of “limited voir dire.”*<sup>259</sup> Maryland caselaw regarding *voir dire* between 1993 and 2025 illustrates the harm and confusion caused by the dogmatic adherence to the concept of “limited *voir dire*” and simultaneous expansion of the definition

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<sup>254</sup> *Muldrow v. State*, 305 A.3d 879, 889 (Md. App. Ct. 2023) (citations omitted).

<sup>255</sup> *Id.* at 893 (first citing *Berthiaume v. Smith*, 875 F.3d 1354, 1360 (2017); and then citing *Toney v. Zarynoff’s, Inc.*, 755 N.E.2d 301, 307 (Mass. App. Ct. 2001)).

<sup>256</sup> *Mitchell v. State*, 321 A.3d 116, 135 (Md. 2024).

<sup>257</sup> *See, e.g.*, Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 33; Forster, *supra* note 184, at 252.

<sup>258</sup> *See generally* Harak, *Fixing Maryland Voir Dire*, *supra* note 11 (arguing for the expansion of Maryland’s current “limited” *voir dire* system); Forster, *supra* note 184 (concluding that Maryland must expand its current system of “limited” *voir dire* to protect the right to a fair trial).

<sup>259</sup> *See, e.g.*, Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 28-29.

of disqualifying bias resulting in ever-changing “mandatory” areas of inquiry and inconsistent application of the law.<sup>260</sup>

In *Davis v. State* (1993), Judge Robert M. Bell (later Chief Judge Bell), joined by Judge John C. Eldridge, dissented from the majority opinion that affirmed a trial judge’s refusal to ask potential jurors whether they or any close friend or relative was or had been a member of law enforcement.<sup>261</sup>

*Davis* involved an appeal from a conviction in the Circuit Court for Baltimore City for possession with intent to distribute cocaine and heroin.<sup>262</sup> Davis argued that his proposed *voir dire* question about ties to law enforcement “may have led to the disqualification for cause of one or more of the prospective jurors or, at the very least, would have allowed him to intelligently exercise his peremptory challenges.”<sup>263</sup> The majority rejected Davis’s first argument on the basis that “[t]he fact that a prospective juror is employed as, related to, or associated with a law enforcement officer does not establish that the prospective juror has any undue bias or prejudice that will prevent that person from fairly and impartially determining the matter before them.”<sup>264</sup> The majority further rejected Davis’s argument that follow-up questioning about the details of a potential juror’s relationship to law enforcement may well have revealed a disqualifying bias explaining: “We see no difference between this approach and the practice in some other states that permit parties to use *voir dire* as a means to more effectively exercise peremptory challenges—a practice that this Court has long since rejected.”<sup>265</sup> The majority concluded: “Where parties do not direct their questions to grounds for disqualification but such questions are ‘speculative, inquisitorial, catechising or ‘fishing’, asked in aid of deciding on peremptory challenges,” a trial judge has the discretion to refuse to ask them.<sup>266</sup>

Next, in an outright effort at *voir dire* reform, Davis argued that Maryland should join the “‘overwhelming majority’ of states that have adopted the position that a criminal defendant is ‘entitled to make

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<sup>260</sup> See *infra* Section II.C. A quick glance at the citations in this Section reveal a plethora of opinions relating to the proper application of “limited *voir dire*” that have been divided and overturned since 1993, demonstrating the unstable and inconsistent application of the law. See *infra* Section II.C.

<sup>261</sup> *Davis v. State*, 633 A.2d 867, 881 (Md. 1993) (Bell, J., dissenting), *overruled by*, *Pearson v. State*, 86 A.3d 1232 (Md. 2014).

<sup>262</sup> *Id.* at 870.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 884.

<sup>265</sup> *Id.* at 872-73 (quoting *McGee v. State*, 146 A.2d 194, 196-97 (Md. Ct. Spec. App. 1959)).

<sup>266</sup> *Id.* at 872-73 (quoting *id.* at 196-97).

reasonable inquiries of prospective jurors so that he may intelligently exercise his right of peremptory challenge.”<sup>267</sup> Citing *Handy* and *Whittemore*, the majority declined to revisit Maryland’s system of limited *voir dire* out of concern for judicial economy.<sup>268</sup> The majority explained:

This Court initially adopted the rules concerning the scope of *voir dire* because allowing more extensive inquiry would unduly tax the efficiency of Maryland’s judicial system. Although some litigants might benefit from broader mandatory *voir dire*, a greater number of citizens would be hindered due to the accompanying decline in their ability to gain prompt resolution of their litigation. In *Handy* and *Whittemore*, this Court decided that any such detrimental effects outweighed the marginal gains springing from unlimited *voir dire*.<sup>269</sup>

In his dissenting opinion, Judge Bell rejected the idea that “expanding the scope of *voir dire* somewhat” would “unduly tax the efficiency of Maryland’s judicial system” stating that expanding *voir dire* may require a trial judge “to ask an additional two or three” questions in order to seat a fair and impartial jury.<sup>270</sup> He opined: “Certainly, that is not

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<sup>267</sup> *Davis*, 633 A.2d at 873.

<sup>268</sup> *Id.* at 874 (first citing *Whittemore v. State*, 134 A. 322, 323 (Md. 1926); and then citing *Handy v. State*, 60 A. 452, 454 (Md. 1905)).

<sup>269</sup> *Id.* at 874-75 (quoting *Davis v. State*, 611 A.2d 1008, 1010 (Md. Ct. Spec. App. 1992)). The majority in *Davis* also noted that California had recently implemented multiple changes in its *voir dire* process. *Davis v. State*, 633 A.2d 867, 875-76 (Md. 1993). In 1981, in the case of *People v. Williams*, the California Supreme Court expanded *voir dire* in criminal cases to allow inquiry aimed at uncovering “subconscious bias” and allowed “reasonable inquiries made to assist counsel in the intelligent exercise of peremptory challenges.” *Id.* at 875 (citing *People v. Williams*, 628 P.2d 869, 871 (Cal. 1981)). According to the *Davis* majority, “[i]n response to the apparent waste of judicial resources in the criminal arena, due to extensive *voir dire* required under *Williams*, the voters of California passed Proposition 115” in 1992, which resulted in a return to “limited *voir dire* for criminal trials.” *Id.* at 875-76 (citing *People v. Boulerice*, 7 Cal.Rptr.2d 279, 285-86 (Cal. App. 1992)). What the *Davis* majority could not have known, however, was that California would quickly return to a form of expanded *voir dire* in criminal trials by guaranteeing the right of the parties to question jurors directly after a judge completed his or her questioning. See CAL. CIV. PROC. CODE § 223 (West 2001) (guaranteeing attorney-led *voir dire*) (prior to 2018 amendment); CAL. CIV. PROC. CODE § 223 (West 2018) (prohibiting various limitations). While questions are still aimed at uncovering disqualifying bias, courts cannot limit the methodology employed by parties and are required to “permit liberal and probing examination” to uncover bias. See CAL. CIV. PROC. CODE § 223 (West 2018).

<sup>270</sup> *Davis*, 633 A.2d at 888 (Bell, J., dissenting).

too high a price to pay to give meaning to a right guaranteed by our Constitution.”<sup>271</sup> Judge Bell did not, however, advocate for wholesale adoption of expanded *voir dire* that would permit questions aimed at informing the intelligent exercise of peremptory challenges.<sup>272</sup> Instead, he advocated that trial courts should employ a more flexible form of “expansive enough” yet still “limited *voir dire*” explaining:

I maintain that the *voir dire* process is meaningful only when it is expansive enough to allow a party—be it the State or the defense—to elicit factual information which could form the predicate for a challenge for cause. . . . When the inquiries that constitute proper *voir dire* are restrictively interpreted, so that the *voir dire* process does not produce any information other than that which is automatically disqualifying, the defendant may be deprived of the right to a fair and impartial jury; he or she is completely at the mercy of the good faith, objectivity, and astuteness of the individual venirepersons. I believe that it is an abuse of discretion for the court to so restrict the *voir dire* process. Under the rationale underlying the majority’s view of *voir dire*, taken to its logical conclusion, all that would be necessary to empanel a legally sufficient jury is that the trial court ask the prospective jurors whether they could be fair and impartial. Only those jurors who confessed that they could not would, or could, be challenged for cause. Because the *voir dire* has not produced any other information, the others would be absolutely insulated from challenge.<sup>273</sup>

In a footnote, Judge Bell explained that his vision of “more expansive” but still “limited” *voir dire* would have a “fall-out effect” of reducing the likelihood that peremptory challenges could be used for unconstitutional purposes because more expansive *voir dire* could, in some circumstances inform the intelligent exercise of peremptory challenges.<sup>274</sup> Judge Bell explained that “the incidental availability of information which could form the basis for the exercise of peremptory challenges would make more likely that jurors are not stricken for legally impermissible reasons.”<sup>275</sup>

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<sup>271</sup> *Id.*

<sup>272</sup> *See id.* at 885 (majority opinion).

<sup>273</sup> *Id.* at 874-75 (quoting *Davis v. State*, 611 A.2d 1008, 1010 (Md. Ct. Spec. App. 1992)).

<sup>274</sup> *Id.* at 881 n.1.

<sup>275</sup> *Id.*

The *Davis* case marked the start of a line of cases in which Maryland's high court judges would disagree about the appropriate way to address *voir dire*.<sup>276</sup> Trial courts continued to wrestle with determining the purpose of individual *voir dire* questions.<sup>277</sup> As noted in detail above, societal understanding of bias has continued to evolve.<sup>278</sup> Maryland's appellate courts faced ever increasing challenges to trial court refusals to ask questions that trial judges did not view as sufficiently limited.<sup>279</sup> By 2000, Judge Bell had become the Chief Judge of the Court of Appeals.<sup>280</sup> Chief Judge Bell authored the majority opinion in *Dingle v. State*, a case that illustrates the changing landscape of *voir dire* in Maryland.<sup>281</sup>

In *Dingle* (2000), the Court of Appeals reversed a trial court's decision to ask *voir dire* inquiries in a "compound" manner by instructing jurors that they need only respond to an inquiry in the affirmative if the juror believed their ability to be fair and impartial was impacted.<sup>282</sup> Most previous appellate decisions addressing *voir dire* dealt with a trial court's refusal to ask a particular question.<sup>283</sup>

In contrast, the *Dingle* court reversed a trial court for asking a particular question the wrong way.<sup>284</sup> Chief Judge Bell explained that "[b]ecause [the trial judge] did not require an answer to be given to the question as to the existence of the status or experience unless accompanied by a statement of partiality, the trial judge was precluded from . . . exercising discretion, and, at the same time, the petitioner was denied the opportunity to discover and challenge venire persons who might be biased."<sup>285</sup> Chief Judge Bell writing for the *Dingle* majority rejected any argument that judicial economy outrank the constitutional right to a fair and impartial jury.<sup>286</sup> He explained that "[e]xpediency and the perceived need to

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<sup>276</sup> See, e.g., *Evans v. State*, 637 A.2d 117, 137 (Md. 1994); *Oken v. State*, 681 A.2d 30, 56 (Md. 1996).

<sup>277</sup> See, e.g., *Dingle v. State*, 759 A.2d 819, 824-34 (Md. 2000).

<sup>278</sup> See *supra* Section I.E.

<sup>279</sup> See, e.g., *Evans*, 637 A.2d at 137; *Oken*, 681 A.2d at 56.

<sup>280</sup> *Maryland Manual On-Line, A Guide to Maryland & its Government: Court of Appeals: Former Judges*, MD. STATE ARCHIVES, <https://msa.maryland.gov/msa/mdmanual/29ap/former/html/msa11654.html> (on file with the University of Baltimore) (last visited Nov. 25, 2025).

<sup>281</sup> See generally *Dingle*, 759 A.2d (explaining that the changes were moving away from the long practiced limited *voir dire* structure).

<sup>282</sup> *Id.* at 833.

<sup>283</sup> See *id.* at 824 (citing *Alexander v. R.D. Grier & Sons Co.*, 30 A.2d 757, 758 (Md. 1943)); *id.* at 829 (citing *Davis v. State*, 633 A.2d 867, 872 (Md. 1993)); *id.* at 834 (citing *Perry v. State*, 686 A.2d 274, 282 (Md. 1996)).

<sup>284</sup> *Id.* at 830.

<sup>285</sup> *Id.* at 828.

<sup>286</sup> See *id.* at 826-28.

limit the process” led the trial court to improperly “avoid examination of each affected venire person as to the admittedly relevant matters.”<sup>287</sup>

Judge Irma Raker filed a dissenting opinion joined by Judges Alan M. Wilner and Glenn T. Harrell expressing perplexity about the court’s progressively inconsistent application of limited *voir dire*.<sup>288</sup> She pointed out the juxtaposition of the majority opinion in *Davis* affirming a trial court’s decision *not* to ask a question and the majority opinion in *Dingle* reversing a trial court’s decision to *add* a phrase to questions that were likely non-mandatory in the first place.<sup>289</sup> Judge Raker opined: “The Court’s holding in this case effectively transmutes the function of these questions into soliciting grounds for peremptory challenges—something we have steadfastly refused to do.”<sup>290</sup> She then admonished: “If the Court wants to do that, *the Court should say so and not muddle the difference between challenges for cause and peremptory challenges.*”<sup>291</sup>

In *State v. Thomas* (2002),<sup>292</sup> another case authored for the majority by Chief Judge Bell, the Court of Appeals reversed a trial court’s refusal to ask members of a jury venire whether any of them had “strong feelings regarding violations of narcotics laws.”<sup>293</sup> The *Thomas* majority opined that a question aimed at discovering potential juror’s “attitude concerning the crime with which the respondent was charged . . . is directed at biases, specifically, those related to the respondent’s alleged criminal act, which if uncovered are disqualifying when they impair the ability of the juror to be fair and impartial.”<sup>294</sup> Like his dissenting opinion in *Davis* and his majority opinion in *Dingle*, Chief Judge Bell encouraged trial courts to broadly explore areas of inquiry that had the potential to lead to disqualifying biases.<sup>295</sup>

Judge Raker, joined by Judge Harrell, filed a concurring opinion pointing out the problematic piecemeal expansion of *voir dire* on a “case-by-case basis.”<sup>296</sup> Judge Raker recognized that “Maryland is one of the few states in the country that does not permit *voir dire* to inform the exercise of

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<sup>287</sup> *Dingle*, 759 A.2d at 826.

<sup>288</sup> *Id.* at 830 (Raker, J., dissenting).

<sup>289</sup> *Id.* at 840-42.

<sup>290</sup> *Id.* at 843.

<sup>291</sup> *Id.* (emphasis added).

<sup>292</sup> See generally *State v. Thomas*, 798 A.2d 566 (Md. 2002), *abrogated by*, *Pearson v. State*, 86 A.3d 1232 (Md. 2014) (reversing the trial court’s refusal to ask prospective jurors whether they had strong feelings about narcotics violations).

<sup>293</sup> *Id.* at 567.

<sup>294</sup> *Id.* at 571.

<sup>295</sup> *Id.* at 574.

<sup>296</sup> *Id.* at 575 (Raker & Harrell, JJ., concurring).

peremptory challenges.”<sup>297</sup> Despite Maryland’s “limited *voir dire*, however, Judge Raker wrote: “I discern a trend in Maryland, on a case-by-case basis, to expand *voir dire*. . . . The discretion of trial judges in controlling *voir dire* is, little by little and case by case, being diminished.”<sup>298</sup> Judge Raker called for the implementation of expanded *voir dire* as follows:

Rather than continue this case-by-case expansion of the scope of *voir dire* examination for cause, and in its wake continue to reverse judgments based on *voir dire* error, let us, once and for all, join the rest of the country and expand the purpose of *voir dire* in Maryland to include the informed exercise of peremptory challenges. Since we have not moved to abolish peremptory challenges, let us at least afford counsel the information necessary to exercise an informed challenge. To that end, I would endorse a *voir dire* process that would enable a lawyer to elicit sufficient information to develop a rational basis for excluding a potential juror, whether for cause or by peremptory challenges.”<sup>299</sup>

Judge Battaglia filed a dissenting opinion in *Thomas* theorizing that the trial court had properly exercised its discretion in the context of traditional limited *voir dire*.<sup>300</sup> Judge Battaglia also, however, expressed concern that the majority opinion would lead to inconsistent application in trial courts because “litigants will be charged with the difficult task of determining the limitations of the majority opinion in developing *voir dire* questions and trial courts will be left to speculate as to whether the *voir dire* really is designed to support strikes for cause or peremptory challenges.”<sup>301</sup> Judge Battaglia challenged her colleagues in the majority saying: “If the majority is desirous of expanding Maryland’s traditionally conservative *voir dire* process to include eliciting information to aid the attorneys in exercising peremptory challenges, then it should do so explicitly and without reservation.”<sup>302</sup>

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<sup>297</sup> *Id.* at 575-76.

<sup>298</sup> *Thomas*, 798 A.2d at 575-76 (first citing *Dingle v. State*, 759 A.2d 819, 824 n.8 (Md. 2000); then citing *Hernandez v. State*, 742 A.2d 952, 967 (Md. 1999); then citing *Hill v. State*, 661 A.2d 1164, 1169 (Md. 1995); then citing *Bowie v. State*, 595 A.2d 448, 455 (Md. 1991); then citing *Casey v. Roman Catholic Arch.*, 143 A.2d 627, 632 (Md. 1958); then citing *Corens v. State*, 45 A.2d 340, 343-44 (Md. 1946); and then citing *Langley v. State*, 378 A.2d 1338, 1344 (Md. 1977)).

<sup>299</sup> *Id.* at 575-76 (Raker & Harrell, JJ., concurring).

<sup>300</sup> *See id.* at 578 (Battaglia, J., dissenting).

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

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

Just a few months later, in *Sweet v. State* (2002), the Court of Appeals issued another opinion involving *voir dire* in a criminal case involving sexual abuse of a minor.<sup>303</sup> This time, the majority opinion was authored by Judge Raker.<sup>304</sup> The *Sweet* majority,<sup>305</sup> relied on *Thomas* to hold that the trial court erred in refusing to ask potential jurors whether “the charges stir up strong emotional feelings in you that would affect your ability to be fair and impartial in this case.”<sup>306</sup> Chief Judge Bell, joined by Judge Eldridge, filed a concurring (in part) opinion that agreed with the majority’s *voir dire* analysis.<sup>307</sup> Judge Battaglia filed a dissenting opinion adopting the rationale for her dissent in *Thomas*.<sup>308</sup>

In *Landon v. Zorn* (2005), the Court of Appeals issued a rare opinion regarding *voir dire* in a civil case.<sup>309</sup> The Court affirmed a trial court’s refusal to ask the following question: “Does any member of the jury panel have any preconceived opinion or bias or prejudice in favor of, or against plaintiffs in personal injury cases in general and medical malpractice cases in particular? If yes, please explain.”<sup>310</sup> Interestingly, both the Maryland Trial Lawyers’ Association<sup>311</sup> and Maryland Defense Counsel filed amicus briefs that agreed on one point – expanded *voir dire*.<sup>312</sup> The Court noted that although Maryland Defense Counsel contended that the trial court was correct, it nevertheless advocated that the Court “should take this opportunity to expand *voir dire* when an appropriate factual basis is proffered.”<sup>313</sup> The Court declined and insisted that *voir dire* in Maryland is limited to uncovering disqualifying bias.<sup>314</sup> In affirming the trial court, the *Landon* court reasoned that “[e]ven if prospective jurors had preconceived notions about plaintiffs in lawsuits, and in medical malpractice cases in particular, such beliefs would not automatically render them disqualified for

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<sup>303</sup> *Sweet v. State*, 806 A.2d 265, 266-67 (Md. 2002).

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

<sup>305</sup> *Id.* at 266.

<sup>306</sup> *Id.* at 270-71 (citing *Thomas*, 798 A.2d at 556).

<sup>307</sup> *Id.* at 271-73 (Bell, J., dissenting).

<sup>308</sup> *Id.* at 273 (Battaglia, J., dissenting).

<sup>309</sup> See *Landon v. Zorn*, 884 A.2d 142, 145 (Md. 2005), *abrogated by*, *McQuitty v. Spangler*, 976 A.2d 1020 (Md. 2009).

<sup>310</sup> *Id.* at 147, 156.

<sup>311</sup> Now known as the Maryland Association for Justice, Inc. See *About MAJ*, MD. ASS’N FOR JUST., <https://www.mdforjustice.com/?pg=AboutMAJ> (on file with the University of Baltimore Law Forum) (last visited on Nov. 18, 2025).

<sup>312</sup> *Landon*, 884 A.2d at 145 n.2.

<sup>313</sup> *Id.* at 151.

<sup>314</sup> *Id.*

cause.”<sup>315</sup> For that reason, the *Landon* Court said, no *voir dire* question on such issues was required.<sup>316</sup>

In *Curtin v. State* (2006), Judge Battaglia authored the majority opinion opining that a trial court had not erred in refusing to ask potential jurors whether they had “strong feelings concerning the use of handguns [such] that they would be unable to render a fair and impartial verdict based on the evidence.”<sup>317</sup> Judge Battaglia reasoned that the question “was not one that, if answered in the affirmative, would have provided a basis for a strike for cause in the instant case.”<sup>318</sup> Judge Wilner filed a concurring opinion agreeing with the majority opinion under the traditional limited *voir dire* analysis, but also noting that the court had already “essentially taken judicial notice that some people may have particularly strong feelings about narcotics crimes” (referring to the majority opinion in *Thomas*) and asking “what difference does it make what the crime is?”<sup>319</sup> Judge Wilner advocated that the judiciary “put the question in the Rules,” which would “give us the opportunity to frame an acceptable (not necessarily a mandated) form of question going to bias.”<sup>320</sup>

Chief Judge Bell filed a dissenting opinion in *Curtin*, joined by Judge Raker.<sup>321</sup> Chief Judge Bell argued that “[i]t is unconscionable that we would inquire in some cases, those we have specifically recognized, but refuse to do so in those other cases, simply because it might take too long and perhaps because it may be too difficult to decide which cases fall into” a “category” of crimes.<sup>322</sup> Chief Judge Bell argued: “[W]e must require, as a matter of policy, trial courts to ask, in every criminal trial, whether the prospective juror has such strong feelings about the charged crime as to

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<sup>315</sup> *Id.* at 152.

<sup>316</sup> *Id.*

<sup>317</sup> *Curtin v. State*, 903 A.2d 922, 936 (Md. 2006) (Wilner, J., concurring).

<sup>318</sup> *Id.* at 924 (majority opinion).

<sup>319</sup> *Id.* at 935 (Wilner, J., concurring).

<sup>320</sup> *Id.* Judge Wilner’s predilection to change Maryland’s approach to *voir dire* by Rule is unsurprising as he served as Chair of the Standing Committee on Rules of Practice and Procedure (“Rules Committee”) for more than two decades. *See Court of Appeals, Former Judges, Alan M. Wilner*, MD. STATE ARCHIVES (Apr. 14, 2025), <https://msa.maryland.gov/msa/mdmanual/29ap/former/html/msa11679.html> (on file with University of Baltimore Law Forum). Moreover, Judge Wilner’s concurring opinion in *Curtin* was somewhat prophetic as just seven years later the Rules Committee would issue a recommendation that Maryland expand *voir dire* for the purpose of allowing inquiries designed to inform the intelligent exercise of peremptory challenges. *See Curtin*, 903 A.2d at 935 (Wilner, J., concurring).

<sup>321</sup> *Id.* (Bell, J., dissenting).

<sup>322</sup> *Id.* at 938.

make it difficult or impossible to weigh the facts fairly.”<sup>323</sup> He concluded “a Rule is simply unnecessary.”<sup>324</sup>

In *Stewart v. State* (2007), Judge Raker and Chief Judge Bell once again disagreed on *voir dire* principles.<sup>325</sup> Judge Raker authored the majority opinion holding that a trial court did not abuse its discretion in refusing to ask questions that the defendant argued were designed “to eliminate the possibility of bias in a child sex abuse case.”<sup>326</sup> Chief Judge Bell disagreed and opined: “This case highlights, in my opinion, a lack of consistency in this Court’s rulings regarding *voir dire* questions that are designed to discover a potential juror’s bias with respect to the crime for the commission of which the defendant has been charged and for which he or she is being tried.”<sup>327</sup> Chief Judge Bell further noted that the majority opinion had acknowledged in a footnote that “it [is] sound practice . . . to ask prospective jurors, when asked to do so, whether the fact that the defendant is charged with a particular crime would affect their ability to be fair and impartial.”<sup>328</sup> Chief Judge Bell queried: “If asking such questions are ‘sound practice,’ one must ask: why is it not a required practice, especially given the precedents in this State?”<sup>329</sup> Chief Judge Bell argued that the trial court had failed to carry out its duty to ferret out bias, explaining: “Because potential jurors may not outwardly admit or even recognize that they are biased, it is incumbent upon the trial court to ensure that an impartial jury is empaneled.”<sup>330</sup> He concluded with: “This ruling adds additional confusion to an already confusing and increasingly inconsistent line of cases. I dissent.”<sup>331</sup>

In *Moore v. State* (2010), Chief Judge Bell wrote the majority opinion holding that a trial court erred when it refused to “ask potential jurors on *voir dire* whether they would tend to view the testimony of witnesses called by the defense with more skepticism than that of witnesses called by the State, merely because they were called by the defense.”<sup>332</sup> Judge Joseph F. Murphy, Jr. wrote a concurring opinion explaining why a more expansive approach to *voir dire* would ultimately result in less appeals

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<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> See *Stewart v. State*, 923 A.2d 44, 47, 57 (Md. 2007), *abrogated by*, *Kazadi v. State*, 223 A.3d 554 (Md. 2020), *and Mitchell v. State*, 321 A.3d 116 (Md. 2024).

<sup>326</sup> *Id.* at 54.

<sup>327</sup> *Id.* at 57 (Bell, C.J., dissenting).

<sup>328</sup> *Id.* at 56 n.6 (majority opinion).

<sup>329</sup> *Id.* at 57 (Bell, C.J., dissenting).

<sup>330</sup> *Id.* at 60.

<sup>331</sup> *Stewart*, 923 A.2d at 60 (Bell, C.J., dissenting).

<sup>332</sup> *Moore v. State*, 989 A.2d 1150, 1153 (Md. 2010).

and better use of judicial resources.<sup>333</sup> Judge Murphy made two suggestions.<sup>334</sup> First, “that the circuit court resolve a ‘doubtful’ and/or ‘marginal’ *voir dire* question in favor of the party who has requested that it be asked.”<sup>335</sup> Second, Judge Murphy recommended that for each requested *voir dire* question “the trial judge should ask himself or herself, ‘does this question probe for a condition that would be likely to impair a juror’s ability to decide this case on the evidence presented?’ If the answer to that question is ‘yes,’ the question should be asked.”<sup>336</sup> Judge Murphy explained that he made his suggestions in an “effort to reduce the chances that a conviction will be reversed on the ground that the defendant was entitled to a *voir dire* question that the Circuit Court refused to ask.”<sup>337</sup>

In *State v. Shim* (2011), Judge Sally Adkins wrote the majority opinion holding that the trial court erred in refusing to ask: “Does any member of the jury panel have such strong feelings concerning the violent death of another human being that you would be unable to render a fair and impartial verdict based solely on the evidence presented?”<sup>338</sup> The majority opinion carefully recounted the history of limited *voir dire* caselaw, particularly relating to “strong feelings” about certain crimes.<sup>339</sup> Recognizing that “the potential for bias exists in most crimes”, the majority expanded mandatory *voir dire* in criminal cases by holding that “[w]hen requested by a defendant, and regardless of the crime, the court should ask the general question, ‘Does any member of the jury panel have such strong feelings about [the charges in this case] that it would be difficult for you to fairly and impartially weigh the facts.’”<sup>340</sup>

Judge Harrell wrote a concurring opinion in *Shim* that he described as an attempt to “purge [his] conscience.”<sup>341</sup> He described inconsistencies in the opinions in *Thomas*, *Curtin*, and *Sweet*, and offered a self-criticism of sorts for his decision to join the majority in *Curtin*.<sup>342</sup> Judge Harrell explained: “Suffice it to say that perhaps I was moved to join the Majority in *Curtin* because the inexorable case-by-case march feared in

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<sup>333</sup> *Id.* at 1169 (Murphy, J., concurring).

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

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *State v. Shim*, 12 A.3d 671, 674 (Md. 2011), *abrogated by*, *Pearson v. State*, 86 A.3d 1232 (Md. 2014).

<sup>339</sup> *Id.* at 675-82.

<sup>340</sup> *Id.* at 681.

<sup>341</sup> *Id.* at 684 (Harrell, J., concurring).

<sup>342</sup> *See id.*

the *Thomas* concurrence was coming to pass, and I thought to erect a stop sign of sorts to discourage future cases. That failed obviously.”<sup>343</sup>

The Court of Appeals issued its opinion in *Pearson v. State* (2014), once again recounting the history of inconsistent application of limited *voir dire* in Maryland.<sup>344</sup> The *Pearson* Court abrogated the holdings in *Shim*, *Sweet*, and *Thomas* and overruled the holding in *Davis*.<sup>345</sup> Writing for the majority, Judge Shirley M. Watts held that the language that had been expressly adopted by the Court in *Shim*, *Sweet*, and *Thomas* was “at odds” with the Court’s holding in *Dingle* relating to compound questions.<sup>346</sup> The majority held that the language *it had previously approved* relating to a juror’s ability to fairly and impartially decide a particular case improperly “shifted responsibility to decide a prospective juror’s bias from the trial court to the prospective juror.”<sup>347</sup> The *Pearson* majority also explicitly overruled the majority opinion in *Davis*, which affirmed the trial court’s refusal to inquire about potential jurors’ employment with law enforcement.<sup>348</sup> The *Pearson* majority opinion quoted Chief Judge Bell’s *Davis* dissent and explained: “a defendant is entitled to know whether a prospective juror has worked in the law enforcement field if all of the State’s witnesses and/or the witnesses whose testimony is reasonably likely to be the basis for a conviction are members of the law enforcement community.”<sup>349</sup>

Like many of the advocates described *supra*, Defendant Cervante Pearson argued that “Maryland should discontinue limited *voir dire* by allowing *voir dire* to facilitate the intelligent use of peremptory challenges.”<sup>350</sup> The majority declined to expand *voir dire* referred the issue to Maryland’s Rules Committee saying: “To gather more information on the important issue of whether to maintain limited *voir dire*, we would refer the issue to the Standing Committee on Rules of Practice and Procedure for its consideration and recommendation.”<sup>351</sup>

Judge Harrell filed a concurring opinion pointing out that, rather than conducting some extensive “study,” Maryland could simply look to the

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<sup>343</sup> *Id.* at 61.

<sup>344</sup> *Pearson*, 86 A.3d at 1235-37.

<sup>345</sup> *Id.* at 1239, 1242 (first citing *State v. Shim*, 12 A.3d 671, 681 (Md. 2011); then citing *State v. Thomas*, 798 A.2d 566, 567, 573 (Md. 2002); then citing *Sweet v. State*, 806 A.2d 265, 270-71 (Md. 2002); and then citing *Davis v. State*, 633 A.2d 867, 869-70 (Md. 1993)).

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* at 1239.

<sup>348</sup> *Id.* at 1242 (citing *Davis*, 633 A.2d at 869-70).

<sup>349</sup> *Id.*

<sup>350</sup> *Pearson*, 86 A.3d at 1236 n.1.

<sup>351</sup> *Id.*

vast majority of its sister states and to the Federal Courts that employ expanded *voir dire* stating:

In my view, this case should be the vehicle by which this Court embraces what Judge Raker called for in her concurring opinion (which I joined) in *State v. Thomas*, 369 Md. 202, 217–19, 798 A.2d 566, 574–576 (2002)—expansion of the purpose and use of *voir dire* to aid in the intelligent exercise of peremptory challenges.

The Majority opinion frets that it would be “imprudent for us to address this far-reaching issue without the benefit of study regarding the possible ramifications.” (Maj. op. at 357 n. 1, 86 A.3d at 1236 n. 1). I am more sanguine and energetic in my belief that the Court, without delay, should draw upon the experiences of the 48 states and the federal circuits that have gone before us to adopt a suitable format of the “intelligent use” approach in Pearson’s case. Although the Rules Committee is one way to address the issue, I, for one, am ready to “do it now” (borrowing former Governor Schaefer’s pet phrase).<sup>352</sup>

Judge Robert McDonald filed a dissenting opinion, joined by Judge Adkins, calling it “odd” to reverse a trial court for an opinion that “followed this Court’s precedent in conducting the *voir dire* examination.”<sup>353</sup> Ultimately, however, Judge McDonald agreed with Judge Harrell that Maryland “should join the vast majority of other states and provide for the pre-trial examination of prospective jurors to include questions, within the discretion of the trial court, that might be more relevant to the exercise of peremptory strikes than challenges for cause.”<sup>354</sup>

If the reader is keeping track, they will know that by the time of the decision in *Pearson*, at least seven judges on the high court of Maryland had expressed the view that Maryland should revisit its view of “limited *voir dire*” in some form or another.<sup>355</sup> Unfortunately, despite the clear need for *voir dire* reform in Maryland, and as set forth below, it would take ten more years, many more appellate cases, and massive efforts from judges and lawyers across Maryland before the Maryland judiciary took any

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<sup>352</sup> *Id.* at 1243-44 (Harrell, J., concurring).

<sup>353</sup> *Id.* at 1244 (McDonald, J., dissenting).

<sup>354</sup> *Pearson*, 86 A.3d at 1244 (McDonald, J., dissenting).

<sup>355</sup> See *supra* text accompanying notes 272, 295, 320, 334, 338, 354.

affirmative action toward improving Maryland's inconsistent and ineffective jury selection system.<sup>356</sup>

*D. Voir Dire Reform Efforts and Continued Confusion 2014-2025.*

The *Pearson* opinion was published on February 21, 2014.<sup>357</sup> At the time, Judge Wilner was the chair of the Rules Committee.<sup>358</sup> Having written the concurring opinion in *Curtin* calling for a Rules change that would address *voir dire*,<sup>359</sup> it is unsurprising that Judge Wilner immediately embraced the *Pearson* Court's charge "[t]o gather more information on the important issue of whether to maintain limited *voir dire*."<sup>360</sup> Indeed, on July 15, 2014, the Rules Committee issued its One Hundred and Eighty-Fifth Report (the "185<sup>th</sup> Report") that it described as "a special report in response to the Court's request, in footnote 1 to its Opinion in *Pearson v. State*."<sup>361</sup> The 185<sup>th</sup> Report indicated that the purpose of the report was to "make a recommendation to the Court whether the scope of *voir dire* examination should be extended beyond its current limited function of determining a specific cause for disqualification of jurors, to include facilitating what has been termed the 'intelligent exercise of peremptory challenges.'"<sup>362</sup>

The 185<sup>th</sup> Report noted that described analysis of an enormous amount of information including: a study by the National Center for State Courts, Rules and Statutes concerning *voir dire* in all fifty States and the District of Columbia, American Bar Association Standards for *Voir Dire* and Federal Caselaw.<sup>363</sup> The 185<sup>th</sup> Report noted that "Standard 15-2.4(c) of the American Bar Association Criminal Justice Standards states explicitly: '*Voir dire* examination should be sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges.'"<sup>364</sup> The 185<sup>th</sup> Report also acknowledged that "[m]ost of the U.S. Courts of Appeal have explicitly adopted and applied the view that

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<sup>356</sup> See discussion *infra* notes 434-40.

<sup>357</sup> *Pearson*, 86 A.3d at 1232.

<sup>358</sup> See *Court of Appeals, Former Judges, Alan M. Wilner*, MD. STATE ARCHIVES (Apr. 14, 2025), <https://msa.maryland.gov/msa/mdmanual/29ap/former/html/msa11679.html> (on file with University of Baltimore Law Forum).

<sup>359</sup> *Curtin v. State*, 903 A.2d 922, 935 (Md. 2006) (Wilner, J., concurring).

<sup>360</sup> STANDING COMM. ON RULES OF PRAC. AND PROC., ONE HUNDRED EIGHTY-FIFTH REPORT, MD. CT., at 8-9 (2014), <https://www.mdcourts.gov/sites/default/files/rules/reports/185th.pdf> (on file with the University of Baltimore Law Forum) (citing *Pearson*, 86 A.3d at 1236 n. 1).

<sup>361</sup> *Id.* at 1 (citing *Pearson*, 86 A.3d at 1236 n. 1).

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

<sup>363</sup> *Id.* at 10.

<sup>364</sup> *Id.* at 3 (quoting CRIMINAL JUSTICE STANDARD § 15-2.4(c) (A.B.A 2000)).

*voir dire* should generally be allowed to assist counsel in exercising peremptory challenges, subject to the overall control of the court with respect to particular questions or specific lines of inquiry.”<sup>365</sup> Additionally, it noted that “[a]mong the States, it appears that, aside from Maryland, only Pennsylvania,<sup>366</sup> California in criminal cases,<sup>367</sup> and Virginia purport clearly to limit *voir dire* to eliciting grounds for a challenge for cause.”<sup>368</sup> With regard to methodology of conducting *voir dire*, i.e. judge-led vs. attorney-led, the 185<sup>th</sup> Report explained that research had shown that “juror responses to attorney questions were generally more candid because (i) jurors were less intimidated than when questioned by the judge, and (ii) attorneys were more knowledgeable about the nuances of their cases and better suited to formulate questions on those issues.”<sup>369</sup> Nevertheless, it indicated that research also revealed “that many judges prefer to conduct the examination because they believe that the attorneys waste too much time and unduly invade jurors’ privacy.”<sup>370</sup> The 185<sup>th</sup> Report also pointed out that Maryland’s Council on Jury Use and Management had issued a recommendation in 2010 that “advance written questionnaires for jury panels should be utilized” in appropriate cases.<sup>371</sup> Furthermore, it noted that the Maryland State Bar Association (“MSBA”) had created a “special committee to develop form *voir dire* questions for both civil and criminal

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<sup>365</sup> *Id.* at 5.

<sup>366</sup> The 185<sup>th</sup> Report did not acknowledge the requirement of extensive questionnaires in Pennsylvania criminal cases which requires potential jurors to disclose extensive information such as their employment history, their spouses employment history, residential history, number of children, whether they or anyone close to them had ever worked in law enforcement, etc. *See* PA. CODE § 632 (2015). Similarly, the report did not acknowledge the extensive areas of mandatory inquiry that had been adopted by Pennsylvania in civil cases including things that were most certainly not mandatory under Maryland law such as: “[o]ccupation and employment history of the prospective juror, the juror’s spouse and children and members of the juror’s household” and “[r]elationship of the prospective juror or any member of the prospective juror’s immediate family to the insurance industry, including employee, claims adjustor, investigator, agent, or stockholder in an insurance company.” 231 PA. CODE § 220.3 (2025); STANDING COMM. ON RULES OF PRAC. AND PROC., ONE HUNDRED EIGHTY-FIFTH REPORT, MD. CT., at 8-9 (2014), <https://www.mdcourts.gov/sites/default/files/rules/reports/185th.pdf> (on file with the University of Baltimore Law Forum).

<sup>367</sup> The report was written before California expanded *voir dire* in criminal cases. *See* CAL. CIV. PROC. § 223 (West 2024).

<sup>368</sup> STANDING COMM. ON RULES OF PRAC. AND PROC., ONE HUNDRED EIGHTY-FIFTH REPORT, MD. CT., at 5 (2014), <https://www.mdcourts.gov/sites/default/files/rules/reports/185th.pdf> (on file with the University of Baltimore Law Forum).

<sup>369</sup> *Id.* at 7-8.

<sup>370</sup> *Id.* at 8.

<sup>371</sup> *Id.* (quoting J. FREDERICK SHARER, COUNCIL ON JURY USE AND MANAGEMENT REPORT (2000)).

cases” although final recommendations had not been made by that committee.<sup>372</sup> The Rules Committee ultimately made five recommendations, the first of which was: “*The Court should join the Federal courts and the great majority of State courts and permit voir dire to include relevant inquiries designed to facilitate or guide the intelligent exercise of peremptory challenges, in both civil and criminal cases.*”<sup>373</sup>

We can find no evidence that Maryland’s High Court ever publicly considered the 185<sup>th</sup> Report of the Rules Committee.<sup>374</sup> Instead, Maryland’s trial judges and appellate courts continued to grapple with disagreements about whether particular questions were designed to elicit a disqualifying bias and, therefore, “mandatory.”<sup>375</sup>

In *Collins v. State* (2019), Judge Watts wrote the majority opinion reversing the trial court’s decision to ask “strong feelings” questions in a “compound” manner.<sup>376</sup> The trial court asked: “Does anyone on this panel have any strong feelings about the offense of burglary to the point where you could not render a fair and impartial verdict based on the evidence” and “[d]oes any member of this panel have strong feelings about the offense of theft to the extent that it would make you unable to be fair and impartial and base your decision only on the evidence in this case.”<sup>377</sup> The trial court refused to separate the second part of the question, *i.e.* whether the juror thought that he or she could be fair and impartial.<sup>378</sup> Citing the opinions in *Dingle* and *Pearson*, the majority reversed the trial court.<sup>379</sup>

In a would-be comical concurrence, Judge Harrell wrote: “I howl anew into an unresponsive void that the present case should be the vehicle by which this Court embraces expansion of the purpose and use of voir dire to aid in the intelligent exercise of peremptory challenges.”<sup>380</sup> Judge Harrell

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<sup>372</sup> *Id.* at 9.

<sup>373</sup> *Id.* at 10-11 (emphasis added).

<sup>374</sup> See *Aguero v. State*, No. 796, Sept. Term, 2019, 2020 WL 3266561, at \*5 n.1 (Md. Ct. Spec. App. June 17, 2020) (citing STANDING COMM. ON RULES OF PRAC. AND PROC., ONE HUNDRED EIGHTY-FIFTH REPORT, MD. CT., at 5 (2014), <https://www.mdcourts.gov/sites/default/files/rules/reports/185th.pdf> (on file with the University of Baltimore Law Forum)) (“The Rules Committee did consider the issue and recommended that, with certain limitations and protective procedures, *voir dire* be expanded in general conformity with the rest of the country. . . . So far, the Court has taken no action on that Report.”).

<sup>375</sup> See, e.g., *Mitchell v. State*, 321 A.3d 116, 120-21 (Md. 2024).

<sup>376</sup> *Collins v. State*, 205 A.3d 1012, 1016 (Md. 2019).

<sup>377</sup> *Id.* at 1017.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.* at 1023-24, 1030 (first citing *Dingle v. State*, 759 A.2d 819, 821, 823 (Md. 2000); and then citing *Pearson v. State*, 86 A.3d 1232, 1240 (Md. 2014)).

<sup>380</sup> *Id.* at 1031 (Harrell, J., concurring) (first citing STANDING COMM. ON RULES OF PRAC. AND PROC., ONE HUNDRED EIGHTY-FIFTH REPORT, MD. CT., at 5 (2014),

lamented the failure of Maryland's high court to consider and adopt the recommendations of the Rules Committee's 185<sup>th</sup> Report from 2014, writing: "[The] report, like my concurrences, seems to have received publicly from the Court only the chirping of crickets in reply. The Court has done nothing . . . with the recommendations of the Rules Committee. Time moves on and the Court should act."<sup>381</sup>

Judge McDonald filed a dissent, joined by Chief Judge Ellen Barbera, once again pointing out the inconsistency in reversing a trial court for asking a *voir dire* question in the precise way that the high court had blessed in *Sweet and Thomas*.<sup>382</sup>

In *Kazadi v. State* (2020), the majority opinion reversed a murder conviction because, "in [the majority's] view, the trial judge abused his discretion by not asking prospective jurors about certain legal principles governing criminal trials that would be covered in the court's jury instructions at the end of the trial."<sup>383</sup> The majority held that "during *voir dire*, a trial court must ask whether any prospective jurors are unwilling or unable to comply with the jury instructions on the fundamental principles of presumption of innocence, the State's burden of proof, and the defendant's right not to testify."<sup>384</sup>

Judge McDonald issued an opinion dissenting in part, joined by Judge Michelle Hotten and Judge Joseph Getty.<sup>385</sup> Judge McDonald once again expressed concern that the majority opinion found error by a "trial judge who conducted the jury selection process by following Maryland appellate precedent."<sup>386</sup> He further noted "a certain irony in the Majority Opinion" in that "[i]t endorses the idea that there is only 'limited *voir dire*' in Maryland" while simultaneously establishing "new mandatory *voir dire* questions" that "are not required by . . . [other] jurisdictions, such as the federal courts, that allow a broader *voir dire* process addressed to the exercise of peremptory strikes as well as strikes for cause."<sup>387</sup>

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<https://www.mdcourts.gov/sites/default/files/rules/reports/185th.pdf> (on file with the University of Baltimore Law Forum); and then citing *State v. Thomas*, 798 A.2d 566, 574-76 (Md. 2002) (Raker, J., concurring)).

<sup>381</sup> *Id.* at 1031 (Harrell, J., concurring) (first citing STANDING COMM. ON RULES OF PRAC. AND PROC., ONE HUNDRED EIGHTY-FIFTH REPORT, Md. Ct., at 5 (2014), <https://www.mdcourts.gov/sites/default/files/rules/reports/185th.pdf> (on file with the University of Baltimore Law Forum); and then citing *Thomas*, 798 A.2d at 574-76 (Raker, J., concurring)).

<sup>382</sup> *Collins*, 205 A.3d at 1034 (McDonald, J., dissenting).

<sup>383</sup> *Kazadi v. State*, 223 A.3d 554, 586 (Md. App. Ct. 2020) (McDonald, J., dissenting in part).

<sup>384</sup> *Id.* at 559 (majority opinion).

<sup>385</sup> *Id.* at 586 (McDonald, J., dissenting in part).

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

<sup>387</sup> *Id.* at 586-87.

Judge Getty also issued an opinion, dissenting in part, joined by Judges McDonald and Hotten.<sup>388</sup> Judge Getty argued that the new mandatory questions adopted by the majority represented an unjustified departure from *stare decisis* and Maryland's tradition of limited *voir dire* "pav[ing] the way toward creating a patchwork of mandatory *voir dire* questions."<sup>389</sup> Judge Getty expressed concern that the majority opinion in *Kazadi* would "serve to only complicate the *voir dire* process, confuse trial judges in the exercise of their broad discretion, and lead courts astray from the purpose of limited *voir dire*."<sup>390</sup>

In *State v. Jordan* (2022), the majority's opinion reaffirmed the principle announced in *Kazadi* that it was error for the trial court to refuse to ask potential jurors about their ability or willingness to comply with the court's instructions regarding presumption of innocence, burden of proof, and the right not to testify.<sup>391</sup> Nevertheless, the majority held that the trial court's refusal to ask that question was subject to "harmless error" review and that it was, indeed, harmless error in *Jordan*.<sup>392</sup> Judge Watts and Judge Jonathan Biran both filed dissenting opinions (and joined each other's opinions) pointing out the inconsistency between reversing the conviction in *Kazadi* based on the failure to ask a mandatory *voir dire* question, and the majority's holding in *Jordan* that the trial court's failure to ask a mandatory question was "harmless error."<sup>393</sup>

In *Mitchell v. State* (2024),<sup>394</sup> Maryland's high court – by that point called the Supreme Court of Maryland – adopted yet another "mandatory" question in the context of limited *voir dire* holding that under the circumstances in that case the trial court "was required to ask prospective jurors a question designed to uncover bias concerning child-witness credibility."<sup>395</sup> Justice Eaves issued an opinion concurring in part and dissenting in part joined by Justice Watts.<sup>396</sup> Justice Eaves expressed the opinion that "these types of *voir dire* questions typically are a problem in search of a solution" that "highlight the ineffectiveness of asking generalized questions that are not helpful in eliciting bias or prejudice for which disqualification should be imposed,"<sup>397</sup> though she

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<sup>388</sup> *Id.* at 587 (Getty, J., dissenting in part).

<sup>389</sup> *Kazadi*, 223 A.3d at 587 (Getty, J., dissenting in part).

<sup>390</sup> *Id.*

<sup>391</sup> *State v. Jordan*, 281 A.3d 129, 137 (Md. App. Ct. 2022) (citing *Kazadi*, 223 A.3d at 581).

<sup>392</sup> *Id.* at 144.

<sup>393</sup> *See id.* at 151 (Watts & Biran, JJ., dissenting).

<sup>394</sup> *Mitchell v. State*, 321 A.3d 116, 131 (Md. 2024).

<sup>395</sup> *Id.*

<sup>396</sup> *See id.* (Eaves, J., concurring in part, dissenting in part).

<sup>397</sup> *Id.* at 139.

simultaneously disclaimed any suggestion that “additional, detailed questions with information about the case should be asked.”<sup>398</sup> Justice Eaves criticized the majority for “open[ing] the door to further ‘fishing expeditions’ against our precedent and ‘limited’ *voir dire*.”<sup>399</sup>

As Maryland’s appellate courts continued to disagree about the proper scope of *voir dire* and the discretion of trial courts to ask or refuse to ask questions, lawyers and litigants grew weary of waiting for Maryland to modernize its *voir dire* process to allow questions designed to inform the intelligent exercise of peremptory challenges.<sup>400</sup> In the Fall of 2023, lawyers from a group of diverse specialty bars, and the State’s Attorney from Baltimore City, led by the Maryland Association for Justice, Inc., banded together to discuss possible ways to address Maryland’s antiquated and ineffective system of *voir dire*.<sup>401</sup>

Recognizing that Maryland’s high court had failed to act on the recommendations of the Rules Committee’s 185<sup>th</sup> Report and it could not seem to reach a consensus on the proper methodology to expand *voir dire*, the concerned lawyers sought help from the legislature.<sup>402</sup> In January of 2024, two legislators, who also happen to be lawyers, introduced bills in both the Senate and House, that would adopt the recommendations of the Rules Committee’s 185<sup>th</sup> Report via statute.<sup>403</sup> Senate Bill 827 (“SB 827”) was sponsored by Senator Will Smith and its cross-file, House Bill 1079 (“HB 1079”), was sponsored by Delegate N. Scott Phillips.<sup>404</sup> SB 827 and HB 1079 specified that the purpose of *voir dire* is to: (1) “Identify and remove prospective jurors who are unable to serve fairly and impartially;

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<sup>398</sup> *Id.* at 139 n. 2.

<sup>399</sup> *Id.* at 140.

<sup>400</sup> *See supra* Section II.B.

<sup>401</sup> *See generally Testimony in support of SB 827 and HB 1079 submitted to the Courts and Judicial Proceedings Committee*, Gen. Assemb., 446th Sess. (Md. 2024), [https://mgaleg.maryland.gov/cmte\\_testimony/2024/jpr/20663\\_02292024\\_92214-908.pdf](https://mgaleg.maryland.gov/cmte_testimony/2024/jpr/20663_02292024_92214-908.pdf) (on file with the University of Baltimore Law Forum) (showing that efforts at *voir dire* reform were supported by members of the Asian Pacific Bar Association of Maryland, J. Franklin Bourne Bar Association, Alliance of Black Women Attorneys, Maryland Christian Legal Society, Maryland Hispanic Bar Association, Maryland Association for Justice, Inc., Public Justice Center, Office of the Public Defender, Maryland Criminal Defense Attorney’s Association, Ivan Bates, State’s Attorney for Baltimore City, Charles County Bar Association, Howard County Bar Association, and Baltimore County Bar Association).

<sup>402</sup> *See id.*

<sup>403</sup> *See* S.B. 827; H.B.1079; STANDING COMM. ON RULES OF PRAC. AND PROC., ONE HUNDRED EIGHTY-FIFTH REPORT, MD. CT., at 8-9 (2014), <https://www.mdcourts.gov/sites/default/files/rules/reports/185th.pdf> (on file with the University of Baltimore Law Forum).

<sup>404</sup> S.B. 827; H.B. 1079.

and (2) Allow the Parties to obtain information that may provide guidance for the use of peremptory challenges and challenges for cause.”<sup>405</sup>

Before a hearing was held in the Senate Judicial Proceedings Committee, stakeholders met with the Chairman of the Judicial Proceedings Committee Senator Smith and a representative from the judiciary who expressed concerns about implementation of expanded *voir dire*.<sup>406</sup> An agreement was reached to add an amendment to SB 827 that added a workgroup to study implementation of the statute for a period of one year from July 1, 2024 to June 30, 2025, after which expanded *voir dire* would take effect.<sup>407</sup> With the addition of the workgroup, SB827 passed out of Committee and subsequently *unanimously* passed on the Senate Floor on March 12, 2024 before “crossover.”<sup>408</sup>

On the House side, the Chairman of the House Judiciary Committee, Luke Clippinger, decided not to put HB 1079 to a vote.<sup>409</sup> Instead, he conferred with Chairman Smith and, together, they agreed to defer adopting expanded *voir dire* via statute.<sup>410</sup> Instead, the Chairmen agreed to send a letter together to Chief Justice Fader asking the Court to once again take up the issue of expanding the purpose of *voir dire* in Maryland.<sup>411</sup> On April 4, 2024, the Chairmen wrote to CJ Fader saying: “the concerns with regard to

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<sup>405</sup> S.B. 827; H.B. 1079.

<sup>406</sup> Stakeholders’ Meeting with Senator Smith, Chairman of the Judicial Proceedings Committee (2024).

<sup>407</sup> See *Courts and Judicial Proceedings - Jury Examination and Workgroup to Study the Voir Dire Process: Amendments to Senate Bill 827 (First Reading File Bill) Before the Judicial Proceedings Committee*, 2024 Gen. Assemb., 446th Sess. (Md. 2024), [https://mgaleg.maryland.gov/2024RS/amds/bil\\_0007/SB0827\\_96332401.pdf](https://mgaleg.maryland.gov/2024RS/amds/bil_0007/SB0827_96332401.pdf) (on file with the University of Baltimore Law Forum).

<sup>408</sup> See *Courts and Judicial Proceedings - Jury Examination and Workgroup to Study the Voir Dire Process: Third Reading Passed, S.B. 827 Before the Judicial Proceedings Committee*, 2024 Gen. Assemb., 446th Sess. (Md. 2024), <https://mgaleg.maryland.gov/2024RS/votes/senate/0616.pdf> (on file with the University of Baltimore Law Forum). Crossover is the deadline by which bills filed in one chamber of the Maryland General Assembly (House or Senate) must move to the other chamber in order to continue with the legislative process. Typically, bills that do not pass through one chamber before crossover are “dead” (although there are exceptions). Angelica Bailey Thurpai, *Crossover 2025*, MD. MUN. LEAGUE (Mar. 18, 2025), [https://www.mdmunicipal.org/index.php?option=com\\_dailyplanetblog&view=entry&year=2025&month=03&day=18&id=349:crossover-2025](https://www.mdmunicipal.org/index.php?option=com_dailyplanetblog&view=entry&year=2025&month=03&day=18&id=349:crossover-2025) (on file with the University of Baltimore Law Forum).

<sup>409</sup> See *History of HB1079*, 2024 Gen. Assemb., 446th Sess. (Md.2024), <https://mgaleg.maryland.gov/mgaweb/Legislation/Details/sb0827?ys=2024RS> (on file with the University of Baltimore Law Forum).

<sup>410</sup> STANDING COMM. OF RULES OF PRAC. AND PROC., MINUTES OF THE RULES COMMITTEE, MD. SUP. CT., at 3 (2024), <https://www.mdcourts.gov/sites/default/files/minutes-rules/minutes20240517.pdf> (on file with the University of Baltimore Law Forum).

<sup>411</sup> *Id.* at 13.

the *voir dire* process raised in SB827 are in the purview and most appropriate for the consideration of” the Rules Committee.<sup>412</sup>

On April 11, CJ Fader wrote to the Rules Committee “to request that the Rules Committee consider, on an expedited basis, whether to recommend changes to the Maryland Rules concerning the use of juror *voir dire* to allow parties to obtain information to inform the intelligent exercise of peremptory challenges.”<sup>413</sup> Chief Justice Fader’s request acknowledged the recommendations that had been made a decade earlier in the 185<sup>th</sup> Report and asked that the Rules Committee “take up this issue” at its next meeting.<sup>414</sup>

The Rules Committee scheduled a meeting to consider expanding *voir dire* to take place on May 17, 2024.<sup>415</sup> In advance of the meeting, the Rules Committee solicited comments from various stakeholders.<sup>416</sup> The circuit court administrative judges submitted a letter opposing the expansion of *voir dire*.<sup>417</sup> The letter, joined by twenty one of the twenty three administrative judges in Maryland, expressed the view that expanding *voir dire* was not essential to selecting a fair jury.<sup>418</sup> In particular, the judges pointed out that in their experience, Maryland’s generous allotment of peremptory challenges is sufficient to ensure a selection of fair and impartial juries.<sup>419</sup> The judges explained their concern that expanding “will

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<sup>412</sup> See STANDING COMM. OF RULES OF PRAC. AND PROC., TWO HUNDRED AND TWENTY-SECOND REPORT, MD. CT., at 11-12 (2024), <https://www.courts.state.md.us/sites/default/files/rules/reports/222ndreport.pdf> (on file with the University of Baltimore Law Forum); Memorandum from the Maryland Association for Justice on the Rules Committee’s ‘Consideration of *Voir Dire* referral from the Supreme Court’, at 3 (May 16, 2024) (citing Letter from Chairmans Smith and Clippenger to Chief Justice Fader).

<sup>413</sup> Letter from Matthew J. Fader, C.J., Md. Sup. Ct., to Alan M. Wilner, Chair, Standing Comm. on Rules of Prac. and Proc. (April 11, 2024) (on file with authors).

<sup>414</sup> *Id.*

<sup>415</sup> See STANDING COMM. OF RULES OF PRAC. AND PROC., MINUTES OF THE RULES COMMITTEE, MD. SUP. CT., at 2 (2024), <https://www.mdcourts.gov/sites/default/files/minutes-rules/minutes20240315.pdf> (on file with the University of Baltimore Law Forum).

<sup>416</sup> See *MSBA Provides Resources to Prepare Profession for Maryland’s Pilot Program for Expanded Voir Dire*, MSBA (Dec. 12, 2024) <https://www.msba.org/site/site/content/News-and-Publications/News/Advocacy/MSBA-Provides-Resources-to-Prepare-Profession-for-Maryland%E2%80%99s-Pilot-Program-for-Expanded-Voir-Dire.aspx> (on file with the University of Baltimore Law Forum) [hereinafter *MSBA Provides Resources*].

<sup>417</sup> Letter from Audrey J.S. Carrion, A.C.J., Cir. Ct. Balt. City to Alan M. Wilner, Chair, Standing Comm. on Rules of Prac. and Proc. (May 16, 2024) (on file with authors).

<sup>418</sup> *Id.*

<sup>419</sup> *Id.*

cause delays in jury selection, increase costs to courts, counties, Baltimore City, and public frustration.”<sup>420</sup>

The Maryland Association for Justice (“MAJ”) submitted a comment describing the negative impacts of Maryland’s limited *voir dire* system as set forth above.<sup>421</sup> With regard to the judicial economy concerns expressed by the trial judges, MAJ pointed out that the alleged time saved by judicially-conducted *voir dire* without attorney participation was studied extensively in the late 1960s and early 1970s.<sup>422</sup> Research revealed no dramatic difference between the time taken for judge-led *voir dire* versus attorney-led *voir dire*.<sup>423</sup> MAJ also pointed to another more recent study conducted in 2007, which compared judicially-conducted *voir dire* in federal courts with attorney-conducted *voir dire*, that again demonstrated that attorney-conducted *voir dire* takes no more time than judge-conducted *voir dire*.<sup>424</sup>

MAJ’s Comment challenged the concept that Maryland courts should prioritize judicial economy over the constitutional right to a fair and impartial jury as follows:

Given the demonstrated gains in ferreting out disqualifying bias, even if a small amount of time can be saved by curtailing or eliminating entirely participation by counsel, are we willing to continue to live with having Maryland juries that are demonstrably more susceptible to bias? If time is a real concern, there are ways of dealing with it by rule or statute and we are not advocating that judges should not continue to control the process, but rather are advocating for the guaranteed right of attorney participation in questioning the entire venire.<sup>425</sup>

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<sup>420</sup> *Id.*

<sup>421</sup> Memorandum from the Md. Assoc. for Just. on the Rules Committee’s ‘Consideration of *Voir Dire* referral from the Supreme Court’ (May 16, 2024) (on file with authors) [hereinafter Memorandum from Md. Assoc. for Just.].

<sup>422</sup> *Id.* (citing Jon Van Dyke, *Voir Dire: How Should it Be Conducted to Ensure That Our Juries are Representative and Impartial*, 3 HASTINGS CONST. 65, 95-97 tbl. II (1975)).

<sup>423</sup> *Id.*

<sup>424</sup> *Id.* at 10 (citing Vidmar & Hans, *American Juries: The Verdict* 89 (Prometheus Books 2007)); see Mogill & Nixon, *A Practical Primer on Jury Selection*, 65 MICH. B. J. 52, 54 (1986).

<sup>425</sup> Memorandum from Md. Assoc. for Just., *supra* note 421.

The May 17, 2024 Rules Committee Meeting was attended by various stakeholders who presented diverse positions on *voir dire*.<sup>426</sup> The Rules Committee subsequently decided to form a subcommittee to make a recommendation on *voir dire*.<sup>427</sup> The subcommittee included circuit court judges and appellate judges, along with civil and criminal practitioners.<sup>428</sup>

On July 18, 2024, the Rules Committee issued its two hundred and twenty-second Report (the “222<sup>nd</sup> Report”) and once again recommended the expansion of *voir dire*.<sup>429</sup> The 222<sup>nd</sup> Report reaffirmed “that the research findings for the 185<sup>th</sup> Report concerning the national scope of *voir dire* remain accurate.”<sup>430</sup> The Committee included recommended draft amendments to the Maryland Rules that would define the purpose and scope of *voir dire*.<sup>431</sup> The draft amendments specified that the purpose of *voir dire* is to “identify and remove prospective jurors who are not legally qualified to serve as jurors or are unable to serve fairly and impartially” and that the scope of *voir dire* would “allow the parties to obtain information that may provide guidance for the use of peremptory challenges and challenges for cause.”<sup>432</sup>

The 222<sup>nd</sup> Report also recommended adoption of a Committee note referencing the “Model Jury Selection Questions promulgated by the MSBA” and reflecting that “the MSBA is currently reviewing and, if needed, updating the Model Jury Selection Questions for both civil and criminal trials.”<sup>433</sup>

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<sup>426</sup> See STANDING COMM. OF RULES OF PRAC. AND PROC., MINUTES OF THE RULES COMMITTEE, SUP. CT. MD., at 1 (2024), <https://www.mdcourts.gov/sites/default/files/minutes-rules/minutes20240517.pdf> (on file with the University of Baltimore Law Forum).

<sup>427</sup> *Id.* at 17.

<sup>428</sup> See MD. STATE BAR ASS’N SPECIAL COMM. ON VOIR DIRE, MODEL VOIR DIRE FOR MARYLAND’S PILOT PROJECT FOR EXPANDED VOIR DIRE 4 (Md. State Bar Ass’n, Inc. 2024), <https://msba.org/common/Uploaded%20files/Downloads/Resources/2024/MSBA%20Model%20Voir%20Dire%20Updated%202024.pdf> (on file with the University of Baltimore Law Forum).

<sup>429</sup> STANDING COMM. OF RULES OF PRAC. AND PROC., TWO HUNDRED AND TWENTY-SECOND REPORT, MD. CT., at 13 (2024), <https://www.courts.state.md.us/sites/default/files/rules/reports/222ndreport.pdf> (on file with the University of Baltimore Law Forum).

<sup>430</sup> *Id.* at 12.

<sup>431</sup> *Id.* at 13.

<sup>432</sup> *Id.* at 8-9.

<sup>433</sup> *Id.* at 23.

On September 13, 2024, the Supreme Court of Maryland held a meeting to consider the recommendations of the Rules Committee.<sup>434</sup> During the hearing, the circuit court judges again expressed concern about the logistics of implementing expanded *voir dire*.<sup>435</sup> Rather than accepting the Rules Committee's recommendation, the Court worked together to come up with Rule 16-310, which created the Pilot Program for Expanded *Voir Dire*.<sup>436</sup> Maryland Rule 16-310 states:

In anticipation of potential changes to Rules 2-512 and 4-312 to identify allowing “the parties to obtain information that may provide guidance for the use of peremptory challenges’ as an appropriate purpose for juror *voir dire* (“expanded *voir dire*”), the Supreme Court of Maryland may create a pilot program to implement use of expanded *voir dire* for that purpose in a representative sample of circuit courts around the State. The purposes of the pilot program shall include, but not necessarily be limited to, gathering information and experience that may be used to: (1) study the effects of expanded *voir dire* on the effectiveness and efficiency of jury selection, case management, juror satisfaction, public perception of the trial process, court operations, and related concerns; (2) develop guidance and education to assist courts, attorneys, and litigants in the implementation of expanded *voir dire* statewide; and (3) inform efforts of the Standing Committee on Rules of Practice and Procedure and the Supreme Court to consider whether amendments to Rules 2-512 and 4-312 are appropriate.<sup>437</sup>

In short, Maryland Rule 16-310 created a *voir dire* study. As set forth in more detail below, since January 1, 2025, certain trial court judges in certain Maryland jurisdictions have been presiding over trials where juries are selected using expanded *voir dire* methods.<sup>438</sup> Maryland's Supreme Court has been collecting data from those trials.<sup>439</sup> The data will

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<sup>434</sup> RULES ORDER, SUPREME CT. OF MD., at 1 (2024), <https://www.courts.state.md.us/sites/default/files/rules/order/ro222nd.pdf> (on file with the University of Baltimore Law Forum).

<sup>435</sup> *See id.* at 5 (explaining how the *voir dire* pilot program will aid understanding how to properly implement an expanded *voir dire* in Maryland).

<sup>436</sup> *See id.* at 1.

<sup>437</sup> MD. CODE ANN., MD. RULES § 16-310 (West 2024).

<sup>438</sup> *See infra* Part III.

<sup>439</sup> *See infra* Part III.

be used to inform the Court's decision about whether and how to reform *voir dire* in Maryland.<sup>440</sup>

### III. MARYLAND'S PILOT PROGRAM.

Maryland Rule 16-310 is entitled "Pilot Program for Expanded *Voir Dire*."<sup>441</sup> While the authors certainly advocate for the "expansion" of Maryland's "limited *voir dire*" system, they take issue with the judiciary's dichotomization of *voir dire* as either "limited" or "expanded."<sup>442</sup> As explained above, *voir dire* in America was founded upon and continues to be grounded in the *dual* purpose of enabling parties to discover and identify information to either assert a challenge for cause or inform the party's use of a peremptory challenge.<sup>443</sup> As such, rather than "expanding *voir dire*," the changes contemplated by Maryland's Pilot Program simply realign Maryland with the federal courts and nearly every other state by enabling parties to better ferret out both explicit bias *and* implicit bias so as to protect Maryland citizen's constitutional right to a fair and impartial jury.<sup>444</sup>

One week after the adoption of Rule 16-310, Chief Justice Fader sent letters to leaders of legal organizations across the state advising them that he had appointed Judge Laura Ripken from the Appellate Court of Maryland as the Chair of the Advisory Board and asking them to appoint their own representatives to the Advisory Board.<sup>445</sup> Chief Justice Fader's letter explained that the Advisory Board would "have input into the development of the Pilot Program, w[ould] monitor and advise during the implementation of the program, and [would] review data and information collected during the program and ultimately make recommendations concerning expanded *voir dire* to the Standing Committee on Rules of Practice and Procedure and the Supreme Court of Maryland."<sup>446</sup>

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<sup>440</sup> See *infra* Part III.

<sup>441</sup> MD. CODE ANN., MD. RULES, § 16-310 (West 2024).

<sup>442</sup> See *infra* Part III.

<sup>443</sup> See *supra* Section I.D.

<sup>444</sup> See MD. STATE BAR ASS'N SPECIAL COMM. ON VOIR DIRE, MODEL VOIR DIRE FOR MARYLAND'S PILOT PROJECT FOR EXPANDED VOIR DIRE 4 (Md. State Bar Ass'n, Inc. 2024),

<https://msba.org/common/Uploaded%20files/Downloads/Resources/2024/MSBA%20Model%20Voir%20Dire%20Updated%202024.pdf> (on file with the University of Baltimore Law Forum).

<sup>445</sup> See *generally* Letter from Matthew J. Fader, C.J., Md. Sup. Ct., to Gwen-Marie Davis, President, Md. Ass'n for Just. (Sep. 20, 2024) (on file with authors) (demonstrating at least one letter that was received from a Maryland Bar Association therefore, other associations received one from Chief Justice Fader).

<sup>446</sup> See *id.* at 1.

The Advisory Board consists of members of the judiciary, civil litigators, criminal litigators, and Chairmen Smith and Clippinger.<sup>447</sup> The Supreme Court of Maryland also employs a Ph.D. statistician who is assisting the Advisory Board with data collection and analytics.<sup>448</sup> Once assembled, the Advisory Board immediately began developing the Pilot Program in accordance with Maryland Rule 16-310.<sup>449</sup> By December of 2024, the Advisory Board had crafted a program that is designed to simultaneously study the effects of broadening the scope of *voir dire* questions to include information that will inform the intelligent exercise of peremptory challenges and study the efficacy and efficiency of various methods of conducting *voir dire*.<sup>450</sup> The Advisory Board issued a “packet” describing the implementation of the Pilot Program.<sup>451</sup> The five methods being studied in the Pilot Program are:

1. Traditional *voir dire* with additional questions for the intelligent exercise of peremptory strikes.
2. Individual *voir dire* at the bench or outside the trial courtroom.
3. Attorney-led *voir dire* of a panel.
4. Questionnaires.
5. Limited opening remarks at the beginning of *voir dire*.<sup>452</sup>

The Pilot Program began collecting data from eight jurisdictions on January 2, 2025,<sup>453</sup> including Allegany County, Anne Arundel County, Baltimore City, Carroll County, Cecil County, Charles County, Montgomery County, and Worcester County.<sup>454</sup> The jurisdictions are intentionally selected to represent a cross-section of Maryland’s diverse landscape.<sup>455</sup> The administrative Judges in each of the Pilot Jurisdictions were tasked with selecting certain Pilot Judges in each jurisdiction before whom Pilot Program cases would be tried.<sup>456</sup> The number of Pilot Judges in each jurisdiction is proportionate to the number of judges in each jurisdiction (i.e. Baltimore City and Montgomery County have 6 Pilot

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<sup>447</sup> See MD. JUDICIARY, *Expanded Voir Dire Pilot* (2025) (on file with the authors) (listing all the different members on the advisory board).

<sup>448</sup> See *id.* (listing Dr. Jamie Walter as the Maryland Judiciary Director of Research and Analysis).

<sup>449</sup> MSBA Provides Resources, *supra* note 416.

<sup>450</sup> See MD. STATE BAR ASS’N SPECIAL COMM. ON VOIR DIRE, *supra* note 444.

<sup>451</sup> See MSBA Provides Resources, *supra* note 416.

<sup>452</sup> *Id.*

<sup>453</sup> *Id.*

<sup>454</sup> See Fader, *supra* note 445, at 1.

<sup>455</sup> Zois, *supra* note 142, at 7.

<sup>456</sup> *Id.* at 7.

Judges, Anne Arundel County has 3, Carroll and Charles Counties have 2, and Allegany, Cecil, and Worcester Counties have 1).<sup>457</sup> The Pilot Judges represent a fair cross-section of judges based on their experience.<sup>458</sup>

As noted by the Rules Committee in the 222<sup>nd</sup> Report, the MSBA was tasked with updating the Model *Voir Dire* Packet for 2024 to include questions that would be examples for expanded voir dire.<sup>459</sup> The MSBA Special Committee on *Voir Dire* issued its Model Voir Dire Update in December of 2024.<sup>460</sup> The Update is a resource for sample *voir dire* questions in all cases, including examples of expanded *voir dire* questions that could be used in Pilot Program cases.<sup>461</sup>

In order to ensure accurate analysis, data is being collected for every jury trial that takes place in Pilot Jurisdictions during the data collection period, regardless of whether the presiding judge is a Pilot Judge or not.<sup>462</sup> Among other things, Pilot Jurisdictions are tracking the methodology of *voir dire* employed, the amount of time it takes to empanel a jury, attorney satisfaction with the adequacy of *voir dire*, and juror satisfaction with the process.<sup>463</sup>

Unfortunately, the Pilot Program has faced challenges in collecting what the Court deems to be sufficient data to publish results.<sup>464</sup> Various factors have contributed to the insufficient data collection.<sup>465</sup> For example, even well into the Pilot Program, many attorneys remain unaware that the Pilot Program exists.<sup>466</sup> The Pilot Program was announced through the judiciary's website, the Maryland State Bar Association, and other bar

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<sup>457</sup> Jamie Walter, *Expanded Jury Voir Dire Pilot Research Project*, MD. COURTS, [https://drive.google.com/file/d/18liUI18W\\_8H\\_xNaphzxeFFERiKOW1UR6/view](https://drive.google.com/file/d/18liUI18W_8H_xNaphzxeFFERiKOW1UR6/view) (on file with the University of Baltimore Law Forum) (last visited Sep. 15, 2025).

<sup>458</sup> Zois, *supra* note 142, at 7.

<sup>459</sup> STANDING COMM. OF RULES OF PRAC. AND PROC., TWO HUNDRED AND TWENTY-SECOND REPORT, MD. CT., at 23 (2024), <https://www.courts.state.md.us/sites/default/files/rules/reports/222ndreport.pdf> (on file with the University of Baltimore Law Forum).

<sup>460</sup> See generally MD. STATE BAR ASS'N SPECIAL COMM. ON VOIR DIRE, *supra* note 444 (showing the updated model voir dire questions for practitioners).

<sup>461</sup> See generally *id.* (demonstrating examples practitioners can use during voir dire).

<sup>462</sup> MSBA Provides Resources, *supra* note 416.

<sup>463</sup> See Fader, *supra* note 445, at 1.

<sup>464</sup> See generally NOTICE OF OPEN MEETING REGARDING THE 225<sup>TH</sup> REPORT OF THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE AND PROPOSED AMENDMENT TO RULE 16-310, SUP. CT. MD., [https://www.mdcourts.gov/sites/default/files/rules/reports/rulesnotice16-310\\_0.pdf](https://www.mdcourts.gov/sites/default/files/rules/reports/rulesnotice16-310_0.pdf) (on file with the University of Baltimore Law Forum) (last visited Sep. 17, 2025) (explaining that the Voir Dire Pilot Program Advisory Board needs additional time to analyze data).

<sup>465</sup> See Zois, *supra* note 142, at 8 (suggesting that there have been multiple problems with data collection).

<sup>466</sup> Interviews with Md. att'ys and judges (2024-2025).

associations.<sup>467</sup> The judiciary did not, however, issue letters or notices to all Maryland lawyers notifying them of the Pilot Program.<sup>468</sup>

Through numerous conversations with their fellow lawyers, the Authors have discovered a number of facts which have led them to the following observations and conclusions regarding the Pilot Program.<sup>469</sup> Many of the lawyers, who are now aware of the Pilot Program's existence, first became aware on the eve of their trials.<sup>470</sup> Accordingly, by their own admission, most of these lawyers were unprepared and thus unable to meaningfully implement the available tools the Pilot Program affords them.<sup>471</sup> In the Authors' view this was a foreseeable consequence because attorneys were not provided with any significant notice, education, or training as to how to implement the new options for *voir dire* afforded to them by the Pilot Program.<sup>472</sup> Time will tell how the lack of awareness among the trial bar<sup>473</sup> combined with trial attorneys' lack of education and training<sup>474</sup> will affect the data generated by the Pilot Program.<sup>475</sup> It would be a tragedy if the Pilot Program were deemed unsuccessful because of the preventable lack of awareness or meaningful participation of what could and should be a trial bar educated in the tools provided to them by the Pilot Program.<sup>476</sup>

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<sup>467</sup> RULES ORDER, SUPREME CT. OF MD., at 1 (2024), <https://www.courts.state.md.us/sites/default/files/rules/order/ro222nd.pdf> (on file with the University of Baltimore Law Forum); *Maryland Judiciary to Implement Pilot Program on Expanded Voir Dire Beginning in January 2025*, MSBA (Nov. 15, 2024), <https://www.msba.org/site/site/content/News-and-Publications/News/General-News/Pilot-Program-on-Expanded-Voir-Dire.aspx> (on file with the University of Baltimore Law Forum) [hereinafter *Maryland Judiciary to Implement*]; Asian Pacific American Bar Association of Maryland, LINKEDIN (2024), [https://www.linkedin.com/posts/apaba-md\\_voir-dire-town-hall-a-discussion-on-marylands-activity-7259287056504270849-enpa/](https://www.linkedin.com/posts/apaba-md_voir-dire-town-hall-a-discussion-on-marylands-activity-7259287056504270849-enpa/) (on file with the University of Baltimore Law Forum).

<sup>468</sup> See *generally Lawyers*, MD. COURTS, <https://www.mdcourts.gov/lawyers> (on file with the University of Baltimore Law Forum) (last visited Sep. 17, 2025) (lacking a notice regarding the Pilot Program until June 16, 2025).

<sup>469</sup> Interviews with Md. att'ys (2024); discussion *infra* notes 476-489.

<sup>470</sup> Interviews with Md. att'ys, *supra* note 475.

<sup>471</sup> *Id.*

<sup>472</sup> See *supra* notes 465, 467, 469-70; see also RULES ORDER, SUPREME CT. OF MD., at 1 (2024), <https://www.courts.state.md.us/sites/default/files/rules/order/ro222nd.pdf> (on file with the University of Baltimore Law Forum) (containing the original order handed down from the Court implementing the Pilot Program); *Maryland Judiciary to Implement*, *supra* note 467 (explaining the initial implementation of the Pilot Program).

<sup>473</sup> See *supra* notes 465, 469-70.

<sup>474</sup> See *supra* notes 465, 469-70.

<sup>475</sup> See *supra* notes 461, 465.

<sup>476</sup> See *supra* note 469-475.

Compounding the above problems is that in some cases in some jurisdictions within the Pilot Program trial judges are not assigned until the day of trial.<sup>477</sup> As a result, some of the attorneys who did not know of the Pilot Program's existence have been surprised to learn that their case was before a Pilot Judge and thus were incapable of meaningfully implementing the new tools the program afforded them.<sup>478</sup> Moreover, trial lawyers and Pilot Judges have not been given an open forum to exchange ideas about the best way of implementing some of the options available in the Pilot Program.<sup>479</sup> Even after trials in Pilot Jurisdictions conclude, data collection has been impaired by the failure of some attorneys to submit their trial surveys.<sup>480</sup> As a result of these data collection challenges, the Pilot Program's original sunset date of June 30, 2025 has been extended to June 30, 2026.<sup>481</sup> The Authors sincerely hope that the extension<sup>482</sup> will be accompanied by improvements to the Pilot Program so as to ensure the collection of sufficient data and, eventually full implementation of the *voir dire* system contemplated by the Pilot Program.<sup>483</sup>

#### IV. CONCLUSION.

The Authors wholeheartedly believe that most jurors, lawyers, and judges genuinely want to protect the constitutional right to a fair and

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<sup>477</sup> See, e.g., *How the Court Works*, MONTGOMERY CNTY. CIR. CT., <https://www.montgomerycountymd.gov/cct/how-court-works.html> (on file with the University of Baltimore Law Forum) (last visited Sep. 18, 2025) (explaining that in order “[t]o find out the name of the judge assigned to a particular case, [litigants should] call the Assignment Office at 240-777-9000 after 3:00 pm the day before the scheduled trial/event date”); Interviews with Md. att’ys and judges, *supra* note 472.

<sup>478</sup> Interviews with Md. att’ys in the Voir Dire Pilot Program (2024).

<sup>479</sup> See Interviews with Md. att’ys and judges, *supra* note 472.

<sup>480</sup> Zois, *supra* note 142, at 8.

<sup>481</sup> NOTICE OF OPEN MEETING REGARDING THE 225<sup>TH</sup> REPORT OF THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE AND PROPOSED AMENDMENT TO RULE 16-310, SUP. CT. MD., [https://www.mdcourts.gov/sites/default/files/rules/reports/rulesnotice16-310\\_0.pdf](https://www.mdcourts.gov/sites/default/files/rules/reports/rulesnotice16-310_0.pdf) (on file with the University of Baltimore Law Forum) (last visited Sep. 17, 2025).

<sup>482</sup> *Id.*

<sup>483</sup> See RULES ORDER, SUPREME CT. OF MD., at 1 (2024), <https://www.courts.state.md.us/sites/default/files/rules/order/ro222nd.pdf> (on file with the University of Baltimore Law Forum) (“The purposes of the pilot program shall include, but not necessarily be limited to, gathering information and experience that may be used to: (1) study the effects of expanded voir dire on the effectiveness and efficiency of jury selection, case management, juror satisfaction, public perception of the trial process, court operations, and related concerns; (2) develop guidance and education to assist courts, attorneys, and litigants in the implementation of expanded voir dire statewide. . .”).

impartial jury.<sup>484</sup> Nevertheless, as it was created and implemented more than one hundred and twenty years ago, Maryland's system of "limited *voir dire*" was not designed to take into account what social science has taught the legal community about the effects of implicit bias on jury selection.<sup>485</sup> Maryland's current Pilot Program, if implemented fully, will enable Maryland litigants a meaningful ability to root out implicit bias during *voir dire* for the first time.<sup>486</sup>

Although the Authors respect the desire to collect "data" from the Pilot Program, it is important to also recognize that there is no evidence, anecdotal or otherwise, to suggest that cases in the Pilot Program are causing significant waste of judicial time and resources.<sup>487</sup> Given the fact that most of the Country's jurisdictions have been using a system that enables parties to ferret out both implicit and explicit biases through attorney conducted questions for more than two hundred years,<sup>488</sup> it is difficult to understand why more time is needed to study this issue.

For a time, the Authors remained baffled by the number of Maryland trial judges who opposed aligning Maryland's *voir dire* process with the rest of the Country.<sup>489</sup> Upon reflection, however, perhaps trial judges – like any other human being – have their own implicit biases that may impact the way they view this issue.<sup>490</sup> After all, as human beings most trial judges are likely to have a visceral need to believe that the *voir dire* they have conducted during their time on the bench has effectively eliminated every juror who possessed an explicit or implicit bias that should have disqualified that juror.<sup>491</sup> Social science establishes, however, that this

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<sup>484</sup> U.S. CONST. amend. VI.

<sup>485</sup> See Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 26-27 (citing *Dingle v. State*, 759 A.2d 819, 826 (Md. 2000)).

<sup>486</sup> *Id.* at 26.

<sup>487</sup> See Interviews with Md. att'ys, *supra* note 475.

<sup>488</sup> Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 31 (quoting Lee Refo et al., *Principles for Juries and Jury Trials*, AM. BAR ASS'N. (2005)) ("[V]oir dire by the judge, augmented by attorney-conducted questioning, is significantly fairer to the parties and more likely to lead to the impaneling of an unbiased jury than is voir dire conducted by the judge alone.").

<sup>489</sup> See *supra* Section II.D.

<sup>490</sup> Jeffrey Rachlinski et al., *Getting Explicit About Implicit Bias*, Vol. 103 No. 3, BOLCH JUD. INST. 75, 76 (2020), [https://judicature.duke.edu/wp-content/uploads/sites/3/2020/12/ImplicitBias\\_Fall2020.pdf](https://judicature.duke.edu/wp-content/uploads/sites/3/2020/12/ImplicitBias_Fall2020.pdf) (on file with the University of Baltimore Law Forum).

<sup>491</sup> See *id.* ("What is more important for judges, however, is whether this bias affects their decision-making. Judges take an oath to be impartial and follow a code of ethics that demands that race does not play a role in their decisions. Commitments like these could motivate judges to avoid relying on implicit biases. In fact, we have some evidence that judges sometimes can avoid relying on their implicit associations when making judgments.").

cannot possibly be the case.<sup>492</sup> Even in the plethora of jurisdictions that employ safeguards like opening statements in *voir dire*, juror questionnaires, and attorney conducted *voir dire*, it is inevitable that in some cases jurors who possess undiscovered disqualifying biases will make their way onto a jury.<sup>493</sup> No system is flawless.<sup>494</sup> Nevertheless, the Authors contend that the rest of the Country's successes in ferreting out bias through the means contemplated by the Pilot Program more than justify its implementation regardless of what the data ultimately reveals.<sup>495</sup> After all, the right to a trial by a fair and impartial jury has been and should be sacrosanct.<sup>496</sup> More importantly, even under the Pilot Program and the Rule change that it contemplates adopting, trial judges are still afforded the ability to control the process to make sure that judicial time and resources are not unnecessarily squandered.<sup>497</sup>

Each day that Maryland continues to wallow in the mire of its antiquated system of "limited *voir dire*" is another day in which the right to a fair and impartial jury is being compromised by seating jurors whose biases are either legally disqualifying or would be considered to be so by the parties.<sup>498</sup> Accordingly, the authors urge the Maryland Judiciary to act now and adopt a new Rule expanding the scope of *voir dire* to match that of the federal courts and the overwhelming majority of the states while at the same time encouraging the use of the methods identified in the Pilot Program including the right to attorney-conducted *voir dire* and juror questionnaires.<sup>499</sup>

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<sup>492</sup> See Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 28.

<sup>493</sup> See *id.*

<sup>494</sup> See *id.*

<sup>495</sup> See *supra* Section II.D.

<sup>496</sup> See Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 26 (quoting *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991)) ("Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors.").

<sup>497</sup> See Fader, *supra* note 445, at 1.

<sup>498</sup> See Harak, *Fixing Maryland Voir Dire*, *supra* note 11, at 26-28 (citing *Dingle v. State*, 759 A.2d 819, 826 (Md. 2000)).

<sup>499</sup> See *supra* Part III.

## ARTICLE

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### THE RIGHT TO REST: AN EXAMINATION OF MARYLAND'S PATCHWORK LAWS ON SEPULCHER, BURIAL GROUNDS, HUMAN REMAINS

By: Derek Van De Walle, Esq.<sup>1</sup>

#### I. INTRODUCTION.

The laws of sepulcher, burial grounds,<sup>2</sup> and human remains embody one of the most ancient and sacred rights recognized in human history: the dignified treatment of the dead.<sup>3</sup> These common law doctrines give next-of-kin the right to possess and bury the deceased, to determine who has authority over the disposition and final resting place of human remains, and allows them to bring private claims against third parties for interference with these rights.<sup>4</sup> In Maryland, the development of these doctrines has often failed to keep pace with modern realities.<sup>5</sup> As courts hesitate to articulate firm legal standards and legislative reforms stall or fail to go far enough; Maryland finds itself confronting a fragmented legal regime that leaves the living without recourse and the dead without protection.<sup>6</sup>

In the past year alone, Maryland has witnessed legal challenges over the desecration of a historic African American burial ground, mishandling of human remains during disinterment, legislative efforts aimed at

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<sup>2</sup> The common law right of sepulcher “grants an absolute right to the immediate possession of the decedent’s remains for preservation and burial, and the right to receive damages from any person who unlawfully interferes with that right, or who improperly deals with the decedent’s remains.” TANYA MARSH, *THE LAW OF HUMAN REMAINS* 47 (2015). The law of burial grounds, or burial places, refers to “refer to the court-made legal principles that govern, among other things, owning, using, accessing, protecting, and disposing of places where human remains are interred.” *See Bethesda Afr. Cemetery Coal. et al. v. Hous. Opportunities Comm’n of Montgomery County*, 322 A.3d 681, 691 n. 3 (Md. 2024).

<sup>3</sup> *See* Ela A. Leshem, *Dead Bodies as Quasi-Persons*, 77 VAND. L. REV. 999, 1064 (2024) (discussing how U.S. law supports the sacred act of dignifying the dead).

<sup>4</sup> *See* Katherine Calderon, *The World of the Dead, The Right of Sepulcher and The Power of Information*, 32 TOURO L. REV. 785, 792 (2016) (discussing familial rights over a deceased family member’s body).

<sup>5</sup> *See infra* Parts III, V; *Bethesda Afr. Cemetery*, 322 A.3d at 732 (Booth, J., dissenting).

<sup>6</sup> *See Bethesda Afr. Cemetery*, 322 A.3d at 771-72.

safeguarding sacred burial sites and increasing criminal penalties for acts of desecration, and crematory mismanagement in handling human remains.<sup>7</sup> Together, these developments highlight the fact that the laws of sepulcher, burial grounds, and human remains are still developing and must continue to evolve to meet the demands of modern ethical, cultural, and legal expectations surrounding the treatment of the dead.<sup>8</sup>

This article examines the current state of the laws of sepulcher, burial grounds, and human remains, first, by providing a brief overview of these doctrines in Maryland.<sup>9</sup> Then the article explains these doctrines through the lens of recent caselaw developed in *Bethesda African Cemetery Coalition et al. v. Housing Opportunities Commission of Montgomery County*,<sup>10</sup> offering a historical overview of the law governing burial grounds and interprets the provisions of Maryland Code Annotated, Business Regulation Article, Section 5-505, (“Bus. Reg. Section 5-505”) and *Osiris Holding of Maryland LLC et al. v. Daniels*, which established the standard of care for cemetery operators.<sup>11</sup> Next, the article provides an overview of both enacted and failed legislative efforts from the 2025 General Assembly session.<sup>12</sup> Finally, the article reviews recent instances of crematorium mishandling and evaluates how these failures can be remedied through state action and private litigation.<sup>13</sup> Taken together, the matters explored in this article highlight the need for this area of law to continue to evolve to reflect contemporary ethical standards, protect historical burial grounds, and ensure consistent and dignified treatment of the dead.<sup>14</sup>

The goal of this article is to shed light on these evolving areas of law, clarify the legal frameworks currently in place, and identify where gaps remain.<sup>15</sup> By examining recent cases, legislative activity, and real-world controversies, this article also aims to inform ongoing conversations and support thoughtful reform in the care and custody of the dead.<sup>16</sup> As Maryland confronts new challenges involving the treatment of human remains and the protection of historic burial grounds, Maryland jurisprudence requires a clearer and more cohesive legal approach to

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<sup>7</sup> See *infra* Parts II-VI.

<sup>8</sup> See *infra* Parts II-VI.

<sup>9</sup> See *infra* Part II.

<sup>10</sup> See *infra* Section III.A. See generally *Bethesda Afr. Cemetery*, 322 A.3d 681 (discussing the statutory history of the law governing cemeteries).

<sup>11</sup> See *infra* Section III.B; see generally *Osiris Holding of Md., LLC v. Daniels*, 330 A.3d 735 (Md. App. 2025) (discussing the professional standard of care owed by funeral service providers and the legal consequences of mishandling human remains).

<sup>12</sup> See *infra* Part IV.

<sup>13</sup> See *infra* Part V.

<sup>14</sup> See *infra* Part VI.

<sup>15</sup> See *infra* Parts II-VI.

<sup>16</sup> See *infra* Parts II-VI.

address issues arising in the laws of sepulcher, burial grounds, and human remains.<sup>17</sup>

## II. AN OVERVIEW OF THE LAWS OF SEPULCHER, BURIAL GROUNDS, AND HUMAN REMAINS IN MARYLAND.

The law of sepulcher is a person's or class of persons' right to: (1) determine the place and manner of the disposition of an individual's remains, and (2) control the remains of a deceased individual.<sup>18</sup> Pursuant to Maryland Code, Health-General Article, Section 5-509, ("Health-Gen Section 5-509") any individual eighteen years or older may decide the disposition of their own body.<sup>19</sup> If a decedent does not express burial wishes under Health-Gen. Section 5-509, the next of kin has a quasi-property right to determine the body's disposition.<sup>20</sup> This right is not a true property interest, but a limited "sacred trust" recognized by courts for burial purposes, not commercial use.<sup>21</sup> It may be superseded by contractual rights, such as those in an insurance policy authorizing an autopsy.<sup>22</sup> The statutory order of who has the right to decide disposition is: (1) surviving spouse, (2) adult child, (3) parent, (4) adult sibling, (5) designated representative, (6) legal guardian, and (7) any willing person.<sup>23</sup> If unclaimed, the State Anatomy Board assumes responsibility.<sup>24</sup>

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<sup>17</sup> See *infra* Parts IV-VI.

<sup>18</sup> See RESTATEMENT (THIRD) OF TORTS: MISC. PROVISIONS §48D (A.L.I., Tentative Draft No. 2, 2023).

<sup>19</sup> MD. CODE ANN., HEALTH-GEN. § 5-509(a)-(b) (West 2025) (stating that an individual may decide the disposition of their own body by executing a document).

<sup>20</sup> *Painter v. U.S. Fid. & Guar. Co.*, 91 A. 158, 160 (Md. App. Ct. 1914).

<sup>21</sup> See *id.*; *Snyder v. Holy Cross Hosp.*, 532 A.2d 334, 340-41 (Md. Ct. Spec. App. 1976) (quoting PERCIVAL E. JACKSON, *THE LAW OF CADAVERS AND OF BURIAL PLACES* 97 (2d ed. Prentice-Hall 1950)).

<sup>22</sup> See *Painter*, 91 A. at 160 (holding that an insurer's right to conduct an autopsy under the terms of a life insurance policy superseded the family's rights of sepulcher). Autopsies generally require family consent unless mandated by law (e.g., in cases of violent, sudden, or suspicious deaths). See MD. CODE ANN., HEALTH-GEN. § 5-501(a) (West 2008); *id.* § 5-308(a); see also *Snyder v. Holy Cross Hosp.*, 352 A.2d 334, 341-42 (Md. App. 1976) (stating that the state had a compelling interest in performing autopsy to determine true cause of child's sudden and unexpected death); *Young v. Coll. of Physicians & Surgeons of Balt. City*, 32 A. 177, 179 (Md. 1895) (permitting the City Hospital to conduct a post-mortem examination without the family's consent to ascertain whether disease caused the decedent's death).

<sup>23</sup> MD. CODE ANN., HEALTH-GEN. § 5-509(c)(2) (West 2025).

<sup>24</sup> *Id.* § 5-406(a)(1). The State Anatomy Board has authority over anatomic donations in Maryland (including distribution of bodies and body parts to medical colleges), as well as over unclaimed bodies. MD. CODE ANN., HEALTH-GEN. § 5-401 *et seq* (West 2025).

Currently, Maryland law does not recognize a general right to disinterment,<sup>25</sup> *i.e.*, the right to exhume human remains.<sup>26</sup> Once the right of burial has been discharged, “the right of custody ceases and the body is thereafter in the custody of the law and disinterment or disturbance of the body is subject to the control of a court of equity.”<sup>27</sup> Thus, courts strongly disfavor disinterment due to the cultural and spiritual significance of burial grounds.<sup>28</sup>

Disinterment may be authorized only by a court sitting in equity and granted only for good cause.<sup>29</sup> Courts consider several factors in determining whether good cause exists for disinterment: the wishes of the deceased (especially if shaped by religious beliefs), the desires of the surviving spouse and next of kin, and the cemetery’s rules.<sup>30</sup> Most common justifications for court approved disinterment include situations where the initial burial was meant to be temporary, when there is no room for a spouse to be buried alongside the deceased, or where the body was mistakenly buried in the wrong plot.<sup>31</sup> Disinterment may also be permitted for public necessity, such as for public works projects, abandoned cemeteries, or to determine the cause of death.<sup>32</sup> When no public necessity exists, cemetery owners have a right to oppose disinterment; provided, however, that they

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<sup>25</sup> *Unger v. Berger*, 76 A.3d 510, 515 (Md. Ct. Spec. App. 2013) (citing *Kline v. Green Mount Cemetery*, 677 A.2d 623, 625 (Md. App. 1996)) (noting that there is “no right to disinterment” and that disinterment “it is a disfavored action”).

<sup>26</sup> See BLACK’S LAW DICTIONARY, 12th ed. (2024) (defining “disinter” as to “exhume [] a corpse”).

<sup>27</sup> See, e.g., *Dougherty v. Mercantile-Safe Deposit & Trust Co.*, 387 A.2d 244, 246 (Md. 1978) (denying a surviving spouse’s petition to disinter her husband’s remains where the spouse initially consented to location of the interment); *Kline*, 677 A.2d 623 (Md. Ct. Spec. App. 1996) (dismissing a petition to disinter the body of John Wilkes Booth where the location of the grave was unknown, the grave was likely damaged by water, identification would be inconclusive, and other remains were buried above Booth’s grave).

<sup>28</sup> *Rhee v. Highland Dev. Corp.*, 958 A.2d 385, 399 (Md. Ct. Spec. App. 2008).

<sup>29</sup> *Radomer Russ-Pol Unterstutzung Verein of Balt. City v. Posner*, 4 A.2d 743, 744 (Md. 1939) (“It has generally and long been recognized that Equity only affords an adequate remedy in cases involving the disposition of the bodies of the dead.”); *Unger*, 76 A.3d 510 at 515 (quoting *Dougherty*, 282 Md. at 620) (“Once a body has been buried, it ‘is subject to the control of a court of equity.’”); *Gallaher v. Trustees of the Cherry Hill Methodist Episcopal Church of Cherry Hill, Inc.*, 399 A.2d 936, 941 (Md. Ct. Spec. App. 1979) (determining an equity action brought by a cemetery to determine who is entitled to a burial lot).

<sup>30</sup> See *Posner*, 4 A.2d at 746.

<sup>31</sup> *Dougherty*, 387 A.2d at 246; see, e.g., *Gallaher*, 399 A.2d at 942 (ordering disinterment of remains wrongfully buried in a lot promised to another).

<sup>32</sup> *Gallaher*, 399 A.2d at 745 (requesting injunction to prevent cemetery from disinterring remains).

must be named as parties in such proceedings to ensure their interests are represented and bound by any resulting court order.<sup>33</sup>

In contrast, the law of burial places refers to the “court-made legal principles that govern, among other things, owning, using, accessing, protecting, and disposing of places where human remains are interred.”<sup>34</sup> It also “protect[s] the portion of the right of sepulcher that applies after interment, ‘particularly to prevent the grave from being disturbed.’”<sup>35</sup> Cemeteries are considered sacred spaces and not ordinary real estate.<sup>36</sup> Thus, an interest in a burial plot is a qualified property interest.<sup>37</sup> The interests acquired in burial lots are limited rights, typically a license or an easement, for the purpose of burial only.<sup>38</sup> Meanwhile, the law of human remains “governs unburied human remains.”<sup>39</sup> Collectively, these areas of law—sepulcher, burial grounds, and human remains—arose from and are governed by courts sitting in equity, yet each governs a different aspect of post-mortem rights: disposition, preservation of burial places, and handling of the body.<sup>40</sup>

These principles have developed overtime by statute and common law, resulting in a patchwork of principles marked by a lack of cohesion.<sup>41</sup> Recently, in *Bethesda African Cemetery*, the Supreme Court of Maryland

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<sup>33</sup> *Kline v. Green Mount Cemetery*, 677 A.2d 623, 629 (Md. App. 1996).

<sup>34</sup> *Bethesda Afr. Cemetery Coal. et. al. v. Hous. Opportunities Comm’n of Montgomery County*, 322 A.3d 681, 772 n.3 (Md. 2024).

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

<sup>36</sup> *See Diffendall v. Diffendall*, 209 A.2d 914, 916-17 (Md. 1965); *Leshem*, *supra* note 3, at 1055-56.

<sup>37</sup> *Diffendall*, 209 A.2d at 916 (“[T]he Courts and legislative bodies have almost universally recognized that the ‘property’ or ‘estate’ which one acquires when he purchases a cemetery lot or a crypt is a ‘qualified’ property or estate. It is generally referred to, even though conveyed by a deed absolute in form, as an easement, privilege, or license for the sole purpose of sepulture [sic] as long as the property remains a cemetery.”).

<sup>38</sup> *See Abell v. Proprietors of Green Mount Cemetery*, 56 A.2d 24, 25 (Md. 1947) (“A place for the burial of the dead has characteristics differing from those of an ordinary tract of land. To many it is sacred ground which should not suffer intrusion from mundane objects.”); *Dougherty v. Mercantile-Safe Deposit and Trust Company*, 387 A.2d 244, 246 (Md. 1978) (“[W]here an interment takes place with the consent, express or implied, of those most interested, the interment is regarded in law as a final sepulcher.”).

<sup>39</sup> *Bethesda Afr. Cemetery*, 322 A.3d at 691 n.3 (citing TANYA MARSH, *THE LAW OF HUMAN REMAINS* 31–53 (2016)).

<sup>40</sup> *See id.* at 690-92 (explaining that American equity courts “respond[ed] to a gap in our legal system left by rejecting an established church, and by declining to adopt the English legal system in its entirety”); *Unterstützung Verein v. Posner*, 4 A.2d 743, 744 (Md. 1939) (“It has generally and long been recognized that Equity only affords an adequate remedy in cases involving the disposition of the bodies of the dead.”); *Unger v. Berger*, 76 A.3d 510, 515 (Md. App. 2013) (quoting *Dougherty*, 387 A.2d at 246) (“Once a body has been buried, it ‘is subject to the control of a court of equity.’”).

<sup>41</sup> *Bethesda Afr. Cemetery*, 322 A.3d at 690.

began to clarify and unify these doctrines.<sup>42</sup> However, this clarification remains stalled and incomplete, and the need for clearer, stronger legal guidance is deeply felt by those whose loved ones' final resting places have been desecrated or ignored.<sup>43</sup>

### III. JUDICIAL DEVELOPMENTS IN THE LAWS OF SEPULCHER, BURIAL GROUNDS, AND HUMAN REMAINS IN MARYLAND.

Maryland has addressed issues involving the law of sepulcher, burial grounds, and human remains, but only in a piecemeal fashion.<sup>44</sup> However, recently the Supreme Court of Maryland provided a comprehensive history of this body of law in Maryland, as well as its historical development in the United States, all within the context of a desecration of a historic African American cemetery.<sup>45</sup> Although the court acknowledged the significance and complexity of this area of law, it ultimately declined to establish clear

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<sup>42</sup> See *infra* Part III. See generally *Bethesda Afr. Cemetery*, 322 A.3d 681 (Md. 2024) (discussing laws regarding burial sites and the gaps within Maryland law for protecting such sites); *Osiris Holding of Md., LLC v. Daniels*, 330 A.3d 735 (Md. App. 2025) (discussing the duty of care owed by cemetery operators and what constitutes a breach of that duty).

<sup>43</sup> See *infra* Parts III-V.

<sup>44</sup> See, e.g., *Young v. Col. of Physicians & Surgeons of Balt. City*, 32 A. 177 (Md. 1895) (affirming the decision of the lower court that a lawful post-mortem examination conducted under the coroner's authority without familial consent did not create civil liability where defendants acted within the scope of their duties and treated the body with ordinary decency); *Posner*, 4 A.2d at 747 (remanding the case to the lower court for vagueness regarding the circumstances of the original burial which needed to be determined before interment of the father's remains); *Diffendall v. Diffendall*, 209 A.2d 914, 917 (Md. 1965) (affirming the judgment of the lower court that a family's mausoleum crypt interest was not the property of a debtor); *Dougherty*, 387 A.2d at 248 (affirming the judgment of the lower court denying the wife's request to disinter her husband's body where her original consent to burial in the family plot was voluntary and not coerced, and removing another interred family member was unnecessary); *Kline v. Green Mount Cemetery*, 677 A.2d 623, 633-34 (Md. Ct. Spec. App. 1996) (affirming the ruling of the lower court dismissing a petition to disinter John Wilkes Booth's body); *Rhee v. Highland Development Corp.*, 958 A.2d 385, 402 (Md. Ct. Spec. App. 2008) (holding that the lower court erred in granting the developer's motion to dismiss on grounds that the developer had a duty to not fraudulently conceal the existence of a desecrated cemetery on the property); *Unger*, 76 A.3d at 516-17 (holding that the court where decedent's body was buried had subject matter jurisdiction over the disinterment claim). See generally *Gallaher v. Trustees of the Cherry Hill Methodist Episcopal Church of Cherry Hill, Inc.*, 399 A.2d 936, 943 (Md. Ct. Spec. App. 1979) (affirming the lower court's ruling that laws of equity apply to the effect of legal burial title and were not an abuse of discretion to require the disinterment of the remains of the plot's second purchaser).

<sup>45</sup> See *infra* Section III.A; *Bethesda Afr. Cemetery*, 322 A.3d at 690-706 (discussing the history of burial place common law in the United States).

parameters or guiding principles, opting instead for a cautious wait-and-see approach.<sup>46</sup> Meanwhile, the Appellate Court of Maryland addressed, for the first time in Maryland, the standard of care owed by a cemetery operator in disinterring human remains.<sup>47</sup>

*A. Bethesda African Cemetery Coalition et al. v. Housing Opportunities Commission of Montgomery County.*

The case of *Bethesda African Cemetery Coalition et al. v. Housing Opportunities Commission of Montgomery County* highlights the tensions between statutory protections for cemeteries, rights of descendants with community stakeholders, and the limits of judicial review.<sup>48</sup> Against this backdrop, the Supreme Court of Maryland was asked to determine whether a public housing authority could lawfully sell land containing a historic African American burial ground without court approval.<sup>49</sup>

The case centers on a historic African American burial ground known as Moses Cemetery, located in Montgomery County, Maryland, which contains the remains of at least two-hundred African Americans, some of whom were enslaved.<sup>50</sup> In 1911, a fraternal society called White's Tabernacle Number 39 Lodge of the Ancient Order of Sons and Daughters, Brothers and Sisters of Moses ("White Tabernacle") purchased the land for use as a burial ground for African Americans.<sup>51</sup> After using the land as a burial ground for forty-seven years, White's Tabernacle sold the land in 1958, and the land was sold again sometime later.<sup>52</sup> In the 1960s, the property was developed into an apartment complex and parking lot.<sup>53</sup> There is no dispute that Moses Cemetery was desecrated during the development as evidence showed that "the developers disturbed the ground, removed human remains haphazardly and inconsistently, destroyed grave markers, and ultimately paved a portion of the land into a parking lot."<sup>54</sup>

The property is now owned by the Housing Opportunities Commission ("HOC") of Montgomery County, and it is believed that human remains are still present on the site.<sup>55</sup> When the HOC tried to sell the property, the Bethesda African Cemetery Coalition ("BACC"), Reverend

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<sup>46</sup> *Bethesda Afr. Cemetery*, 322 A.3d at 731.

<sup>47</sup> *See infra* Section III.B; *Osiris Holding*, 330 A.3d at 753.

<sup>48</sup> *Bethesda Afr. Cemetery*, 322 A.3d at 719.

<sup>49</sup> *See id.*

<sup>50</sup> *Id.* at 702-03.

<sup>51</sup> *Id.* at 702.

<sup>52</sup> *Id.* at 703.

<sup>53</sup> *Id.* at 688.

<sup>54</sup> *Bethesda Afr. Cemetery*, 322 A.3d at 688.

<sup>55</sup> *Id.* at 668, 704.

Olusegun Adebayo, the pastor of nearby Macedonia Baptist Church, and descendants of those buried at Moses Cemetery (collectively, the “Coalition”) filed suit to prevent HOC from selling the land without following the procedures laid out in Bus. Reg. Section 5-505.<sup>56</sup> The Coalition’s single count complaint requested that the Circuit Court for Montgomery County issue a writ of mandamus compelling HOC to file an action under Bus. Reg. Section 5-505 before it could sell the property.<sup>57</sup> That statute is a mechanism through which burial grounds may be sold and requires removal and reburial of human remains.<sup>58</sup>

The Coalition argued that the provisions of Bus. Reg. Section 5-505 are mandatory, requiring HOC to obtain a court judgment before selling the Moses Cemetery property for non-burial use.<sup>59</sup> HOC maintained that it did not need to seek a court order under Bus. Reg. Section 5-505 because the statute authorizes, but does not mandate, a court order before the property can be sold.<sup>60</sup> The Montgomery County Circuit Court sided with the Coalition, entering a preliminary injunction blocking the sale and ordering HOC to file an action under Bus. Reg. Section 5-505 before the property could be sold.<sup>61</sup> The Appellate Court of Maryland reversed, holding that Bus. Reg. Section 5-505 is a permissive mechanism for quiet title, and thus, did not require HOC to seek court approval before selling the cemetery

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<sup>56</sup> *Id.* at 668.

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

<sup>58</sup> MD. CODE ANN., BUS. REG. § 5-505 (West 1997). The statute provides as follows:

(a) An action may be brought in accordance with the Maryland Rules and a court may pass a judgment for sale of a burial ground for another purpose if:

- (1) the ground has been dedicated and used for burial;
- (2) burial lots have been sold in the burial ground and deeds executed or certificates issued to buyers of the lots;
- (3) the ground has ceased to be used for burial; and
- (4) it is desirable to dispose of the burial ground for another purpose.

(b) If the court is satisfied that it is expedient or would be in the interest of the parties to sell the burial ground, the court:

- (1) may pass a judgment for the sale of the burial ground on the terms and notice the court sets;
- (2) shall order that as much of the proceeds of the sale as necessary be used to pay the expenses of removing any human remains in the burial ground, buying burial lots in another burial ground, and reburying the remains; and
- (3) shall distribute the remaining proceeds of the sale among the parties according to their interests.

(c) A judgment for the sale of a burial ground passes to the buyer of the burial ground the title to the burial ground free of the claims of:

- (1) the owners of the burial ground; and
- (2) the holders of burial lots. *Id.*

<sup>59</sup> *Bethesda Afr. Cemetery*, 322 A.3d at 689, 706-07.

<sup>60</sup> *Id.* at 707.

<sup>61</sup> *Id.* at 704-05.

land.<sup>62</sup> The Supreme Court of Maryland granted the Coalition’s petition for a writ of certiorari and affirmed in part, holding that Bus. Reg. Section 5-505 is a quiet title statute and that court approval before the sale was not mandatory.<sup>63</sup>

Before explaining why, however, the supreme court discussed the following history and development of the law of burial grounds in Maryland.<sup>64</sup> The United States derived its common law from England, which the ecclesiastical courts had jurisdiction over marriage, divorce, alimony, and the final disposition of human remains.<sup>65</sup> When the United States was founded, American courts rejected the ecclesiastical courts, creating a “sizeable legal void—it had no law regarding the disposition of human remains or burial places.”<sup>66</sup> That void was filled by equity courts.<sup>67</sup>

First, the Supreme Court of Maryland held that a writ of mandamus was unavailable to the Coalition because the matter was within the circuit court’s equitable powers.<sup>68</sup> In doing so, the court espoused five key principles on the law of burial grounds: (1) that land used for interments becomes a distinct form of real property subject to the jurisdiction of a court of equity;<sup>69</sup> (2) as long as remains are interred in the land, both the deceased and their memorials must be protected, and disturbing them is generally not permitted unless “there is good reason to do so[;]”<sup>70</sup> (3) under the common law of burial places, land containing human remains is considered freely transferable, allowing private parties to buy and sell it at their discretion;<sup>71</sup> (4) land may cease being used as a burial ground, typically through abandonment;<sup>72</sup> and (5) the common law of burial places can evolve to address new challenges, allowing courts of equity to develop legal principles that balance the interests of the living with the protection of the deceased.<sup>73</sup>

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<sup>62</sup> *Id.* at 689, 706-07.

<sup>63</sup> *Id.* at 705, 707, 719. However, the court remanded in part because the Coalition “may seek” leave to amend its complaint and assert a claim for equitable relief based on the alleged violation of specific common law rights related to burial grounds. *Id.* at 727-28.

<sup>64</sup> *Id.* at 690-702.

<sup>65</sup> *Bethesda Afr. Cemetery*, 322 A.3d at 690-91.

<sup>66</sup> *Id.* at 691-92 (quoting Tanya Marsh, *When Dirt and Death Collide: Legal and Property Interests in Burial Places*, 30 PROB. & PROP. 59, 60 (2016)).

<sup>67</sup> *Id.* at 690-94; see also *Beatty v. Kurtz*, 27 U.S. 566, 582-84 (1829) (supporting the idea that the courts sitting in equity assumed the role of the ecclesiastical courts in protecting the repose of the deceased).

<sup>68</sup> *Bethesda Afr. Cemetery*, 322 A.3d at 708.

<sup>69</sup> *Id.* at 709.

<sup>70</sup> *Id.* at 709-10.

<sup>71</sup> *Id.* at 710-11.

<sup>72</sup> *Id.* at 711-13.

<sup>73</sup> *Id.* at 713-16.

Then, on the subject of Bus. Reg. Section 5-505, the supreme court agreed with the appellate court that the statute is not mandatory, meaning it is optional for sellers to use this statute when selling burial grounds.<sup>74</sup> The statute provides a mechanism to sell land free from burial restrictions, but HOC was not required to invoke it because “[t]he word ‘may’ in [Section] 5-505(a) connotes an optional mechanism by which to obtain a *judgment* for sale of a burial ground ‘for another purpose,’ not the sole mechanism by which to *sell* a burial ground.”<sup>75</sup> Therefore, the Coalition was not entitled to a writ of mandamus to compel HOC to follow Section 5-505 before selling the land.<sup>76</sup>

The opinion garnered a partial concurrence with partial dissent by Justice Booth.<sup>77</sup> She agreed with the majority that a writ of mandamus was not an available remedy because the provisions of Bus. Reg. Section 5-505 are optional.<sup>78</sup> Justice Booth also agreed that the common law of burial grounds could offer a remedy, but expressed reservations about discussing the potential for future remedies because the issue was moot.<sup>79</sup> She noted, however, that Maryland law provides a comprehensive statutory scheme regulating the interment, disinterment, and protection of human remains, including detailed provisions governing cemeteries,<sup>80</sup> criminal penalties for unlawful disinterment and desecration,<sup>81</sup> and procedural safeguards for lawful disinterment and reinterment.<sup>82</sup>

In addition, there were two dissenting opinions in *Bethesda African Cemetery*, authored by Justice Shirley M. Watts and Justice Michele D. Hotten, which expressed a strong disagreement with the majority’s ruling that compliance with Bus. Reg. Section 5-505 is optional for the sale of burial grounds.<sup>83</sup>

First, comparing the majority’s opinion to a “Trojan horse,” Justice Watts concluded that the provisions of Bus. Reg. Section 5-505 are mandatory and that a writ of mandamus was available to the Coalition.<sup>84</sup>

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<sup>74</sup> *Bethesda Afr. Cemetery*, 322 A.3d at 717.

<sup>75</sup> *Id.* at 719 (emphasis in original).

<sup>76</sup> *Id.* at 716. However, the court declined to “attempt to detail all of the potentially applicable principles here.” *Id.* at 709.

<sup>77</sup> *Id.* at 729 (Booth, J., concurring in part and dissenting in part).

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

<sup>79</sup> *Id.*

<sup>80</sup> MD. CODE ANN., BUS. REG. § 5-101 (West 2024).

<sup>81</sup> See MD. CODE ANN., CRIM. LAW § 10-402 (West 2017); *id.* § 10-403 (West 2003); *id.* § 10-403 (West 2025).

<sup>82</sup> *Bethesda Afr. Cemetery*, 322 A.3d at 730 (Booth, J., concurring in part and dissenting in part).

<sup>83</sup> *Id.* at 729-772 (Booth, J., concurring in part and dissenting in part; Watts, J., dissenting; Hotten, J., dissenting).

<sup>84</sup> *Id.* at 730 (Booth, J., concurring in part and dissenting in part).

She challenged the majority's portrayal of Bus. Reg. Section 5-505 as a permissive quiet title mechanism, arguing instead that the statute has always imposed mandatory procedures for the sale of burial grounds, including judicial approval, public notice, and reinterment requirements.<sup>85</sup>

Justice Watts, citing to Maryland Rule 14-401 and its predecessors, maintained that the Bus. Reg. Section 5-505's plain language, legislative history, and related procedural rules demonstrated that Bus. Reg. Section 5-505 is the exclusive and mandatory vehicle for the lawful sale of burial grounds no longer in use.<sup>86</sup> Tracing the statute's evolution from 1868, Justice Watts emphasized that each version of the law consistently required court supervision, and she rebutted the majority's reliance on permissive language like "may" by explaining that it merely gives courts discretion to approve a sale—not private actors to bypass the law.<sup>87</sup> Drawing on case law, including *Partridge v. First Independent Church of Baltimore*,<sup>88</sup> *Reed v. Stouffer*,<sup>89</sup> and *Gump v. Sibley*,<sup>90</sup> she highlighted the judiciary's long-standing recognition of Bus. Reg. Section 5-505 as a required safeguard against unauthorized transfers.<sup>91</sup>

Justice Watts also concluded that the court's remand allowing the Coalition to amend its complaint under the "common law of burial places" was an empty remedy because it left "unclear what kind of relief Petitioners could seek or would be available under the common law of burial places."<sup>92</sup> Further, she faulted the majority for presenting defenses, such as abandonment and laches, as potential escape hatches for the HOC.<sup>93</sup> In Justice Watts' opinion, the majority disregarded the clear statutory mandate of Bus. Reg. Section 5-505.<sup>94</sup>

Moreover, Justice Watts warned that the decision opens the door for burial grounds to be sold without oversight, disproportionately harming those least able to protect their ancestral resting places.<sup>95</sup> In closing, she called on the General Assembly to clarify the statute's mandatory nature and reaffirm its role in protecting the dignity of the dead and the rights of the living.<sup>96</sup> In sum, Justice Watts criticized the majority for enabling the

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 733-744 (Watts, J., dissenting).

<sup>87</sup> *Id.* at 736.

<sup>88</sup> *Partridge v. The First Independent Church of Balt.*, 39 Md. 631, 636-40 (1874).

<sup>89</sup> *Reed v. Stouffer*, 56 Md. 236, 251-53 (1881).

<sup>90</sup> *Gump v. Sibley*, 28 A. 978, 979-80 (Md. 1894).

<sup>91</sup> *Bethesda Afr. Cemetery*, 322 A.3d. at 745-48 (Watts, J., dissenting).

<sup>92</sup> *Id.* at 731.

<sup>93</sup> *Id.* at 732.

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

<sup>95</sup> *Id.* at 751-52.

<sup>96</sup> *Id.* at 752.

sale of Moses Cemetery without judicial oversight, framing the outcome as both legally flawed and morally troubling.<sup>97</sup>

Second, Justice Hotten, also dissenting, aligned with Justice Watt's view that Bus. Reg. Section 5-505 is mandatory.<sup>98</sup> She would hold that the word "may" as used in Bus. Reg. Section 5-505 is mandatory, not optional because the use of "may" or "shall" is not dispositive in determining whether a statutory provision is mandatory or directory.<sup>99</sup> Instead, arguing to follow past precedent where the court has looked beyond isolated terms to consider the statute's purpose, context, and structure,<sup>100</sup> Justice Hotten illustrated that even seemingly permissive language may carry mandatory force, especially when the statute implicates the public interest or prescribes a specific procedural framework.<sup>101</sup> She concluded that since the statutory language is susceptible to more than one reasonable interpretation, it is ambiguous, and that the correct reading must be resolved through legislative purpose and historical context.<sup>102</sup> Justice Hotten also reconstructed the legislative history of Bus. Reg. Section 5-505 and stressed that burial grounds are subject to enforceable use restrictions that run with the land, grounded both in recorded instruments (such as deeds or easements) and in the inherent jurisdiction of equity courts over the treatment of human remains.<sup>103</sup>

Justice Hotten also determined that Bus. Reg. Section 5-505 is a remedial statute with broad public interest functions, not merely a quiet title mechanism.<sup>104</sup> Consistent with Maryland precedent, remedial statutes must be construed liberally to effectuate their legislative purpose.<sup>105</sup> Here, Bus. Reg. Section 5-505 should be broadly interpreted because "[r]emedies for the removal and re-burial of human remains are not generally available and unauthorized removal is subject to criminal penalties."<sup>106</sup> Yet, as Justice Hotten observed, because a burial ground that has ceased active use and been sold for another purpose creates an exigency requiring protection of

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<sup>97</sup> *Bethesda Afr. Cemetery*, 322 A.3d at 752 (Watts, J., dissenting).

<sup>98</sup> *Id.* at 753 (Hotten, J., dissenting).

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

<sup>100</sup> *Id.* at 756 (Hotten, J., dissenting) (citing *Hitchins v. Mayor of Cumberland*, 138 A.2d 359, 362 (Md. 1958); see *Md.-Nat'l Cap. Park & Plan. Comm'n. v. Silkor Dev. Corp.*, 229 A.2d 135, 140 (Md. 1967); *Office & Pro. Emps. Int'l Union, Local 2 (AFL-CIO) v. Mass Transit Admin.*, 453 A.2d 1191, 1195 (Md. 1982).

<sup>101</sup> *Bethesda Afr. Cemetery*, 322 A.3d at 755-56 (Hotten, J., dissenting).

<sup>102</sup> *Id.* at 755-56.

<sup>103</sup> *Id.* at 756-57.

<sup>104</sup> *Id.* at 762.

<sup>105</sup> *Id.* (citing *Pak v. Hoang*, 835 A.3d 1185, 1191 (Md. 2003)).

<sup>106</sup> *Id.* at 762 (Hotten, J., dissenting).

the deceased and their surviving relatives, the statute’s remedial purpose “is circumvented when rendered discretionary for landowners.”<sup>107</sup>

The majority’s opinion reaffirms that courts of equity retain jurisdiction over burial sites and provides a valuable overview of the common law governing burial places, an area of law that has seldom been addressed.<sup>108</sup> As the dissents highlight, however, the court’s decision not to articulate concrete standards for equitable relief under this body of law leaves future litigants without meaningful guidance.<sup>109</sup> Future litigants are essentially compelled to assert broad and potentially speculative common law claims in the hopes that their contours will be clarified over time.<sup>110</sup> In light of this legal uncertainty, trial courts should exercise discretion in permitting amended pleadings and extend procedural latitude to both plaintiffs and defendants as the contours of these emerging common law claims continue to develop.

Given the legal uncertainty in this area, trial courts should allow procedural flexibility as these emerging common-law claims continue to develop. *Bethesda African Cemetery* underscores the historical and cultural complexities surrounding burial-ground preservation, particularly for historically African American cemeteries long subject to erasure.<sup>111</sup> It also exposes an unresolved tension between individual property rights and the broader community’s interest in cultural stewardship.<sup>112</sup> As development pressures persist and many cemeteries remain vulnerable, Maryland courts—through their equitable powers—may increasingly be called to interpret existing doctrines more broadly to protect those who can no longer speak for themselves.<sup>113</sup>

*B. Osiris Holding of Maryland LLC et al. v. Daniels — The Standard of Care for Cemetery Operators.*

The *Osiris Holding of Md. v. Daniels* decision marks the first time a Maryland appellate court has articulated the standard of care governing cemetery operators during disinterment.<sup>114</sup> In January of 2025, the Appellate Court of Maryland addressed several issues of first impression

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<sup>107</sup> *Bethesda Afr. Cemetery*, 322 A.3d. at 763 (Hotten, J., dissenting).

<sup>108</sup> *Id.* at 729 (Biran, J., majority opinion).

<sup>109</sup> *Id.* at 732 (Watts, J., dissenting).

<sup>110</sup> *See id.* at 731.

<sup>111</sup> *See id.* at 707 (Biran, J., majority opinion).

<sup>112</sup> *Id.* at 707.

<sup>113</sup> *Bethesda Afr. Cemetery*, 322 A.3d. at 772 (Hotten, J. dissenting).

<sup>114</sup> *Osiris Holding of Md., LLC v. Daniels*, 330 A.3d 735, 735 (Md. App. 2025).

arising out of the negligent disinterment of a decedent's remains from the wrong burial plot in *Osiris Holding*.<sup>115</sup>

By way of background, Osiris Holding of Maryland, LLC and Osiris Holding of Maryland Subsidiary, Inc. (collectively, "Osiris") operated Lincoln Memorial Cemetery located in Prince George's County, Maryland.<sup>116</sup> In September 2016, Mrs. Daniels hired Osiris for the burial of her son at Lincoln Memorial in accordance with Muslim customs.<sup>117</sup> Mr. Daniels' gravesite was verified by a family member with Lincoln Memorial, albeit incorrectly, before he was buried.<sup>118</sup>

Months after the burial, Mrs. Daniels was advised by an employee of Lincoln Memorial that her son had been interred in the wrong burial plot.<sup>119</sup> Lincoln Memorial offered to disinter and reinter her son, but Mrs. Daniels twice refused to sign authorization forms containing liability waivers.<sup>120</sup> She ultimately chose to rebury him at Al-Firdaus Memorial Gardens<sup>121</sup> and, because she would not sign the cemetery's revised waiver, obtained authorization from the State's Attorney's Office to proceed with the disinterment.<sup>122</sup>

Eventually, a day was set for disinterment, and on that day, Mrs. Daniels, her daughter, granddaughter, and a mortician and transporter from Al-Firdaus arrived to take possession of her son's remains.<sup>123</sup> There was some delay in starting the process, and the mortician had to leave early.<sup>124</sup>

Notably, Mrs. Daniel's son's body was wrapped in a shroud and placed directly into an outer burial container (the "OBC"), without a coffin or casket, and the lid was placed on top.<sup>125</sup> The OBC in this case was made of reinforced concrete, and the lid was not sealed to the base.<sup>126</sup> The lid to the OBC was cracked, which caused further delay.<sup>127</sup> As the operators attempted to remove the OBC, it fell, and the cracked lid slid off, exposing her son's head.<sup>128</sup> Then, the OBC was dropped a second time, this time with such force that her son's body "popped in the air" and spilled his remains

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

<sup>116</sup> *Id.* at 739.

<sup>117</sup> *Id.* at 739-40.

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

<sup>119</sup> *Id.* at 740.

<sup>120</sup> *Osiris Holding*, 330 A.3d at 740.

<sup>121</sup> *Id.*

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

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

<sup>124</sup> *Id.* at 741.

<sup>125</sup> *Id.* at 740.

<sup>126</sup> *Osiris Holding*, 330 A.3d at 740.

<sup>127</sup> *Id.* at 741.

<sup>128</sup> *Id.* at 741.

on the ground.<sup>129</sup> Using a shovel, his remains were placed back inside the OBC, and a backhoe was used to realign the OBC.<sup>130</sup> All of this occurred with Mrs. Daniels present to witness it.<sup>131</sup> Eventually, the OBC was removed, her son's remains were removed from the OBC and placed inside the new one, and transported to Al-Firdaus.<sup>132</sup>

As a result of Osiris's conduct in disinterring her son's remains, Mrs. Daniels filed a complaint alleging breach of contract, negligence, intentional infliction of emotional distress, and unfair and deceptive trade practices in violation of the Maryland Consumer Protection Act.<sup>133</sup> For her negligence claim, Mrs. Daniels alleged that "Osiris breached its duty to her by failing to properly disinter her son's remains and being careless, reckless, and/or negligent in handling her son's remains."<sup>134</sup>

Central to Mrs. Daniels' theory at trial was that although a mortician was required by state law to be present throughout the disinterment process, no mortician was present.<sup>135</sup> She argued that, had a mortician been present, the remains from the compromised OBC could have been moved into the new OBC waiting nearby for that purpose.<sup>136</sup> Osiris, on the other hand, argued that the mortician's presence was neither necessary nor required, as the mortician's presence was required only to move the remains to the new OBC, not to supervise the disinterment.<sup>137</sup>

At trial, after the close of Mrs. Daniels' chase-in-chief, the trial court granted Osiris' motion for judgment on all claims except negligence, which was submitted to the jury.<sup>138</sup> The jury found Osiris negligent in disinterring Mr. Daniels' remains, and awarded Ms. Daniels \$3,040 in expenses and \$357,000 in noneconomic damages.<sup>139</sup> The trial court denied Osiris' Motion for Judgment Notwithstanding the Verdict, and Osiris appealed the trial court's ruling.<sup>140</sup>

On appeal, Osiris argued that the trial court erred in denying their motion for judgment because Mrs. Daniels failed to present expert testimony relating to the standard of care for disinterment, asserting that disinterment is beyond the ken of the average trier of fact.<sup>141</sup> Meanwhile,

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

<sup>130</sup> *Id.* at 742.

<sup>131</sup> *Id.* at 741.

<sup>132</sup> *Osiris Holding*, 330 A.3d at 742.

<sup>133</sup> *Id.* at 742.

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

<sup>135</sup> *Id.* at 745.

<sup>136</sup> *Id.* at 745.

<sup>137</sup> *Id.* at 746.

<sup>138</sup> *Osiris Holding*, 330 A.3d at 746.

<sup>139</sup> *Id.* at 748.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 749.

Mrs. Daniels maintained that there was sufficient evidence that Osiris had acted negligently, particularly the evidence of industry standards through the testimony of two cemetery professionals.<sup>142</sup> Specifically arguing that the standard of care was breached when Osiris failed to have a mortician present.<sup>143</sup>

The Appellate Court of Maryland affirmed, concluding that “a cemetery has a duty of care in disinterring or otherwise handling a dead body.”<sup>144</sup> The court, observing that this was an issue of first impression, looked to other jurisdictions, including cases in West Virginia and Georgia to determine a cemetery’s duty of care.<sup>145</sup> Relying on these cases, the appellate court reaffirmed that American law recognizes a quasi-property right in a decedent’s family to have their loved one’s remains handled with dignity, and that this right supports a cause of action for the negligent mishandling of a body—including during an authorized disinterment.<sup>146</sup>

First, the court determined this type of negligence action relates to the duty of care owed by a professional, in which “the professional is held to the standard of care of his or her profession.”<sup>147</sup> Thus, “where the conduct of a professional, a person who has ‘special training and expertise like doctors,’ is at issue, that conduct should be measured against the standard of care of a hypothetical reasonable person with similar training and expertise.”<sup>148</sup> The *Osiris Holding* case adds cemetery operators to that group.<sup>149</sup>

Second, the court clarified that expert testimony is not always required to establish a breach of the professional standard.<sup>150</sup> Instead, expert testimony “*may* be necessary to establish the standard of care owed by the

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<sup>142</sup> *Id.* at 749. As a witness, Osiris called Charles Smith, the general manager of Lincoln Memorial, to explain the standard procedures used by Lincoln Memorial during a disinterment. *Id.* at 746. Osiris also read the deposition transcript of Allen Davis, the general manager of a group of cemeteries that includes Lincoln Memorial, who testified about the general standards governing cemetery operations. *Id.* at 745.

<sup>143</sup> *Id.* Mrs. Daniels also argued that the jury’s verdict could be affirmed based on *res ipsa loquitur*, but the appellate court found that argument was not preserved for appeal. *Id.* at 750 n.18.

<sup>144</sup> *Osiris Holding*, 330 A.3d at 751.

<sup>145</sup> *Id.* at 751 (first citing *Whitehair v. Highland Memory Gardens, Inc.*, 327 S.E.2d 438, 440 (W. Va. 1985); and then citing *Mayer v. Turner*, 234 S.E.2d 853, 855 (Ga. App. 1977)).

<sup>146</sup> *Id.* at 751 (first citing *Whitehair*, 327 S.E.2d at 440-41; and then citing *Mayer*, 234 S.E.2d at 855).

<sup>147</sup> *Id.* at 752 (citing *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, 155 A.3d 445, 450 (Md. 2017)).

<sup>148</sup> *Id.* at 752 (citing *Harris-Reese v. United States*, 615 F. Supp. 3d 336, 368-69 (D. Md. 2022)).

<sup>149</sup> *Id.* at 753.

<sup>150</sup> *Osiris Holding*, 330 A.3d at 753.

professional because ‘professional standards are often beyond the ken of the average layman,’ and therefore, such testimony ‘is necessary to elucidate the relevant standard for the trier of fact.’”<sup>151</sup> In other words, expert testimony is not required for every case.<sup>152</sup> It is only required when the issue involves specialized knowledge beyond the understanding of an average person.<sup>153</sup>

The key consideration in determining whether the issue involves specialized knowledge beyond the average understanding is not whether a layperson is familiar with the topic, but whether the subject is within their general capacity to perceive and comprehend.<sup>154</sup> If a jury can recognize a breach of duty using common knowledge or experience, then expert testimony is unnecessary.<sup>155</sup> As a result, in some professional negligence cases, the alleged misconduct may be so clear that a factfinder can assess it without expert input.<sup>156</sup> Thus, *Osiris Holding* establishes that sufficiently informed testimony from industry insiders, such as cemetery managers or morticians, can provide a jury with an adequate basis to determine the applicable standard of care and assess whether it was breached.<sup>157</sup> This makes recovery more accessible to plaintiffs in cemetery mishandling cases, who may lack the resources to retain formal experts.<sup>158</sup>

Third, applying those principles, the appellate court concluded that expert testimony was not required to establish a breach of the standard of care because the relevant industry standards were clearly explained by a knowledgeable witness.<sup>159</sup> At trial, the cemetery’s general manager testified about standard practices during a disinterment, including the need for a mortician to be present throughout the process and for an extra outer burial container (OBC) to be on hand due to the likelihood that the original container would break.<sup>160</sup> He further explained that if the original OBC was compromised, the remains should be transferred to the new container before being removed from the grave.<sup>161</sup> Additionally, he testified that cemetery professionals are expected to act in a manner that respects the dignity of the decedent and their family.<sup>162</sup> As the appellate court found, this testimony

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<sup>151</sup> *Id.* at 752 (quoting *Schultz v. Bank of Am.*, 990 A.2d 1078, 1086 (Md. 2010)) (emphasis added).

<sup>152</sup> *Id.* (quoting *Schultz v. Bank of Am.*, 990 A.2d 1078 (Md. 2010)).

<sup>153</sup> *Id.* at 752.

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

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

<sup>156</sup> *Osiris Holding*, 330 A.3d at 752.

<sup>157</sup> *Id.* at 753.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 753.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Osiris Holding*, 330 A.3d at 753.

provided sufficient evidence from which a factfinder could determine the applicable standard of care and whether it was breached.<sup>163</sup>

Turning its attention to whether there was sufficient evidence that Osiris had breached that standard of care, the court concluded there was.<sup>164</sup> The court found that Mrs. Daniels' claim concerning the absence of a mortician during the disinterment was supported by sufficient evidence.<sup>165</sup> The testimony established that the industry standard required a mortician to be present throughout the entire process because, as the court observed, "[a] mortician is required to be at a disinterment because, if human remains must be moved, transported, or handled in any way, only a mortician can do so."<sup>166</sup> Several witnesses testified that no mortician was present when the burial container became compromised and the remains spilled.<sup>167</sup> If a mortician had been on site, the remains could have been promptly and respectfully transferred to a new container.<sup>168</sup>

A cemetery representative also acknowledged that spillage of remains was inconsistent with how a disinterment should be conducted.<sup>169</sup> Based on this evidence, the court held that a reasonable factfinder could conclude that the cemetery breached its duty of care, justifying the denial of the defendant's motion for judgment notwithstanding the verdict.<sup>170</sup> However, the court noted, in a footnote, that Mrs. Daniels, despite presenting evidence at trial that state law requires a mortician to be present during disinterment,<sup>171</sup> that "[a]t oral argument, counsel for Mrs. Daniels stated that it was an industry standard as opposed to a state law."<sup>172</sup>

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 753–54.

<sup>165</sup> *Id.* at 755.

<sup>166</sup> *Id.* at 741.

<sup>167</sup> *Id.* at 742.

<sup>168</sup> *Osiris Holding*, 330 A.3d at 745.

<sup>169</sup> *Id.* at 741–742.

<sup>170</sup> *Id.* at 748.

<sup>171</sup> *Id.* at 742 n. 8. Before trial, Mrs. Daniels designated a certified funeral service practitioner to testify about the handling and disinterment of Mr. Daniels' remains. *Id.* at 742. Osiris moved in limine to exclude him, arguing he lacked the qualifications required under Md. Rule 5-702(1) and that his opinions rested on "common sense," not a sufficient factual basis or accepted methodology under Rule 5-702(3). *Id.* The circuit court agreed in part: it found he was qualified to testify as an expert on the standard of care for disinterments under Rule 5-702(1), but excluded his proposed testimony under Rule 5-702(3) because his opinions were not grounded in a sufficient factual foundation and did not require expert testimony. *Id.* at 743.

<sup>172</sup> *Id.* at 742 n.9. Md. Code Ann., Health Occ. § 7-501 provides that "a person may not practice, attempt to practice, offer to practice, or assist in the practice of mortuary science in this State unless licensed by the Board." MD. CODE ANN., HEALTH OCC. § 7-501 (West 2015). While "practicing mortuary science" includes operating a funeral establishment, preparing a dead human body for disposition for compensation; or arranging for or making

Beyond its doctrinal holdings, *Osiris Holding* highlights the serious consequences that can flow from negligent burial practices.<sup>173</sup> Disinterment in Maryland is not a routine procedure as it generally requires authorization from the State’s Attorney<sup>174</sup> or a court order based on good cause.<sup>175</sup>

In sum, *Osiris Holding* provides guidance to practitioners, courts, and cemetery operators.<sup>176</sup> It affirms the interest in dignified treatment of the dead, applies Maryland’s professional negligence framework to the burial industry, and clarifies when expert testimony is—and is not—needed to establish liability.<sup>177</sup> It also involves compensatory damages for the negligent handling of human remains, particularly noneconomic damages, which can be significant.<sup>178</sup> Given the scarce number of Maryland cases with jury verdicts on this issue, *Osiris Holding* serves as a valuable benchmark for assessing potential damages in cases involving the mishandling or disinterment of human remains.<sup>179</sup> Still, tort remedies can

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final disposition of a dead human body for compensation, funeral direction, and disinfecting or preserving a dead human body by arterial or cavity injection, it does not include “the pickup, removal, or transportation of a dead human body, if the unlicensed individual is acting under the direction of a licensed mortician or funeral director.” *Id.* § 7-101(u)(1)–(3).

<sup>173</sup> See *Osiris Holding*, 330 A.3d at 735.

<sup>174</sup> See MD. CODE ANN., CRIM. LAW § 10-402(b) (West 2017) (“State’s Attorney for a county may authorize in writing the removal of human remains from a burial site in the State’s Attorney’s jurisdiction: (1) to ascertain the cause of death of the person whose remains are to be removed; (2) to determine whether the human remains were interred erroneously; (3) for the purpose of reburial; or (4) for medical or scientific examination or study allowed by law.”).

<sup>175</sup> *Unger v. Berger*, 76 A.3d 510, 515 (Md. Ct. Spec. App. 2013) ” (quoting *Dougherty v. Mercantile-Safe Deposit and Trust Co.*, 387 A.2d 244, 246 (Md. App. Ct. 1977)) (“[O]nce a body has been buried, it ‘is subject to the control of a court of equity.’”); *Gallaher v. Trustees of the Cherry Hill Methodist Episcopal Church of Cherry Hill, Inc.*, 399 A.2d 936, 936 (Md. Ct. Spec. App. 1979) (involving an equity action brought by cemetery to determine who is entitled to a burial lot); JACKSON, *supra* note 21, at 97 (“The power of a court of equity [over disinterment] is unquestionable. . . .”). Good cause typically exists when (1) the initial interment was intended to be temporary; (2) where a lack of room for the spouse to be buried alongside the deceased exists; and (3) the remains were wrongfully interred in the lot of the plot owner. *Dougherty*, 387 A.2d at 246; see also *Gallaher*, 399 A.2d at 939 (quoting *Currier v. Woodlawn Cemetery*, 90 N.E.2d 18, 21 (N.Y. 1949)) (“[T]he quiet of the grave, the response of the dead, are not lightly to be disturbed. Good and substantial reasons must be shown before disinterment is to be sanctioned.”).

<sup>176</sup> See *Osiris Holding*, 330 A.3d at 748.

<sup>177</sup> See *supra* Section II.B.

<sup>178</sup> See *Osiris Holding*, 330 A.3d at 739.

<sup>179</sup> See *id.* Cases from other jurisdictions illustrate the wide range of damage awards available in this area of law:

On the lower end, see, e.g., *Moria v. M.E. Rodriguez Funeral Home, L.P.*, 2023 WL 11964086 (Tex. Dist. Ct. Oct. 5, 2023) (resulting in a jury verdict in favor of the plaintiffs in amount of \$36,250 against the funeral home that allowed the corpse to decompose and

only go so far.<sup>180</sup> Families like Mrs. Daniels' must rely on piecemeal legal doctrines, expensive litigation, and emotionally taxing court processes.<sup>181</sup> This is not a sustainable or just model for protecting the dead. Moreover, *Osiris Holding* serves as a cautionary tale for cemeteries to strictly adhere to procedural safeguards, including proper plot verification and the presence of licensed morticians during any exhumation.<sup>182</sup>

#### IV. LEGISLATIVE EFFORTS IN THE 2025 GENERAL ASSEMBLY SESSION.

The Maryland General Assembly has also taking an interest in these cemetery-related doctrines, as shown by the number of bills introduced during the 2025 General Assembly session concerning cemeteries, burial grounds, and human remains.<sup>183</sup>

##### A. Enacted Legislation.

The General Assembly enacted several bills that were signed into law by the Governor during the 2025 legislative session.<sup>184</sup> First, House Bill

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then allowed the deceased's family to see the decayed corpse); *Carpenter v. Valley Health Sys.*, 2004 WL 3312693 (Nev. Dist. Ct. Mar. 26, 2004) (resulting in a verdict of \$6,500 against hospital for misplacing corpse for two days).

On the higher end, *see, e.g.*, ARON HILLEL, JURY AWARDS \$16 MILLION TO VANESSA BRYANT FOR LEAKED CRASH SITE PHOTOS (Aug 24, 2022), [https://www.courthousenews.com/jury-awards-16-million-to-vanessa-bryant-for-leaked-crash-site-photos/#:~:text=Appeals-,Jury%20awards%20\\$16%20million%20to%20Vanessa%20Bryant%20for%20leaked%20crash,to%20the%20jury%20in%20thanks](https://www.courthousenews.com/jury-awards-16-million-to-vanessa-bryant-for-leaked-crash-site-photos/#:~:text=Appeals-,Jury%20awards%20$16%20million%20to%20Vanessa%20Bryant%20for%20leaked%20crash,to%20the%20jury%20in%20thanks) (on file with the University of Baltimore Law Forum) (resulting in a jury awarded Vanessa Bryant, wife of Kobe Bryant, \$15,000,000 and awarded Christopher Chester, who lost family members in the same plane crash, \$16,000,000, for violations of their constitutional right to privacy and to control the remains, memory and death images of their deceased loved ones); *Verna Uptigrow v. S. Nassau Cmty. Hosp.*, JVR No. 505670, 2008 WL 7232075 (N.Y. Mar. 1, 2008) (resulting in a verdict for \$200,000 against hospital for misplacing remains of infant for six days); *Srygley v. Johnsridout's Chapels*, JVR No. 411817, 2002 WL 32509048 (Ala. Apr. 1, 2002) (resulting in jury award of \$270,000 in pain and suffering damages and \$1,000,000 in punitive damages after the funeral home negligently placed the wrong corpse in a relative's casket prior to a funeral service).

<sup>180</sup> *See infra* notes 202-204. *See generally Osiris Holding*, 330 A.3d 735 (holding that a cemetery has a duty of care when handling dead bodies).

<sup>181</sup> *See supra* Section II.B.

<sup>182</sup> *See supra* Section II.B.

<sup>183</sup> *Gains for Cemeteries in the 2025 Maryland General Assembly*, COAL. TO PROTECT MD. BURIAL SITES 1, [https://cpmbs.org/wp-content/uploads/2025/05/CPMBS\\_2025\\_Legislative\\_Report.pdf](https://cpmbs.org/wp-content/uploads/2025/05/CPMBS_2025_Legislative_Report.pdf) (on file with the University of Baltimore Law Forum) (last visited Nov. 9, 2025).

<sup>184</sup> *See supra* Section III.A.

535 and Senate Bill 963, made effective on October 1, 2025, added Section 5–805 of the Maryland Code, Business Regulations Article, and Section 6–226 of the Maryland Code, State Finance and Procurement Article, by establishing the Abandoned and Neglected Cemeteries Fund (the “Fund”) and authorizes the Governor to appropriate up to two hundred and fifty thousand dollars annually to support the care, preservation, maintenance, and restoration of qualifying cemeteries.<sup>185</sup> The Fund, administered by the Secretary of Labor, is non-lapsing and designated specifically to assist cemeteries that meet statutory definitions of abandonment or neglect.<sup>186</sup>

Second, House Bill 509 and Senate Bill 354 established the Maryland Inventory of Cemeteries and Burial Sites Workgroup (the “Workgroup”), to be staffed by the Maryland Historical Trust.<sup>187</sup> The Workgroup is charged with developing findings and recommendations regarding the creation and long-term maintenance of a unified, statewide cemetery inventory system.<sup>188</sup> The law became effective on July 1, 2025, and the Workgroup’s report was due by December 1, 2025.<sup>189</sup> With a focus on centralizing cemetery data and codifying standards, the Workgroup’s efforts aim to improve transparency, accessibility, and protection of burial

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<sup>185</sup> H.B. 535, 447th Gen. Assemb., Reg. Sess. (Md. 2025); S.B. 963, 447th Gen. Assemb., Reg. Sess. (Md. 2025); *see* MD. CODE ANN., BUS. REG. § 5-805 (West 2024); *id.* STATE FIN. & PROC. § 6-226(a)(iii) (West 2024).

<sup>186</sup> *Id.* BUS. REG. § 5-805 (West 2024). An “abandoned cemetery” is defined as one where (1) the entity established to operate it has been terminated, dissolved, or otherwise ceased to exist without conveying title; (2) no property owner is listed with the State Department of Assessments and Taxation; (3) the property has been condemned; or (4) legal ownership cannot be determined, and no responsible party can be located. *Id.* § 5-805(a)(2). In contrast, a “neglected cemetery” is defined as one where (1) two or more citations for failure to maintain the property have been issued by a county or municipality; (2) the site has fallen into disrepair due to inadequate upkeep; (3) the property has experienced vandalism, loitering, or other criminal activity; or (4) there is evidence of physical deterioration or destruction. *Id.* § 5-805(a)(4).

<sup>187</sup> H.B. 509, 447th Gen. Assemb., Reg. Sess. (Md. 2025). The Workgroup’s mandate includes: standardizing legal definitions of key terms (e.g., “cemetery,” “burial site”) across the Maryland Code; reviewing current documentation practices utilized by local governments, state agencies, and nonprofit entities; examining national models and best practices in cemetery documentation and inventory management; recommending a centralized, publicly accessible system to record and locate burial sites statewide; identifying potential funding sources and estimating costs associated with the creation and upkeep of such a system; and assessing the feasibility of a grant program to support grassroots and institutional documentation efforts. *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* *See generally*, MD. GEN ASSEM., MARYLAND INVENTORY OF CEMETERIES AND BURIAL SITES WORKGROUP REPORT, S.B. 354-H.B. 509 (Md. 2025) (describing the final report of the workgroup).

sites across Maryland, particularly those at risk due to abandonment, neglect, or redevelopment.<sup>190</sup>

House Bill 616 and Senate Bill 421 added to Section 5–106(jj) of the Maryland Code, Courts and Judicial Proceedings Article and Section 10–404(a) of the Maryland Code, Criminal Law, by expanding the scope and enforceability of Maryland’s cemetery desecration statute.<sup>191</sup> One key provision included extending the statute of limitations for prosecuting cemetery desecration offenses from one year to three years, now beginning when local authorities knew or reasonably should have known of the violation, rather than the date the offense occurred.<sup>192</sup> By lengthening the window for prosecution and broadening the range of protected features, House Bill 616 and Senate Bill 421 strengthen Maryland’s commitment to the protection and dignity of burial grounds, particularly those that have been historically overlooked or are vulnerable to redevelopment or vandalism.<sup>193</sup>

A final example of legislative interest in cemetery-related doctrines was Senate Bill 57.<sup>194</sup> The bill established standardized procedures for the dignified disposition of unclaimed veterans’ remains in Maryland, including cremains, hydrolyzed remains,<sup>195</sup> and soil remains from natural organic reduction by amending Section 5–803 of the Maryland Code, Business

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<sup>190</sup> See Md. H.B. 509.

<sup>191</sup> H.B. 616, 447th Gen. Assemb., Reg. Sess. (Md. 2025); see MD. CODE ANN., CTS. & JUD. PROC. § 5-106(jj) (West 2024); *id.* CRIM. LAW § 10-404(a)(iii) (West 2025) (prohibiting a person from willfully destroying, damaging, defacing, or removing “any other part of the grounds of a cemetery” in addition to funerary objects and buildings, walls, and fences of a cemetery).

<sup>192</sup> MD. CODE ANN., CRIM. LAW § 10-404(b) (West 2025) (expanding the scope of criminal liability to cover not only the willful destruction or removal of gravestones, monuments, and fences but also landscaping elements and any part of cemetery grounds; and increasing penalties so that offenders are subject to up to five years’ imprisonment, a \$10,000 fine, and mandatory restitution for any resulting damage).

<sup>193</sup> H.B. 1000, 447th Gen. Assemb., Reg. Sess. (Md. 2025); S.B. 616, 447th Gen. Assemb., Reg. Sess. (Md. 2025). House Bill 1000 and Senate Bill 616, which did not pass, would have also amended CRIM. LAW § 10-404 made it a felony to desecrate or unlawfully remove human or pet remains, expanded legal protections to cemeteries owned by families or religious organizations, and granted family members a civil cause of action for damages and attorney’s fees. See H.B. 1000, 447th Gen. Assemb., Reg. Sess. (Md. 2025); S.B. 616, 447th Gen. Assemb., Reg. Sess. (Md. 2025). The bills also proposed license revocation for offenders and enhanced protections for cemetery grounds. See H.B. 1000, 447th Gen. Assemb., Reg. Sess. (Md. 2025); S.B. 616, 447th Gen. Assemb., Reg. Sess. (Md. 2025).

<sup>194</sup> S.B. 57, 447th Gen. Assemb., Reg. Sess. (Md. 2025).

<sup>195</sup> MD. CODE ANN., BUS. REG. § 5-101(o) (West 2024) (“Hydrolyzed remains are the bone fragments produced by the completion of alkaline hydrolysis.”) (citation modified); *id.* § 5-101(b) (“In turn, alkaline hydrolysis is the process of reducing human remains using water, alkaline chemicals, and heat inside a watertight vessel to accelerate decomposition.”) (citation modified).

Regulations Article, and Section 7-406(b)(2)(i) of the Maryland Code, Health-Occupations Article.<sup>196</sup>

*B. Failed Legislation.*

While several of the cemetery-related bills introduced during the 2025 legislative session did not pass, their introduction highlights a growing legislative awareness of the need to better protect Maryland's cemeteries, burial grounds, and human remains.<sup>197</sup> The proposed legislation sought to address a range of legal, ethical, and environmental challenges.<sup>198</sup> They ranged from the rights of descendants when remains are disturbed, to the responsibilities of private and public actors in maintaining sacred sites, and the need for oversight and transparency in the sale or repurposing of burial land.<sup>199</sup>

Among the proposed measures were bills that would have established a Commission on Abandoned and Neglected Maryland Cemeteries within the Office of Cemetery Oversight (“OCO”).<sup>200</sup> The Commission’s mandate would have included assisting in the development of a statewide inventory and searchable database of cemeteries and burial sites, and creating policies with a focus on historically significant cemeteries—particularly abandoned African American burial grounds.<sup>201</sup> The Commission would have also provided support, guidance, and resources for cemetery maintenance and restoration; promoted public education, descendant engagement, and access rights; coordinated with the State Department of Assessments and Taxation (SDAT) on property

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<sup>196</sup> S.B. 57, 447<sup>th</sup> Gen. Assemb., Reg. Sess. (Md. 2025); *see* MD. CODE ANN., BUS. REG. § 5-803(f) (West 2025) (requiring that, if a veteran’s service organization does not claim qualifying unclaimed cremains, hydrolyzed remains, or soil remains within 10 days of notice, the funeral establishment or reduction facility must notify the Department of Veterans and Military Families and transfer the remains to the Department for appropriate disposition. For soil remains, any balance may be transferred to a cemetery or woodland owner if authorized); MD. CODE ANN., HEALTH-OCC. § 7-406(b)(2)(i) (West 2025) (requiring funeral establishments and crematories to provide identifying information for any cremated or hydrolyzed remains that have been unclaimed for 90 days to a veterans service organization, so the organization can determine whether remains belong to a veteran or eligible dependent).

<sup>197</sup> *See infra* notes 211, 214, 216, 220, 223; *infra* Section III.B.

<sup>198</sup> *See infra* notes 211, 214, 216, 220, 223; *infra* Section III.B.

<sup>199</sup> *See infra* notes 211, 214, 216, 220, 223; *infra* Section III.B.

<sup>200</sup> H.B. 724, 447<sup>th</sup> Gen. Assemb., Reg. Sess. (Md. 2025) (which would have amended MD. CODE ANN., BUS. REG. § 5-1001 through 5-1005).

<sup>201</sup> *Id.*

records; facilitated ownership transitions; and developed training programs, including for incarcerated individuals, in cemetery preservation.<sup>202</sup>

Additionally, House Bill 1003 and Senate Bill 0624 sought to reform Maryland's statutory framework governing the relocation of human remains from burial sites by introducing a more structured administrative process under the OCO.<sup>203</sup> Under existing law, individuals must obtain written permission from the local State's Attorney and publish a public notice prior to disinterment or reburial.<sup>204</sup> These Bills, if passed, would have required applicants to first submit an application to OCO, accompanied by additional public notification requirements, including posting notices at the burial site and directly notifying known descendants.<sup>205</sup> The legislation provided for public informational meetings upon request and special procedural accommodations for certain family members or legal representatives.<sup>206</sup> More importantly, the process included a potential 90-day stay if descendant objections arose, allowing for mediation or reburial arrangements.<sup>207</sup> Fines for noncompliance were designated to support OCO's operations through the Cemetery Oversight Fund.<sup>208</sup>

House Bill 711 and Senate Bill 671 proposed a comprehensive, multi-agency study of the environmental and public health implications of deathcare and funeral practices in Maryland.<sup>209</sup> The legislation would have directed the OCO, in partnership with the Maryland Department of Health, the Department of Labor, and the Department of the Environment, to evaluate both conventional and emerging methods of body disposition, including embalming, burial, flame and water-based cremation, natural burials, and human composting.<sup>210</sup> The study aimed to assess the environmental footprint of each method, considering effects on land use, soil and water quality, air emissions, and broader public health concerns.<sup>211</sup>

House Bill 1354 and Senate Bill 1021 proposed a comprehensive framework to improve the oversight, transfer, and preservation of Maryland cemeteries deemed abandoned or at risk.<sup>212</sup> Recognizing cemeteries as culturally and historically significant spaces, the legislation would have

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<sup>202</sup> *Id.*

<sup>203</sup> H.B. 1003, 447<sup>TH</sup> Gen. Assemb., Reg. Sess. (Md. 2025) (which would have amended MD. CODE ANN., CRIM. LAW § 10-402 and § 10-402.1).

<sup>204</sup> *See* MD. CODE ANN., CRIM. LAW § 10-402(b) (West 2017).

<sup>205</sup> *See* H.B. 1003, 447<sup>TH</sup> Gen. Assemb., Reg. Sess. (Md. 2025).

<sup>206</sup> *Id.*; *see* MD. CODE ANN., CRIM. LAW § 10-402(c) (West 2017).

<sup>207</sup> H.B. 1003.; *see* MD. CODE ANN., CRIM. LAW § 10-402(g).

<sup>208</sup> H.B. 1003.; *see* MD. CODE ANN., CRIM. LAW § 10-402(g)(1).

<sup>209</sup> H.B. 711, 447<sup>th</sup> Gen. Assemb., Reg. Sess. (Md. 2025).

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

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

<sup>212</sup> H.B. 1354, 447<sup>th</sup> Gen. Assemb., Reg. Sess. (Md. 2025).

required most cemetery owners, including registered cemetery operators and permit holders, to obtain prior approval from the Director of the OCO before transferring ownership or selling cemetery land.<sup>213</sup> Even religious organizations, while exempt from the approval requirement, would have been obligated to provide notice and seek to identify descendants or other interested parties.<sup>214</sup> These Bills also mandated that the OCO Director weigh public input and cultural factors before approving sales.<sup>215</sup> Notably, the legislation would have repealed existing provisions which allow for court-initiated sales without OCO oversight.<sup>216</sup> In cases of abandonment, these bills also would have empowered public entities to acquire cemeteries and transfer them to stewards committed to preservation.<sup>217</sup>

Although the above legislation did not pass, the number and subject of the Bills show that legislative reform is needed to prevent further mismanagement of the deceased.<sup>218</sup>

## V. RECENT FAILURES IN CREMATORY MANAGEMENT.

Recent incidents of crematorium mismanagement in Maryland over the past several years provide examples of both public enforcement actions and private legal remedies available in response to the mishandling of human remains.<sup>219</sup>

One example takes place in January 2025, where the Maryland State Board of Morticians and Funeral Directors took the extraordinary step of shutting down a crematorium in Charles County after repeated inspections revealed decomposing bodies stored in cardboard boxes stacked one atop another, torn body bags, and bodily fluids pooling on the floor.<sup>220</sup> This crematorium, permitted to operate since 2016, had spent much of the last decade on probation due to multiple failed inspections that uncovered a pattern of violations.<sup>221</sup> In April 2024, the State, operating pursuant to

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<sup>213</sup> *Id.*

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

<sup>215</sup> *Id.*

<sup>216</sup> *See id.*

<sup>217</sup> *Id.*

<sup>218</sup> MD. H.B. 1354.; *see infra* Part V.

<sup>219</sup> *See, e.g.,* Bethesda Afr. Cemetery Coal. v. Hous. Opportunities Comm'n of Montgomery Cnty., 322 A.3d 681, 681 (Md. 2024); Osiris Holding of Md. LLC v. Daniels, 330 A.3d 735, 738 (Md. App. 2025).

<sup>220</sup> Bryan S. Sears, *Mortician Board Members Resign Under Pressure*, MD. MATTERS (February 1, 2025, at 2:35 ET), <https://marylandmatters.org/2025/02/01/mortician-board-members-resign-under-pressure/> (on file with the University of Baltimore Law Forum).

<sup>221</sup> *Id.*

Section 20-301 of the Maryland Code, Health-General Article,<sup>222</sup> imposed a two thousand dollar fine and suspended operations for ten days.<sup>223</sup>

In May of 2023, the family of Patricia Hill filed suit against the State of Maryland and the Office of the Chief Medical Examiner, alleging that Hill's remains were cremated by the Charles County Crematorium without her family's consent.<sup>224</sup> The complaint raised claims of negligence, gross negligence, and intentional infliction of emotional distress.<sup>225</sup> The family also alleged breach of contract, asserting that the crematorium failed to honor the agreed-upon arrangements for Hill's remains.<sup>226</sup> Ultimately, the case settled for one hundred and fifty thousand dollars.<sup>227</sup>

While the Charles County crematorium scandal highlights the state's regulatory authority, it also reveals the limitations of that power when exercised too late.<sup>228</sup> Despite being on probation for prior misconduct, the crematorium was allowed to operate for years, continuing to desecrate human remains with little effective oversight.<sup>229</sup> This incident serves as an example of how crematories and funeral homes, driven by profit rather than a duty of care to the deceased and their families, can exploit gaps in regulation.<sup>230</sup> In turn, the legal system can struggle to deliver timely and effective remedies, particularly in areas where oversight is fragmented or underenforced.<sup>231</sup>

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<sup>222</sup> See generally MD. CODE ANN., HEALTH-GEN. § 20-301 (West 2014) (describing the nuisance control and abatement powers of Secretary of Health).

<sup>223</sup> Meredith Cohn, *A Crematory Wasn't Cremating Bodies But Stockpiling Them*, *State Board Says*, THE BALTIMORE BANNER (Jan. 23, 2025, at 19:22 ET), [https://www.thebaltimorebanner.com/community/public-health/crematory-bodies-stockpiling-health-department-maryland-N4UBAFJ6HJDYVP42SKDJCQP6TU/?fbclid=IwY2xjawICH8hleHRuA2FibQIxMQABHTaiS\\_h1aGfeI\\_m0x\\_a4HeLSZMHyT0qnhvkRozko0nxAyUI-a6rChq4x5w\\_aem\\_VF5Z8hVQGmnDmGTffD84Zg](https://www.thebaltimorebanner.com/community/public-health/crematory-bodies-stockpiling-health-department-maryland-N4UBAFJ6HJDYVP42SKDJCQP6TU/?fbclid=IwY2xjawICH8hleHRuA2FibQIxMQABHTaiS_h1aGfeI_m0x_a4HeLSZMHyT0qnhvkRozko0nxAyUI-a6rChq4x5w_aem_VF5Z8hVQGmnDmGTffD84Zg) (on file with the University of Baltimore Law Forum).

<sup>224</sup> *Laquinte Hill et al. v. Md. Dep't of Health, Off. of the Chief Med. Exam'r*, Case No. 24-C-23-002127 (Balt. City Cir. Ct. 2023).

<sup>225</sup> See *id.*

<sup>226</sup> See *id.*

<sup>227</sup> See *Family of Patricia Hill Settles Lawsuit with the State of Maryland Over Unlawful Cremation*, L. OFF. OF KIM PARKER (Feb. 27, 2024), <https://www.kpcounsel.com/family-of-patricia-hill-settles-lawsuit-with-the-state-of-maryland-over-unlawful-cremation/#:~:text=funeral%20director%20that-,Ms.,distress%20and%20trauma%20to%20Ms.&text=kin%20goes%20against%20basic%20human,violates%20legal%20and%20ethical%20norms.%E2%80%9D> (on file with the University of Baltimore Law Forum).

<sup>228</sup> Sears, *supra* note 231.

<sup>229</sup> *Id.*

<sup>230</sup> See *id.*

<sup>231</sup> *The Maryland Medical Examiner's Office: Addressing Concerns of Negligence in Body Handling and Cremation Errors*, L. OFF. OF KIM PARKER (October 25, 2024),

When matters go awry, the *Hill* case serves as an example of the type of private action a family may bring when their right to control the disposition of a loved one's remains is violated.<sup>232</sup> Under the common law, next-of-kin hold a fundamental right to custody and control over a deceased's body for purposes of burial or cremation.<sup>233</sup> Interference with this right, through, *e.g.*, mishandling, delay, or desecration, gives rise to potential legal claims in tort for interference with that right included damages for emotional distress.<sup>234</sup>

## VI. CONCLUSION.

At its core, the common laws of sepulcher, burying grounds, and human remains represent a collective moral and civic commitment: to treat human remains with dignity, to safeguard cultural and historical memory, and to ensure that grief is not compounded by institutional indifference or legal inadequacy.<sup>235</sup> Yet, recent events in Maryland reveal how fragile that commitment can be.<sup>236</sup>

Taken together, *Bethesda African Cemetery, Osiris Holding*, recent legislation (both enacted and failed), and troubling instances of desecration in Maryland crematoria, confront us with a legal framework that remains fragmented, underdeveloped, and too often reactive.<sup>237</sup> These developments reveal that the common laws of sepulcher, burying grounds, and human remains are a deeper reflection of how a society honors the dignity of both the living and the deceased.<sup>238</sup> More fundamentally, these issues implicate civil rights and social equity.<sup>239</sup> When the State fails to protect these spaces, it fails not only the dead, but the living descendants and stewards who carry their memory forward.<sup>240</sup>

Maryland must respond with a comprehensive agenda for legislative reform.<sup>241</sup> Stronger statutory protections are required to safeguard burial sites and human remains, regulatory agencies must be equipped with

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<https://www.kpcounsel.com/the-maryland-medical-examiners-office-addressing-concerns-of-negligence-in-body-handling-and-cremation-errors/#:~:text=The%20article%20revealed%20that%20bodies,leads%20to%20tragic%2C%20preventable%20outcomes> (on file with the University of Baltimore Law Forum).

<sup>232</sup> See *Hill*, Case No. 24-C-23-002127.

<sup>233</sup> See Calderon, *supra* note 4, at 785, 792.

<sup>234</sup> L. OFF. OF KIM PARKER, *supra* note 242.

<sup>235</sup> See Leshem, *supra* note 3, at 1012-13; Calderon, *supra* note 4, at 792.

<sup>236</sup> See *supra* Sections IV.B-V.

<sup>237</sup> See *supra* Part III.

<sup>238</sup> See *supra* Parts III-V.

<sup>239</sup> See *supra* Part V.

<sup>240</sup> See *supra* Parts III-V.

<sup>241</sup> See *supra* Sections IV.A-B.

expanded enforcement authority, and courts must embrace their equitable role in vindicating these rights, particularly where legislation falls short.<sup>242</sup> Moreover, the treatment of the dead cannot be viewed as a purely private matter, but as a public obligation grounded in principles of dignity, justice, and historical conscience.<sup>243</sup> In protecting the dead, we affirm our values as a just and humane society.<sup>244</sup> The measure of that commitment lies not only in what we memorialize, but in what we choose to protect.<sup>245</sup>

While the laws of sepulcher, burial grounds, and human remains concern the rights of the living,<sup>246</sup> they also offer a means of preserving the dignity of those who can no longer speak for themselves.<sup>247</sup> If we are to truly honor the dead, we must not allow their final resting places to become legal afterthoughts.<sup>248</sup> A cohesive legal framework, one that integrates clear statutory protections, equitable judicial remedies, and effective regulatory oversight, is long overdue.<sup>249</sup>

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<sup>242</sup> See *supra* Sections IV.A-B.

<sup>243</sup> See *supra* Part V.

<sup>244</sup> See *supra* Parts I-V.

<sup>245</sup> See *supra* Parts I-V.

<sup>246</sup> See Leshem, *supra* note 3, at 1026; Calderon, *supra* note 4, at 792.

<sup>247</sup> See Leshem, *supra* note 3, at 1026; Calderon, *supra* note 4, at 792.

<sup>248</sup> See *supra* Parts I-VI.

<sup>249</sup> See *supra* Sections IV.A-B.

**ARTICLE**

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**CONTEMPT POWER IN THE PROVINCE OF MARYLAND**

**By: Joshua T. Carback<sup>1</sup>**

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## I. INTRODUCTION.

Contempt power in American law is something of *arcanum imperii*—a source of legal authority with mysterious origins.<sup>2</sup> The purpose of this Article is to trace the evolution of the contempt power in Maryland law from its English roots through the colonial period up to the American Revolution.<sup>3</sup>

<sup>2</sup> Compare, e.g., TACITUS, THE HISTORIES 1.4.2, p. 8–9 (Clifford H. Moore trans., T.E. Page et al., eds., The Loeb Classical Library, Harvard Univ. Press 1963) (100 – 110 A.D.), with Herbert W. Benario, *Arcanus in Tacitus*, 106 RHEINISCHES MUSEUM FÜR PHILOLOGIE 356, 360 (1963).

<sup>3</sup> I will preface this Article with a note regarding my synthesis of legal authorities and citation to primary historical sources. I synthesized legal authorities for contempt power from the history of England and Maryland up through 1776. I preserve this synthesis for future scholarly research, the general the reference of the Maryland bench and bar, and for the benefit posterity by attaching indices for these authorities as appendices to this Article. These appendices include, among other things, indices of every judicial case, legislative precedent, and statutory reference to the contempt power that I could find from Maryland records preceding independence. My chief contribution to the literature on American colonial law and comparative constitutionalism in this Article lies in my analysis of primary historical sources, including those indexed in the appendices, found in the Maryland State Archives (“MSA”). All citations to the MSA are to the versions of the cited material published on the MSA’s website, The Archives of Maryland Online, unless otherwise specified. This Article is a work of legal history. I therefore balanced different disciplinary techniques, conventions, and styles of citation in developing my own framework for citing legal sources found in the MSA. The citations in this work generally accord to the most widely recognized standard for citation by the legal profession in the United States: *The Bluebook: A Uniform System of*

During the seventeenth and eighteenth centuries, Maryland evolved from a feudal plantation province into an industrialized modern republic.<sup>4</sup> England ascended to world power status during the same timeframe—an achievement due in no small part to a robust legal system.<sup>5</sup> Contempt power was an instrumental component of that system.<sup>6</sup> The transmission of the motherland’s laws abroad was as complex and variable as the circumstances of her children.<sup>7</sup> The substance and procedure of the law of contempt in the Kingdom of England and in the Province of Maryland, however, were strikingly the same.<sup>8</sup> Contempt power was a simple and efficient tool for upholding the dignity and authority of legal institutions on both sides of the Atlantic.<sup>9</sup> Though feudalism perished under the sword of the American Revolution, contempt power survived and translated into the Maryland Declaration of Rights and Constitution of 1776.<sup>10</sup> The notion of “constitutional rights” within the new framework of government still encompasses the law of contempt, including the ancient doctrine of contempt

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*Citation.* My citations to historical legal sources in the MSA largely imitate Bluebook conventions for citing their contemporary analogues in modern legal sources. Citations to judicial cases, rulings, and precedents in the MSA, for example, generally accord with Bluebook Rule 10.

<sup>4</sup> *Compare, e.g.*, 2 HERBERT L. OSGOOD, THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY 4–15 (The Macmillan Co. 1904) [hereinafter OSGOOD, 2 THE AMERICAN COLONIES] (noting that Maryland was established as a feudal proprietorship), with EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC, 1763–1789, 101–03 (4th ed., Univ. of Chi. Press 2013) (contending that the birth of America’s national government coincided with the birth of the first thirteen independent states, including the State of Maryland).

<sup>5</sup> *Compare* 1 CHARLES M. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY: THE SETTLEMENTS 42–43 n.1 (Yale Univ. Press, 1935) (noting that British superiority in developing overseas trade and colonization through “the combination of private enterprise with supervision and control by the state, characteristic of England’s colonial methods in the past, ‘has been the greatest of all facts in the making of the British Empire’”) (quoting SIR CHARLES P. LUCAS, THE BEGINNINGS OF ENGLISH OVERSEAS ENTERPRISE: A PRELUDE TO THE EMPIRE 35, 148 (1917)), with JUSTINIAN’S INSTITUTES 7–8 (Cornell Univ. Press, Peter Birks & Grant McLeod trans., Paul Krueger ed. 1987) (noting the achievements of the English in developing a robust legal tradition), and OSGOOD, 2 THE AMERICAN COLONIES, *supra* note 4, at 31 (conveying the notion that legal excellence is necessary for the consolidation of conquest and expansion).

<sup>6</sup> *See infra* Part II.

<sup>7</sup> *See generally* OSGOOD, 2 THE AMERICAN COLONIES, *supra* note 4, at 163 (noting how constitutional differences between various colonies affected how power was maintained and applied over time).

<sup>8</sup> *See infra* Parts III–IV.

<sup>9</sup> *See infra* Parts II–V.

<sup>10</sup> *See infra* Parts IV–V.

of the sovereign.<sup>11</sup> Contempt power earned its place in the *novus ordo seclorum*.<sup>12</sup>

## II. CONTEMPT POWER IN THE KINGDOM OF ENGLAND.

In the medieval mode of the English Constitution, the executive, legislative, and judicial functions of government all resided in the King-in-Council.<sup>13</sup> The king of England was the Supreme Magistrate, the fount of law and justice.<sup>14</sup> All authority possessed by the royal courts, the Royal Privy Council (*curia regis*), and the English Parliament (*consilia regis*) were derived from him.<sup>15</sup> The king was also the Universal Proprietor; therefore, he was entitled to create new Peers of the Realm and bestow patents of nobility.<sup>16</sup>

Contempt of the sovereign encompassed disobedience and disrespect towards the king's courts, prerogative, person, his title.<sup>17</sup> Contempt of the king's agents and institutions, by extension, was contempt of the king himself.<sup>18</sup> As sovereignty revolved from the king to the King-in-Parliament in 1689,<sup>19</sup> contempt power attenuated from the royal prerogative and attached to the English judiciary and the English Parliament as such.<sup>20</sup> To fully explain the importance of contempt power in the Province of Maryland, it is important to first sketch its development in the motherland from the Norman Conquest of 1066 to the end of the eighteenth century.<sup>21</sup> The ingredients of this sketch are the great commentaries of common law, the English Reports, and the Statutes of the Realm.<sup>22</sup>

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<sup>11</sup> JEAN LOUIS DE LOLME, *THE CONSTITUTION OF ENGLAND; OR AN ACCOUNT OF THE ENGLISH GOVERNMENT* 59 (David Lieberman ed. Liberty Fund 2007) (1784).

<sup>12</sup> *See id.*

<sup>13</sup> *See* 1 SIR FREDERICK POLLOCK & FREDERICK W. MAITLAND, *THE HISTORY OF ENGLISH BEFORE THE TIME OF EDWARD I* 699 (2d ed. 1895).

<sup>14</sup> *See id.* at 475.

<sup>15</sup> *See id.* at 210.

<sup>16</sup> *See id.*

<sup>17</sup> *Id.* at 602-03.

<sup>18</sup> *Id.* at 46-47.

<sup>19</sup> DE LOLME, *supra* note 11, at 225.

<sup>20</sup> *Id.* at 64.

<sup>21</sup> *Id.* at 217.

<sup>22</sup> J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 242-43 (4th ed. 2002) (1979); *see also* MARJORIE CHIBNALL, *ANGLO NORMAN ENGLAND 1066-1166*, 5 (1986) (establishing the changes in England during the Norman Conquest).

A. *Contempt Power and the English Constitution.*

Although the precise origin of the contempt power lies shrouded in mystery, the word “contempt” appears to be an established term of art in English law by the twelfth century.<sup>23</sup> A variety of statutes from that time reflected its plain meaning: disrespect or disobedience of the law.<sup>24</sup> In the legal context, however, the word had three more technical meanings.<sup>25</sup>

The first technical meaning of the word “contempt” was disobedience or disrespect towards the king: “contempt of the sovereign.”<sup>26</sup> This was a sweeping catch-all category arising from the king’s authority as Supreme Magistrate.<sup>27</sup> All violations of law and public authority were in some sense contempt of the sovereign.<sup>28</sup> Contempt, in other words, was the root of all liability.<sup>29</sup>

The second technical meaning of the word “contempt” referred to any disobedience of a statute without a penalty clause was indictable for contempt as a misdemeanor.<sup>30</sup> This was not contempt of the sovereign as such, however, but rather a principle of statutory construction.<sup>31</sup>

The third technical meaning of the word “contempt” was disobedience or disrespect of authority delegated by the king to one of his agents.<sup>32</sup> Inherent to any delegation of the royal authority was the most basic power necessary to carry out the king’s will.<sup>33</sup> Hence the Latin maxim *cuicumque alquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit*—“Whoever grants a thing is deemed also to grant that without

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<sup>23</sup> See generally RONALD L. GOLDFARB, *THE CONTEMPT POWER* 11 (1963); Linton D. Landrum, *Contempt: Origin and History of the Doctrine of Contempt*, 58 ALBANY L. J. 396, 396 (1898); 2 HENRI DE BRACON, *ON THE LAWS AND CUSTOMS OF ENGLAND* 359 (Samuel Thorne & George Woodbine trans. 1968) (1556); RANULF DE GLANVILLE, *THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND* 21, 41–42 (G.D.G. Hall trans. & ed. 1965) (c. 1187 – 1189); POLLOCK & MAITLAND, *supra* note 13, at 551 (recognizing the usage of the term “contempt” in England in the twelfth century); Magna Carta c. 39 (1215); Second Statute of Westminster of 1285, 13 Edw. I c. 39.

<sup>24</sup> See generally, e.g., Presentation of Beneficiaries Act of 1713, 13 Ann. c. 13 (Eng.) (providing for punishment of contempt of court associated with procedures designed to examine and identify “Popish Recusants”).

<sup>25</sup> See 1 SIR WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* ch. 21–24 p. 56–65 (3d ed. 1739) [hereinafter HAWKINS, 1 PLEAS OF THE CROWN].

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

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

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

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

<sup>30</sup> *Id.* at ch. 22 § 5 p. 60.

<sup>31</sup> Compare HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, ch. 22 § 5 p. 60, with Graham McBain, *Abolishing Some Obsolete Common Law Crimes*, 20 KING’S L. J. 89, 104 (2009).

<sup>32</sup> See HAWKINS, PLEAS OF THE CROWN, *supra* note 25, at ch. 21–24 p. 56–65.

<sup>33</sup> See *id.*

which the grant itself would be of no effect.”<sup>34</sup> Contempt power, in this sense, was inherent to institutions to the extent that they bore the king’s aegis and required his authority to execute their functions, for without the power to punish or purge disrespect or disobedience, any grant of authority was nugatory.<sup>35</sup> The most commonly known institutional grantees of contempt power were common law courts and both Houses of Parliament.<sup>36</sup>

There was no separation of powers in the medieval mode of the English Constitution.<sup>37</sup> Contempt of the sovereign and individuals or institutions that bore his agency was therefore inevitably intertwined.<sup>38</sup> This is perhaps best exemplified by a legal controversy in 1237.<sup>39</sup> In such controversy, several knights were charged with disrupting a hundred court and therefore “impeding irreverently the king’s business and in contempt of the king’s dignity.”<sup>40</sup> The disturbance prevented the court from conducting his business.<sup>41</sup> The offense savored in treason, contempt of the royal prerogative, and contempt of court at one and the same time.<sup>42</sup>

Although it is anachronistic to partition contempt into categories coextensive with discrete functions of government—executive, judicial, and legislative<sup>43</sup>—I will do so here for the sake of analytical convenience and structural clarity.<sup>44</sup> Going forward, I will describe each of these three categories as a “family” of contempt.<sup>45</sup> Each family consists of several genera,<sup>46</sup> and each genus consists of several species.<sup>47</sup> There is a substantial overlap, however, across all levels of this typological structure, which, to reiterate, is an artificial construction I use for ease of reference.<sup>48</sup> The latter two families originally encompassed the former while the English Constitution was in its medieval mode.<sup>49</sup> Just as the human fetus is a monolith in utero but rapidly develops and expands his appendages as he matures to

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<sup>34</sup> HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 314 (10th ed. 1931).

<sup>35</sup> *See id.*

<sup>36</sup> *See id.*

<sup>37</sup> RALPH V. TURNER, THE KING AND HIS COURTS: THE ROLE OF JOHN AND HENRY III IN THE ADMINISTRATION OF JUSTICE 1199-1240, 203 (Cornell Univ. Press 1968) (citing *Curia Regis Rolls*, 116B, m.8, no. 1983, pleas coram rege, Easter 1237).

<sup>38</sup> *Id.* at 203.

<sup>39</sup> *Id.* at 206.

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

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

<sup>42</sup> *Id.*

<sup>43</sup> *See infra* Section III.B.

<sup>44</sup> *See infra* Sections II.B–E.

<sup>45</sup> *See infra* Sections II.B–E.

<sup>46</sup> *See infra* Sections II.B–E.

<sup>47</sup> *See infra* Sections II.B–E.

<sup>48</sup> *See infra* Sections II.B–E. *See generally* HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 22–24 p. 56–65 (supporting the different categories).

<sup>49</sup> *See infra* Sections II.B.2–3.

the point of birth,<sup>50</sup> contempt power became increasingly more nuanced and defined as the branches of English government grew and spread out from their primeval trunk rooted in the king's person into a proverbial "pocket park" of bureaucratic endeavor and legal authority in the Early Modern Period.<sup>51</sup>

*B. Contempt of the Sovereign.*

Wherever the medieval origins of the doctrine of contempt of the sovereign may lie, we at least have a firm grasp of its development during the early modern period thanks to the work of Sir William Hawkins.<sup>52</sup> Hawkins mapped out the development of the doctrine of "contempt of the sovereign" in the twenty-first through twenty-fourth chapters of his most famous treatise, *Pleas of the Crown*, published in 1716.<sup>53</sup> In that work, Hawkins characterized the doctrine of contempt of the sovereign—what in American constitutional parlance we might now call "contempt of the executive"—as a family that in turn consists of four genera: 1) contempt of the king's Palace, 2) contempt of the royal prerogative, 3) contempt of the king's person or government, and 4) contempt of the king's title.<sup>54</sup> Hawkins' *Pleas of the Crown* arguably still provides the most systematic and comprehensive account of contempt doctrine under English common law to this day.<sup>55</sup> My analysis of the doctrine of contempt stands on his shoulders.<sup>56</sup> I will take the liberty of modifying Hawkins' typology for contempt power to facilitate my discussion of how the contempt doctrine evolved in three ways.<sup>57</sup>

First, Hawkins writes about a genus within the contempt of the sovereign family known as "contempt of the king's palace."<sup>58</sup> That genus is the root of the modern doctrine of contempt of court because the king could

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<sup>50</sup> THE S.D. DEPT. OF HEALTH, FETAL GROWTH AND DEVELOPMENT 8 (Cynthia Barrett & Kathleen Veness-Meehan 1995), <https://doh.sd.gov/media/bnemplje/fetal.pdf> (on file with the University of Baltimore Law Forum).

<sup>51</sup> See *infra* Sections II.B–D.

<sup>52</sup> See HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 21 §§ 1-15 (entitled "Contempt of the King's Courts"), ch. 22 §§ 1-5 (entitled "Contempt of the King's Prerogative"), ch. 23 §§ 1-8 (entitled "Contempt of the King's Person or Government"), ch. 24 §§ 1-10 (entitled "Contempt of the King's Title").

<sup>53</sup> See *id.*

<sup>54</sup> See *id.* The term "contempt of the executive" is mine. It is anachronistic insofar as we use it in relation to law of contempt in England. But it is helpful for the purpose of conceptualizing contempt power as a fluid doctrine between Anglophone jurisdictions, given the significance of the term "executive" in constitutional parlance. See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See *infra* Sections II.B.1–3.

<sup>57</sup> Cf. HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 22–24 p. 56–65.

<sup>58</sup> See *id.* at ch. 21 §§ 1-15 p. 56–59.

hold court in his palace.<sup>59</sup> I will therefore collapse that entire genus into my discussion of contempts against the English judiciary below.<sup>60</sup>

Second, Hawkins writes about a genus within the “contempt of the sovereign” family known as “contempt against the royal prerogative.”<sup>61</sup> Hawkins designated disobedience of the king’s summons to appear in Parliament as an individual specie within that the “contempt against the royal prerogative” genus.<sup>62</sup> I believe that disobedience of the king’s summons to appear in Parliament to be a doctrinal root of the modern legislative contempt power, specifically contempt of the parliamentary privilege of freedom from arrest; therefore, I will collapse that specie into my discussion of contempts against the English Parliament, which is a family of contempt in my typology, below.<sup>63</sup>

Third, Hawkins writes about a genus within the “contempt of the sovereign” family classified as “contempt oriented the king’s person or government.”<sup>64</sup> Hawkins further classified “tumultuous petitioning of Parliament” as a specie within that genus.<sup>65</sup> Contempt of the king’s person or government, in turn, belongs to a family of contempts oriented against the executive power of the king.<sup>66</sup> I believe tumultuous petitioning of Parliament is a doctrinal root of the modern legislative contempt power, specifically contempt of the parliamentary privilege of freedom of debate.<sup>67</sup> I will therefore collapse that specie into my discussion of contempts against the English Parliament below as well.<sup>68</sup>

#### i. Contempt of the Royal Prerogative.

The first genus within the contempt of the sovereign family—and certainly the broadest genus—was contempt of the royal prerogative.<sup>69</sup> Hawkins cautioned that “[c]ontempts against the king’s prerogative are of so various a nature, that they cannot be well reduced to any certain heads.”<sup>70</sup> He nevertheless managed to distill this genus into three species: refusing to assist

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<sup>59</sup> *See id.*

<sup>60</sup> *See infra* Section I.C.

<sup>61</sup> *See* HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 22 §§ 1-5 p. 59–60.

<sup>62</sup> *See id.*

<sup>63</sup> *See* Lord Sturton and Lord Mordaunt (1606) 74 Eng. Rep. 1067, 1067-68; Noy 102; *infra* Section II.D.

<sup>64</sup> *See* HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 23 §§ 1-8 p. 60.

<sup>65</sup> *See id.* at ch. 23 § 4 p. 60

<sup>66</sup> *See id.*

<sup>67</sup> *See id.*

<sup>68</sup> *See id.*; *infra* Section II.D.

<sup>69</sup> *See* HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 22 §§ 1-5 p. 59–605.

<sup>70</sup> *See id.* at ch. 22 § 1 p. 59.

the king for the good of the public, preferring the interest of a foreign prince to the king, and disobeying the king's lawful commands or prohibitions.<sup>71</sup>

First, an act of refusing to assist the king in achieving a public good was deemed contempt of the royal prerogative.<sup>72</sup> The most prominent example of this specie was refusing to serve the king in a foreign war for pay.<sup>73</sup> This obligation to serve was enshrined in several statutes and therefore overlapped with the category of statutory contempt.<sup>74</sup> Chapter 18 of the Act of 1495, for example, declared that if anyone violated their duty to serve in war when fully compensated, they “forfeit and lose their said offices, fees, and annuities and to stand void at the King's pleasure . . . .”<sup>75</sup>

Second, preferring the interest of foreigners over that of the king was contempt of the royal prerogative.<sup>76</sup> The example Hawkins gave for this specie was receiving a pension from a foreign power without the king's permission.<sup>77</sup>

Third, disobedience of the king's lawful commands or prohibitions was contempt of the royal prerogative.<sup>78</sup> This is the largest and arguably the most important specie of prerogative contempt.<sup>79</sup> It is, in fact, arguably the most important specie of contempt of the executive as a whole.<sup>80</sup> It forms a residual catchall for any disobedience of any source of royal authority.<sup>81</sup>

According to Hawkins, any violation of a statute lacking a penalty clause was indictable as contempt of the royal prerogative.<sup>82</sup> Contempt of the royal prerogative, in other words, was a catchall for statutory criminal responsibility whenever a particular criminal penalty was not otherwise specified in the text of the statute itself.<sup>83</sup> Hawkins cites several authorities to support this doctrinal principle.<sup>84</sup> Sir Edward Coke is not one of them,

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<sup>71</sup> *See id.*

<sup>72</sup> *See id.* at ch. 22 § 2 p. 59.

<sup>73</sup> *See id.*

<sup>74</sup> *See* Act of 1495, 11 Hen. 7, c. 18, § 1; Act of 1402, 4 Hen. 4, c. 13; Act of 1351, 25 Edw. 3, c. 8; Act of 1344, 18 Edw. 3, c. 7; Act of 1327, 1 Edw. 3, c. 5.

<sup>75</sup> *See* Act of 1495, 11 Hen. 7, c. 18, § 1.

<sup>76</sup> *See* HAWKINS, I PLEAS OF THE CROWN, *supra* note 25, at ch. 22 § 3 p. 59; McBain, *supra* note 31, at 103.

<sup>77</sup> *See* McBain, *supra* note 30, at 103.

<sup>78</sup> *See* HAWKINS, I PLEAS OF THE CROWN, *supra* note 25, at ch. 22 § 4 p. 59.

<sup>79</sup> *See* Countess of Shrewsbury's Case (1612) 77 Eng. Rep. 1369, 1370, 12 Co. Rep. 94.

<sup>80</sup> *Cf. id.* at 1372.

<sup>81</sup> *See* HAWKINS, I PLEAS OF THE CROWN, *supra* note 25, at ch. 22 § 4 p. 59.

<sup>82</sup> *Id.* at ch. 22 § 5 p. 60 (“Also every Contempt of a Statute is indictable, if no other Punishment be limited.”).

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

<sup>84</sup> *Compare id.*, with 2 Sir WILLIAM HAWKINS, TREATISE OF THE PLEAS OF THE CROWN ch. 25 § 4 p. 210, ch. 26 § 2 p. 260 (3d ed. 1739) [hereinafter HAWKINS, 2 PLEAS OF THE CROWN]; *see also, e.g.*, Crouther's Case (1603) 78 Eng. Rep. 893, 893–94; Cro. Eliz. 654, 654–55 (Eng.); HAWKINS, I PLEAS OF THE CROWN, *supra* note 25, at 65.

however, it is worth mentioning that Coke previously identified several statutory examples bearing out this principle, including the Magna Carta (1225), specifically its eighth chapter; the Statute of Marlborough (1267); the Statute of Westminster First (1276); and the Statute of Westminster Second (1285).<sup>85</sup> (Coke also stated that whenever a man violated these statutes, the offended party also had a cause of action to recover).<sup>86</sup> The offender was liable to be indicted for a misdemeanor and was punishable with a fine, imprisonment, or both.<sup>87</sup> Liability for contempt of statutes of the realm was not restricted to civilians.<sup>88</sup> It extended to officers' temporal and spiritual, civil and ecclesiastical.<sup>89</sup> Although Hawkins claimed that every contempt of a statute without a penalty clause was prerogative contempt,<sup>90</sup> Contemporary scholar Graham McBain contends that Hawkins' was mistaken.<sup>91</sup> The rule that contempt of a statute without a penalty clause is liable for indictment as a criminal misdemeanor was technically a canon of statutory interpretation, not a tenet of the doctrine of contempt of the royal prerogative (or any contempt of the sovereign) as such.<sup>92</sup>

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<sup>85</sup> See, e.g., SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES LAWS OF ENGLAND ch. 7 p. 18 (6th ed. 1681) [hereinafter COKE, 2 INST.] (noting that under chapter seven of Magna Carta, a widow tenant of the King marrying without the King's license was liable for contempt and must pay a fine); *id.* at ch. 11 p. 122 (noting that under the Statute of Marlborough of 1267, 52 Hen. 3, whenever there is a violation of the statute, the party offended had a cause of action; the offender was liable for contempt and punishable with fine and/or imprisonment); *id.* at ch. 1 p. 163 (noting that under the Statute of Westminster First of 1275, 3 Edw. 1, anyone who violated the statute was liable for contempt); *id.* at ch. 32 p. 427 (noting that under the Statute of Westminster Second of 1285, 13 Edw. I, stat. 1, particularly the Mortmain Act of 1285, justices of the courts were liable for contempt for failure to effectuate the statute).

<sup>86</sup> See COKE, 2 INST., *supra* note 85, at ch. 11 p. 122.

<sup>87</sup> See *id.* at ch. 11 p. 122.

<sup>88</sup> See *id.* at ch. 1 p. 163 (noting that under the State of Westminster First of 1275, 3 Edw. 1, anyone who violated the statute was liable for contempt).

<sup>89</sup> See *id.* at ch. 1 p. 164 (noting that under the Statute of Westminster First of 1275, 3 Edw. 1, if an ordinary contemptuously demanded a clerk not convicted of felony, his temporalities would be seized, and he would lose that franchise or privilege to demand clerks for him and his successors forever); *id.* at ch. 32 p. 427 (noting that under the Statute of Westminster Second of 1285, 13 Edw. I, stat. 1, particularly the Mortmain Act of 1285, justices of the courts were liable for contempt for failure to effectuate the statute); *id.* at ch. 39 p. 451 (noting that under the Statute of Westminster Second of 1285, 13 Edw. 1, stat. 1, s. 38, particularly the Execution of Process Act of 1285, a sheriff who failed to serve a writ was liable for contempt).

<sup>90</sup> McBain, *supra* note 31, at 104.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* McBain further argues that the last recorded instance of a contempt of the sovereign being prosecuted as such was not, as claimed in volume eleven of *Halsbury's Laws of England*, Queen v. Price (1840), 12 Q.B.D. 252 (Eng.), but perhaps a case over a hundred and thirty years earlier: Queen v. Taylor (1703) 2 Ld. Raym. 879, 92 ER 88; 3 Salk 199, 91 ER 775. *Id.* at 104 & nn. 61, 109–110, 125.

Contempt of various manifestations of royal authority not expressed by statutes of the realm in particular—commands from the Royal Privy Council, as well as royal ordinances, orders, proclamations, and writs—certainly were, in any case, contempts of the royal prerogative as such.<sup>93</sup> Examples of contempt of the royal prerogative deriving from “disobedience of the king’s orders and prohibitions” included disobeying summons to appear before the Royal Privy Council; refusing to answer questions posed by the Royal Privy Council; refusing to provide evidence required by a criminal grand jury; not returning from beyond the sea upon request; assembling at a tournament against the King’s wishes; going beyond the sea in violation of the king’s writ *ne exeat regnum*, great or privy seal, or signet or proclamation; and disobedience of banishment by returning from beyond the sea to England.<sup>94</sup> These specifics of contempt illustrate the medieval mode of the English Constitution allocating sovereignty to the throne.<sup>95</sup>

ii. Contempt of the King’s Person or Government.

The second genus within the contempt of the sovereign family is contempt of the king’s person or government.<sup>96</sup> Although Hawkins did not exhaust its particulars, he declared that there were at least six species within this genus.<sup>97</sup>

First, seditious libel and slander scandalizing the king and his government was contempt of the king’s person or government.<sup>98</sup> I must note that because contempt of the king’s title is a separate genus (discussed below), seditious libel or slander regarding the king’s title here would seem to overlap that genus with this one; seditious words against the king’s person or government not specifically regarding the king’s title lie within this genus alone regardless.<sup>99</sup> Speaking disrespectfully about the king by cursing him,

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<sup>93</sup> See, e.g., Hollis’s Case (1618) 80 Eng. Rep. 417, Hob. 271, 272; R. v. Earl of Nottingham (1609) 145 Eng. Rep. 284, 287; Lane 42, 43; Steckford’s Case (1587) 74 Eng. Rep. 636; 3 Leonard 207.

<sup>94</sup> See HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 22 §§ 1-5; COKE, 2 INST., *supra* note 85, at ch. 20 p. 201 (holding that under the Statute of Westminster First of 1275, 3 Edw. 1, a man who is banished from the realm for felony and returns is liable for high contempt); *id.* at ch. 84 p. 179 (holding that a fugitive who disobeys a king’s writ to return from beyond the sea is liable for contempt punishable by forfeiture of his lands and goods); *id.* at ch. 28 p. 80 (holding that any person infected with plague and commanded to keep house but nevertheless disobeyed and went abroad is contempt and a felony).

<sup>95</sup> See HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 22 §§ 1-5.

<sup>96</sup> See *id.* at ch. 23 §§ 1-8.

<sup>97</sup> See *id.*

<sup>98</sup> See *id.* at ch. 23 § 2.

<sup>99</sup> See Queen v. Langley (1704) 87 Eng. Rep. 882; 6 Mod. 125; King v. Cranfield (1696) 87 Eng. Rep. 609; 5 Mod. 203, 204; King v. Burford (1669) 84 Eng. Rep. 310; 2 Keb. 494; King

for example, was forbidden.<sup>100</sup> Although a mayor or burgess could be punished for doing so, they could not be disenfranchised of their office except through an action at law.<sup>101</sup>

Second, doing anything that encouraged rebellion, such as drinking to the pious memory of someone executed for high treason, while arguably liable for treason itself, was also liable for contempt of the king's person or government.<sup>102</sup>

The first two species of contempt of the king's person or government appear to be capable of overlapping insofar as libel and slander against the king can be a tool for encouraging rebellion.<sup>103</sup> The Court of King's Bench's decision in *Blanchflower v. Atwood* in 1607 indicates that these species of contempt could qualify as treason.<sup>104</sup>

Third, attempting to sway the king into changing his policy through intimidation by alluding to the public's uneasiness about his present policy was contempt of the king's person or government.<sup>105</sup>

Fourth, spreading fake news about the king to bring him into disrepute was contempt of the king's person or government.<sup>106</sup>

Fifth, accusing the king of breaching his coronation oath was contempt of the king's person or government.<sup>107</sup>

Sixth, refusing to pay a custom in a foreign country was contempt of the king's person or government because it could create a rift between a foreign sovereign and the king.<sup>108</sup>

All six species within the genus of contempt of the king's person or government illustrate the medieval mode of the English constitution, which

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v. Winne (1667) 84 Eng. Rep. 210, 2 Keb. 336; *Berisford v. Presse* (1610) 80 Eng. Rep. 130, 198; *Yelverton* 197, 198; *Blanchflower v. Atwood* (1607) 80 Eng. Rep. 73; *Yelverton* 107; see also HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 23 §§ 1-8, ch. 24 §§ 1-10 (explaining a seditious libel or slander against the King's title would overlap two genera: contempt of the king or his government and contempt of the king's title as such. All libels or slanders against the king not related to his title, however, would appear to fall exclusively within this genus); *infra* Section II.B.3 (discussing contempt of the king's title).

<sup>100</sup> See *Fuller's Case* (1607) 77 Eng. Rep. 1322; 12 Coke Rep. 41 43; HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 23 §§ 1-8.

<sup>101</sup> See *Bagg's Case* (1615) 77 Eng. Rep. 1271, 1278-79; 11 Co. Rep. 93b, 98a-99a.

<sup>102</sup> See HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 23 § 3; *King v. Anonymous* (1684) 87 Eng. Rep. 33; 3 Mod 53; *Blanchflower*, 80 Eng. Rep. at 73; *Yelverton* at 107.

<sup>103</sup> See HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 23 §§ 2-3.

<sup>104</sup> See *Blanchflower*, 80 Eng. Rep. 73; *Yelverton* 107 (emphasis added).

<sup>105</sup> See HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 23 § 4.

<sup>106</sup> See Memorandum re: Puritans (1604) 79 Eng. Rep. 30, 31; Cro. Jac. 37; HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 23 § 5.

<sup>107</sup> See HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 23 § 6.

<sup>108</sup> See *id.* at ch. 23 §§ 7-8.

allocated sovereignty more to ruler, rather than to the consent of the ruled through Parliament, or more specifically, the King-in-Parliament.<sup>109</sup>

iii. Contempt of the King's Title.

The third genus within the contempt of the sovereign family was contempt against the king's title.<sup>110</sup> This genus consisted of two species: denying the king's title and refusing to take oaths required by law for support of the king's government.<sup>111</sup> These offenses were also generally liable for treason.<sup>112</sup> Although Hawkins did not mention it overtly, praemunire might be lumped into either or both species of contempt, since a refusal to take an oath of supremacy or an oath of allegiance touched on issues of dynasty and legitimacy.<sup>113</sup> The notion that disrespect of the king's title constituted contempt is perhaps the clearest legal epitome of English medieval sovereignty.<sup>114</sup>

C. *Contempt of the English Judiciary.*

As the English Constitution revolved from its medieval to modern mode, the doctrines of contempt of the sovereign and contempt of court unraveled from each other.<sup>115</sup> Sovereignty and authority transmuted from the king's person to the people's representatives and their institutions.<sup>116</sup> Contempt of court became an offense against the judiciary as such, not as mere instruments of the royal prerogative.<sup>117</sup> The courts of common law were responsible for applying the law of the land (*lex terrae angliae*) and anciently wielded the power to punish contempt of their authority. The finest scholars of the common law observed this power and mapped its evolution over successive generations; Edmund Plowden (1518–1585), Edward Coke (1552–1634), Henry Finch (1558–1625), Matthew Hale (1609–1676),

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<sup>109</sup> See *id.*

<sup>110</sup> See 5 SIR WILLIAM BLACKSTONE, COMMENTARY ON THE LAWS OF ENGLAND ch. 9 p. 123 (Henry St. George Tucker ed. 1803) (1766) [hereinafter BLACKSTONE, 5 COMMENTARY]; HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 6 p. 66–67.

<sup>111</sup> See BLACKSTONE, 5 COMMENTARY, *supra* note 110, at ch. 9 p. 123; HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 6 p. 66–67.

<sup>112</sup> See *Blanchflower*, 80 Eng. Rep. at 73; Yelverton at 107.

<sup>113</sup> See BLACKSTONE, 5 COMMENTARY, *supra* note 110, at ch. 8 p. 116, ch. 9 p. 123–24.

<sup>114</sup> See *id.* at ch. 8 p. 122.

<sup>115</sup> See *id.*

<sup>116</sup> See 1 SIR MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN, at ch. 10 p. 59 (1736) [hereinafter HALE, 1 PLEAS OF THE CROWN].

<sup>117</sup> See HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 21 §§ 1–15.

William Hawkins (1673–1746), and William Blackstone (1723–1780) all discussed the contempt power of the judiciary in their great works.<sup>118</sup>

i. Procedure for Contempt of Court.

Contempt power was the essential mechanism for enforcing the prerogative of all courts of record: superior and inferior, secular and sacred, common law and civilian.<sup>119</sup> It therefore not only belonged to the most prestigious royal courts originally located at Westminster Palace, but also to local courts and specialty courts found throughout the realm.<sup>120</sup> Procedurally, however, to punish contempt, a tribunal had to be a court of record.<sup>121</sup> Courts not of record did not inherent possess contempt power. They could only be bestowed contempt power by an Act of Parliament.<sup>122</sup> The Justices of the Peace, for example, did not preside over proceedings of record; therefore, they possessed no contempt power until Parliament bestowed it upon them under the Offenses Against Statutes Act of 1495.<sup>123</sup>

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<sup>118</sup> See BLACKSTONE, 5 COMMENTARY, *supra* note 110, at ch. 9 p. 119–25, ch. 20 285–87; 4 SIR WILLIAM BLACKSTONE, COMMENTARY ON THE LAWS OF ENGLAND ch. 1 p. 16-17 (Henry St. George Tucker ed. 1803) (1766) [hereinafter BLACKSTONE, 4 COMMENTARY]; HALE, 1 PLEAS OF THE CROWN, *supra* note 116, at 490; HAWKINS, 2 PLEAS OF THE CROWN, *supra* note 84, at ch. 1 §§ 13–15 p. 4–5; HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 21; SIR HENRY FINCH, DESCRIPTION OF THE COMMON LAWS OF ENGLAND, ch. 9 p. 72-76 (A. Millar 1759) (1625); 1 EDWARD PLOWDEN, COMMENTARIES, OR REPORTS OF EDMUND PLOWDEN 1, 18a (S. Brooke, Paternoster-Row 1816) (1571) [hereinafter PLOWDEN, 1 COMMENTARIES].

<sup>119</sup> See 1 THE OXFORD HISTORY OF THE LAWS OF ENGLAND: THE CANON LAW AND ECCLESIASTICAL JURISDICTION FROM 1597 TO THE 1640S 153, 165, 317, 327, 347–48 (R.H. Helmholz ed. Oxford Univ. Press 2004) [hereinafter 1 OXFORD HISTORY OF THE LAWS OF ENGLAND]; G.D SQUIBB, THE HIGH COURT OF CHIVALRY: A STUDY OF THE CIVIL LAW IN ENGLAND 152–53, 212, 216 (Special ed. Clarendon Press 1997) (1959) (discussing the contempt power of the High Court of Admiralty and the High Court of Chivalry); SIR EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND ch. 74 p. 325 (1797) (1644) [hereinafter COKE, 4 INST.]; BAKER, *supra* note 22, at 103-04.

<sup>120</sup> See COKE, 4 INST., *supra* note 119, at ch. 28 p. 165 (noting that under 36 Eliz. 3, special courts of oyer and terminer had contempt power); *id.* at ch. 31 p. 170 (holding that Justices of the Peace had contempt power); *id.* ch. 35 at p. 189 (holding that courts of wards and liveries had contempt power); *id.* at ch. 45 p. 229 (holding that stannaries, administrative divisions in the English counties of Cornwall and Devon established to manage the collection of tin coinage, had contempt power).

<sup>121</sup> See *Queen v. Wrightson* (1710) 91 Eng. Rep. 591; 2 Salkeld 699; *Beecher's Case* (1609) 97 Eng. Rep. 559; 8 Co. Rep. 58a; *Thomlinson's Case* (1605) 77 Eng. Rep. 1379; 12 Co. Rep. 104; *Griesley's Case* (1588) 77 Eng. Rep. 530; 8 Co. Rep. 38a.

<sup>122</sup> See *Burdett's Case* (1710) 91 Eng. Rep. 289, 290; 1 Salkeld 327; *Dr. Bonham's Case* (1610) 77 Eng. Rep. 646, 655; 3 Co. Rep. 113b, 119b.

<sup>123</sup> See *King v. Revel* (1721) 93 Eng. Rep. 609; 1 Strange 421; *Queen v. Leighton* (1709) 92 Eng. Rep. 806; Fortescue 172; *Hall v. Turbett* (1591) 78 Eng. Rep. 497; Cro. Eliz. 242;

Judges could summarily punish contempt in their presence, which included not only indignities immediately within eyesight or earshot, but also the proximity of the court.<sup>124</sup> Judges could also punish indirect or constructive contempt—contempt committed beyond the proximity of a courthouse.<sup>125</sup> Constructive contempt was frequently implicated in the context of a *decree nisi* or show cause order—a court order authorizing attachment unless a condition precedent was satisfied.<sup>126</sup> If the condition precedent was unsatisfied, the decree became absolute or binding upon the party contempt of the order.<sup>127</sup> The final stage of litigation was judgment and execution.<sup>128</sup> Failure to abide by a judgment resulted in liability for contempt as well.<sup>129</sup> Upon making a finding of contempt, the court could authorize discovery to ensure that damages were properly and promptly awarded to the offended party.<sup>130</sup>

## ii. Grounds for Contempt of Court.

Any indignity or disobedience against the court was liable for contempt, be it committed by a party as such, their attorney, or a third party—such as a witness, juror, etc.<sup>131</sup> Grounds for being held in contempt of court (*contemptus curiae*) included the following: attorney misconduct; witness misconduct; juror misconduct; witness tampering; perjury; insults or attacks against judges, judicial officers, or other persons involved in judicial proceedings; fighting in the court's presence; jailers' abuse of prisoners; breach of court orders and injunctions; interference with discovery; failure to execute judgments; failure to assist judicial officers when required; and, of course, and failure to appear in court when summoned.<sup>132</sup> However, a judge could only punish a contempt on the context of his own presiding; he could

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Offenses Against Statutes Act of 1495, 11 H. 7 c. 3 (Eng.); HAWKINS, 2 PLEAS OF THE CROWN, *supra* note 116, at ch. 1 § 15 p. 4–5 (citing Offenses Against Statutes Act of 1495, 11 H. 7 c. 3 (Eng.)); COKE, 4 INST., *supra* note 119, at ch. 31 p. 170.

<sup>124</sup> See Carus' Case (1594) 74 Eng. Rep. 944; Owen, 120.

<sup>125</sup> See *id.*

<sup>126</sup> See BLACKSTONE, 4 COMMENTARIES, *supra* note 118, at ch. 18 p. 255.

<sup>127</sup> See Thomas's Case (1719) 88 Eng. Rep. 1043; 11 Mod. 285.

<sup>128</sup> See *id.*

<sup>129</sup> See 1 GEORGE CROMPTON, PRACTICE COMMON PLACED: OR THE RULES AND CASES OF PRACTICE IN THE COURTS OF KING'S BENCH AND COMMON PLEAS 364 (Lond., 1788).

<sup>130</sup> See Bartram v. Dennett (1675) 23 Eng. Rep. 132.

<sup>131</sup> BLACKSTONE, 5 COMMENTARIES, *supra* note 110, at ch. 9 §5 124–26.

<sup>132</sup> See, e.g., King v. Barber (1758) 96 Eng. Rep. 1185; 2 Keny 289; see also BLACKSTONE, 5 COMMENTARIES, *supra* note 110, at ch. 9 p. 123–26, ch. 20 p. 283–85; BLACKSTONE, 4 COMMENTARIES, *supra* note 118, at ch. 33 p. 444; HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 21 §§ 1-15; 2 SIR MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 296 (Lond., 1736) [hereinafter HALE, 2 PLEAS OF THE CROWN].

not intervene to punish a contempt against another court or a judge presiding over another matter in the same court.<sup>133</sup>

Alleged contemnors could plead various defenses, including justification and excuse.<sup>134</sup> If an alleged contemnor failed to appear, a demonstration of necessity, such as an accident, illness, or danger of death, could forgive default.<sup>135</sup> Without a legitimate defense, contempt of court could be quite costly: In one memorable case, *Hutton v. Harrison*, a man was not only fined five thousand pounds for falsely accusing a presiding judge of high treason, but also forfeited ten thousand pounds in damages when the judge sued him civilly.<sup>136</sup>

Three types of judicial contempt are, from a modern point of view, exceptional and worth addressing separately.<sup>137</sup> First, courts could hold judicial officers—sheriffs, bailiffs, gaolers, clerks, etc.—in contempt for injustice, delay, or dereliction of duty.<sup>138</sup> Judges of superior courts could even hold judges of inferior courts in contempt for the same reasons.<sup>139</sup> We might call this the “supervisory contempt power.”<sup>140</sup> Obtaining the appearance of the defendant was often difficult when there was no property that could be distrained to secure his appearance, or the defendant could not be arrested because he could not be found.<sup>141</sup> The incentive for a sheriff or a justice of the peace to shirk their duties was considerable as well.<sup>142</sup> They could not claim expenses for their efforts at first and also liable for their mistakes.<sup>143</sup> Hence the supervisory contempt power was a necessary tool for administering judicial operations.<sup>144</sup>

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<sup>133</sup> See *Millar v. Taylor* (1769) 98 Eng. Rep. 201, 256; 4 Burr. 2303, 2404–05.

<sup>134</sup> See *Reniger v. Fogossa* (1696) 75 Eng. Rep. 1, 30; 1 Plowden 1, 18–19.

<sup>135</sup> *Id.*

<sup>136</sup> See *Hutton v. Harison* (1638) 123 Eng. Rep. 1151, 1152; *Hutton* 131.

<sup>137</sup> *Roach v. Govan* (1742) 26 Eng. Rep. 683, 684–85; 2 Atk. 469, 470–71.

<sup>138</sup> *Griesley’s Case* (1588) 77 Eng. Rep. 530, 534; 8 Co. Rep. 38a, 40b; BLACKSTONE, 5 COMMENTARIES, *supra* note 110, at ch. 20 p. 284.

<sup>139</sup> *Griesley’s Case*, 77 Eng. Rep. at 535–36; 8 Co. Rep. 38a–39a; BLACKSTONE, 5 COMMENTARIES, *supra* note 110, at ch. 20 p. 283–84.

<sup>140</sup> BLACKSTONE, 5 COMMENTARIES, *supra* note 110, at ch. 20 p. 283–84.

<sup>141</sup> See *King v. Beardmore* (1759) 97 Eng. Rep. 564–65; 2 Burr 792–93; *cf.* HAWKINS, 2 PLEAS OF THE CROWN, *supra* note 116, at ch. 10, §§ 25–32 p. 60–61, ch. 27 §§ 9–10 p. 283.

<sup>142</sup> *Bronker’s Case* (1558) 73 Eng. Rep. 369; 2 Dyer 168b.

<sup>143</sup> *Griesley’s Case*, 77 Eng. Rep. at 530, 534–36; 8 Co. Rep at 42a–44a.

<sup>144</sup> See *Beardmore*, 97 Eng. Rep. at 564–67; *Long’s Case* (1677) 86 Eng. Rep. at 1012; 2 Mod. at 182; *Griesley’s Case*, 77 Eng. Rep. at 530; 8 Co. Rep at 38a; *Bronker’s Case* (1558) 73 Eng. Rep. at 369; 2 Dyer at 168b; *see also* 11 WILLIAM CORNISH ET AL., THE OXFORD HISTORY OF THE LAWS OF ENGLAND: 1820–1914 1002–03 (Oxford Univ. Press 2010); BLACKSTONE, 5 COMMENTARIES, *supra* note 110, at ch. 20 p. 283–285; BLACKSTONE, 4 COMMENTARIES, *supra* note 118, at ch. 8 102–12, ch. 33 p. 442–44; HAWKINS, 2 PLEAS OF THE CROWN, *supra* note 116, at ch. 25, §§ 22–32 p. 217–219; HALE, 2 PLEAS OF THE CROWN *supra* note 132, at ch. 28 p. 212; FINCH, *supra* note 118, at ch. 9 p. 79–81); J.H. GLEASON,

Second, authors, printers, and publishers of written materials (like newspapers or magazines) that interfered with a pending court case were liable for contempt.<sup>145</sup> This was known as “contempt by publication.”<sup>146</sup> At the outset of a contempt proceeding, the author, printer, and publisher were all liable.<sup>147</sup> The Court of King’s Bench held in *King v. Wiatt*, however, that if the author avowed himself and the printer and publisher were only involved with a libel through their own ignorance, not willful intent, the author would be held solely responsible.<sup>148</sup>

Third, the offense of *scandalam magnatum*—uttering words scandalizing the character of a “great man of society,” including a judge or even the king himself—was deemed contemptuous because baseless libels against public figures and institutions supposedly had a deleterious effect on the social order.<sup>149</sup> This category could overlap with contempt by publication, for a contemptuous publication could not only scandalize a member of Parliament or the king’s government by simply reprinting parliamentary proceedings, but also by characterizing them in a scandalous, degrading, or insulting manner.<sup>150</sup>

### iii. Punishment for Contempt of Court.

Punishments for contempt of court were sometimes harsh.<sup>151</sup> They included the following: monetary fines; incarceration; public humiliation,

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THE JUSTICES OF THE PEACE IN ENGLAND: 1558 TO 1640, A LATER EIRENARCHA 65 (Eng., Clarendon Press 1969).

<sup>145</sup> See *King v. Wiatt* (1723) 88 Eng. Rep. 96; 8 Mod. 123; *King v. Shipley* (1784) 99 Eng. Rep. 774, 774–75, 779–80; 4 Doug. 73, 73–74, 82–84.

<sup>146</sup> See *Wiatt*, 88 Eng. Rep. at 96; 8 Mod. at 123; *Shipley*, 99 Eng. Rep. at 774, 774–75, 779–80; 4 Doug. at 73–74, 82–84.

<sup>147</sup> See *Shipley*, 99 Eng. Rep. at 774; 4 Doug. at 73; *Cann v. Cann* (1754) 28 Eng. Rep. 332; Ves. Sen. 520, 520–21; *Roach*, (1742) 26 Eng. Rep. at 683; 2 Atk. at 469–71; *King v. Dr. Middleton* (1723) 92 Eng. Rep. 818; Fortescue 201; *Wiatt*, 88 Eng. Rep. at 96, 8 Mod. at 123; *King v. Johnson* (1687) 89 Eng. Rep. 1058; 2 Show K.B. 488; *De Libellis Famosis* (1606) 77 Eng. Rep. 250, 250–52; 5 Co. Rep. 125a, 125a–126a.

<sup>148</sup> See *Wiatt*, 88 Eng. Rep. at 96, 8 Mod. at 123.

<sup>149</sup> *John de Northampton’s Case* (1613) 77 Eng. Rep. 1407, 1407–09; 12 Co. Rep. 132, 132–33; *De Libellis Famosis* (1606) 77 Eng. Rep. at 250–51; 5 Co. Rep. at 125a.

<sup>150</sup> See *Roach*, 26 Eng. Rep. at 683; 2 Atk. at 469; *Dr. Middleton*, 92 Eng. Rep. at 818; Fortescue at 201; *Wiatt*, 88 K.B. at 96; 8 Mod. at 123; *Johnson*, 89 K.B. at 1058; 2 Show K.B. at 488; *King v. Dangerfield* (1685) 87 Eng. Rep. 43, 43–44; 3 Mod. 68, 68–69; *Lake v. R.* (1672) 84 Eng. Rep. 506; 2 Keble 801; *Harrison’s Case* (1639) 79 Eng. Rep. 1034; Cro. Car. 504; *John de Northampton’s Case*, 77 Eng. Rep. at 1407–09; 12 Co. Rep. at 132–34; *De Libellis Famosis*, 77 Eng. Rep. at 250–52; 5 Co. Rep. at 125a–27a.

<sup>151</sup> FINCH, *supra* note 118, at ch. 9 p. 79; *Beardmore*, 97 Eng. Rep. at 567; 2 Burr at 798; *John de Northampton’s Case*, 77 Eng. Rep. at 1408, 1410; 12 Co. Rep. at 133, 135; *Case De Libellis Famosis*, 77 Eng. Rep. at 250; 5 Co. Rep. at 125a; *Johnson*, 89 K.B. at 1058; 2 Show

such as forcing the contemnor to publicly wear a sign or a paper on their head signifying their contempt; corporal punishment, such as severing hands, boxing ears, and whipping; standing in the pillory; apologizing to those offended by the contempt; sequestration, the removal or forfeiture of private property); and, in the case of attorneys, suspension or disbarment.<sup>152</sup> Punishments for contempt in ecclesiastical courts included canon law punishments, like clerical degradation, excommunication, and even referral for execution by immolation.<sup>153</sup> Courts could not, of course, exceed their jurisdictional limitations on their penal authority in punishing contempt.<sup>154</sup> A court-leet, for example, could impose a fine for contempt but not imprisonment.<sup>155</sup>

Physical punishments were also used and often intended to maximize shame and equalize the dishonor incurred. If justice required the hand of a contemnor, the judge would not blush from making it the dominant one.<sup>156</sup> If justice required a good whipping upon the contemnor's bare back, it could be specified not only by the number of lashes, but also by the time it took for a contemnor to travel a certain distance.<sup>157</sup> A contemnor might be whipped, for example, for the length of a walk from Aldgate to Newgate or Newgate to Tyburn.<sup>158</sup>

In addition, judges did not hesitate to deal out considerable fines and long prison sentences, even life imprisonment, for contempt.<sup>159</sup> They often saw fit to vindicate their authority by issuing multiple punishments.<sup>160</sup> Although a court could punish contempt with a monetary fine or incarceration, for example, sometimes judges ordered both.<sup>161</sup> The contemnor

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K.B. at 488; *Hutton v. Harison* (1638) 123 Eng. Rep. 1151, 1152; *Hutton* 131; *Dangerfield*, 87 Eng. Rep. at 43–44; 3 Mod. at 68–67.

<sup>152</sup> See, e.g., *Roach*, 26 Eng. Rep. at 685; 2 Atk. at 469; *Dr. Middleton Case*, 92 Eng. Rep. at 818; Fortescue at 201; *De Clifford's Case*, 22 Eng. Rep. at 596; 2 Eq. Ca. Abr. at 711; *John de Northampton's Case*, 77 Eng. Rep. at 1408, 1410; 12 Co. Rep. at 133, 135; cf. Collateral Report Chapter 99 (1718) 22 Eng. Rep. 596, 597; 1 Eq. Ca. Abr. 710, 711 (discussing sequestration).

<sup>153</sup> See *Johnson*, 89 Eng. Rep. at 1058; 2 Show K.B. at 488 (ordering pillorying, whipping, and clerical degradation); 1 OXFORD HISTORY OF THE LAWS OF ENGLAND, *supra* note 119, at 345.

<sup>154</sup> BLACKSTONE, 5 COMMENTARIES, *supra* note 110, at ch. 20 p. 284.

<sup>155</sup> See *Godfrey's Case* (1615) 77 Eng. Rep. 1199, 1202; 11 Co. Rep. 42a, 43b, 44an.B.

<sup>156</sup> See *King v. Buckenham* (1664–65) 83 Eng. Rep. 1223; 1 Keble 751.

<sup>157</sup> See *Dangerfield*, 87 Eng. Rep. at 43; 3 Mod. at 68.

<sup>158</sup> See *id.*

<sup>159</sup> See *King v. Buckenham* (1640) 86 Eng. Rep. 1223; 1 Keble 751.

<sup>160</sup> See, e.g., *Harrison's Case* (1639) 79 Eng. Rep. 1034; Cro. Car. 504.

<sup>161</sup> See *Beardmore*, 97 Eng. Rep. at 567; 2 Burr at 798; *Harrison's Case* (1639) 79 Eng. Rep. at 1034; Cro. Car. at 504; *Countess of Shrewsbury's Case* (1618) 80 Eng. Rep. 381, 381–82; Hob. 235, 235–36; *John de Northampton's Case*, 77 Eng. Rep. 1407–10; 12 Co. Rep. at 132–35.

was also responsible for paying the costs of the proceedings.<sup>162</sup> When a party was ordered to make fine and ransom, ransom was to be at least treble the fine.<sup>163</sup> Grounds for mitigation included full disclosure of any accomplices to one's contumacious behavior and an apology.<sup>164</sup>

The modern distinction between direct and constructive contempt—contempt within and without the court's presence respectively—was applied, if not at least in name, than certainly in fact, by at least the early seventeenth century.<sup>165</sup> In Oldfield and Gerlin's cases of 1610, for example, the court held that a man who stabbed a justice of the peace before he came into Westminster Hall was liable for contempt but would not have his right hand cut off by mere virtue of where the offense was occurred relative to the "presence" of the court.<sup>166</sup>

#### iv. Legislation and Contempt of Court.

Parliament passed legislation known as exhortatory or declaratory acts that expressed, eliminated, or amended the common law.<sup>167</sup> Some of those acts modified judicial contempt power.<sup>168</sup> Positive enactments touching on judicial contempt power specified particular actions which made one liable for contempt of court, including failure to appear in court;<sup>169</sup> bringing claims before the wrong court;<sup>170</sup> disobedience of arbitration awards;<sup>171</sup> fighting or otherwise disrupting court proceedings;<sup>172</sup> escapes from prison;<sup>173</sup>

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<sup>162</sup> *Cann v. Cann* (1754) 28 Eng. Rep. 332; 2 Ves. Sen. 520.

<sup>163</sup> *See Norton's Case* (1628–1629) 73 Eng. Rep. 512; 2 Dyer 232a.

<sup>164</sup> *Cann*, 28 Eng. Rep. at 332–33; 2 Ves. Sen. at 520–21; *Roach*, 26 Eng. Rep. at 685; 2 Atk. at 472.

<sup>165</sup> *See, e.g., King v. Berchet* (1690) 89 Eng. Rep. 480, 482; 1 Show. K.B. 106, 110.

<sup>166</sup> *See Hall's Case* (1671) 86 Eng. Rep. 744; 1 Mod. 76; *Oldfield & Gerling's Cases* (1610) 77 Eng. Rep. 1349; 12 Co. Rep. 71.

<sup>167</sup> *See* BLACKSTONE, 5 COMMENTARIES, *supra* note 110, at 154, 157.

<sup>168</sup> *Id.* at 54.

<sup>169</sup> *See* A Statute Against Annullers of Judgments of the King's Court 1353, 27 Edw. 3 c. 1 (Eng.); Attachment Act 1452, 31 H. 6 c. 2 (Eng.); BLACKSTONE, 4 COMMENTARIES, *supra* note 118, at ch. 25 p. 331–32, ch. 33 p. 426; RICHARD FITZNEAL, THE DIALOGUE CONCERNING THE EXCHEQUER 17 (c. 1180 A.D).

<sup>170</sup> *See* An Ordinance Made for the State of the Land of Ireland 1359, 31 Edw. 3 c. 11 (Eng.) (punishing noncompliance with Irish weights and measures regulations).

<sup>171</sup> *See* Arbitration Act 1697, 8 & 9 Will. 3 c. 16 (Eng.); BLACKSTONE, 4 COMMENTARIES, *supra* note 118, at ch. 1 p. 16–17.

<sup>172</sup> *See* The Offenses Within the Court Act 1541, 33 Hen. 8 c. 12 (Eng.).

<sup>173</sup> *See* Escape of Debtors Act 1696, 8 & 9 Will. 3 c. 27 (Eng.); Escape of Debtors from Prison Act 1702, 1 Ann. c. 6 (Eng.).

abuses of process and frivolous lawsuits;<sup>174</sup> legal malpractice;<sup>175</sup> and illegal practice of law.<sup>176</sup> These provisions prescribed precise penalties for particular contempts, including fines, imprisonment, outlawry, forfeiture of private property, forfeiture of public office, and excommunication.<sup>177</sup> The Offenses Within the Court Act of 1541 was the preeminent judicial contempt statute for over four centuries.<sup>178</sup> It prohibited bloodshed in the King's Palace at Westminster where royal courts were originally located. Those grounds were privileged from violence by the royal prerogative.<sup>179</sup>

#### *D. Contempt of the English Parliament.*

The English Constitution and the law of the English Parliament (*lex parliamentaria angliae*) bestowed the House of Commons and the House of Lords with legislative power.<sup>180</sup> Both Houses also exercised judicial functions as the high courts over the elections and the qualifications of their

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<sup>174</sup> See Statute of Westminster II 1285, 13 Edw. 1 c. 26; Statute of Marlborough 1267, 52 Hen. 3 c. 8; Statute of Merton 1236, 20 Hen. 3 c. 3; BLACKSTONE, 4 COMMENTARIES, *supra* note 118, at ch. 14 p. 187–88.

<sup>175</sup> See BLACKSTONE, 5 COMMENTARIES, *supra* note 110, at ch. 20 p. 284–85.

<sup>176</sup> See Frivolous Arrests Act 1725, 12 Geo. c. 29 (Eng.); BLACKSTONE, 4 COMMENTARIES, 8 note 117, at ch. 10 p. 134.

<sup>177</sup> See, e.g., Tithes Act 1535, 27 Hen. 8 c. 20 (Eng.) (excommunication and incarceration); Attachment Act 1452, 31 H. 6 c. 2 (Eng.) (forfeiture of private property and seat in Parliament); Tithes Act 1540, 32 Hen. 8 c. 7 (Eng.) (excommunication and incarceration); A Statute Against Annullers § 27 Edw. 3 c. 1 (incarceration and outlawry); An Ordinance for the Clergy 1351, 25. Edw. 3 c. 6 (fine); 1 OXFORD HISTORY OF THE LAWS OF ENGLAND, *supra* note 107, at 620; see also BLACKSTONE, 4 COMMENTARIES, *supra* note 118, at 101–02 (noting that the punishment of excommunication for religious contempt was obsolete in Virginia at the turn of the nineteenth century).

<sup>178</sup> See Offences Against the Court Act 1541, 33 Hen. 8 c. 7 (Eng.).

<sup>179</sup> See *id.*

<sup>180</sup> Political & Constitutional Reform Committee, *UK Constitution A summary, with options for reform*, HOUSE OF COMMONS 10-13 (Mar. 2015) <https://www.parliament.uk/globalassets/documents/commons-committees/political-and-constitutional-reform/The-UK-Constitution.pdf> (on file with the University of Baltimore Law Forum); GEORGE P. PETYT, LEX PARLIAMENTARIA 11 (1689) [hereinafter PETYT'S MANUAL]; I recognize that scholars may quibble about at what point the English Parliament technically became a "legislature." I will not address that issue in this Article. Suffice it to say that it was always a legislature for the purposes of this Article to the extent that it was an institution involving persons in the lawmaking process, whether as a deliberative body, or else in some other kind of advisory role. *Compare Parliament*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Parliament> (on file with the University of Baltimore Law Forum) (last visited Dec. 10, 2025), with *legislative*, WORDORIGINS.ORG, <https://www.wordorigins.org/big-list-entries/legislature> (on file with the University of Baltimore Law Forum) (last visited Dec. 10, 2025) [hereinafter *legislature*, WORDORIGINS.ORG].

own members.<sup>181</sup> During the seventeenth century, the theoretical foundation for the authority of Parliament constitutionally transitioned from power inherent in the delegation of the king's authority to Parliament to power that was inherent in the King-in-Parliament's authority as such.<sup>182</sup> The English Civil War and the Glorious Revolution defeated absolutist readings of the royal prerogative and enshrined the constitutional principle that Parliament is supreme.<sup>183</sup> The King-in-Parliament—the King, House of Commons, and House of Lords sitting together—became a sovereign legislature.<sup>184</sup>

The doctrine of inherent power survived this shift. As the English Constitution revolved from its medieval to modern mode, however, contempt of the royal prerogative and contempt of Parliament unraveled.<sup>185</sup> The latter became a discrete genus of offenses appurtenant to Parliament in and of itself, known as Contempt of Parliament which included interference with its elections and violations of its privileges.<sup>186</sup> There were many privileges.<sup>187</sup> The famous privileges were the freedom of members from arrest while going to and from session, the freedom of speech and debate, and the right of the House of Commons to judge its own elections.<sup>188</sup> Furthermore, Parliamentary contempt proceedings were immune to judicial review.<sup>189</sup>

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<sup>181</sup> Thomas Long's Case, (1571) 1 House of Commons Journal 88, 89 (May 10, 1571); Thomas Long's Case, 1 House of Commons Journal 89 (May 11, 1571); N.M. Fuidge, *Thomas Long*, THE HIST. OF PARLIAMENT: H.C. 1558–1603 (1981), <http://www.histparl.ac.uk/volume/1558-1603/member/long-thomas-1539-93> (on file with University of Baltimore Law Forum); ERSKINE MAY, LAW AND USAGE OF PARLIAMENT 50–53 (Reginald F. D. Palgrave, K.C.B., Alfred Bonham-Carter, Esq. eds., 10th ed., London, William Clowes and Sons, Limited, 1893) [hereinafter MAY 1893].

<sup>182</sup> MAY 1893, *supra* note 181, at 3.

<sup>183</sup> *Id.* at 50.

<sup>184</sup> ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW 107 (Liberty Fund ed. 1915) (1885).

<sup>185</sup> See *King v. Flower* (1799) 101 Eng. Rep. 1408, 1413–14; 8 T.R. 314, 323–24 (Lord Kenyon, C.J., concurring); *id.* at 1414; 8 T.R. at 325 (Grose, J., concurring).

<sup>186</sup> See *Queen v. Paty* (1704) 92 Eng. Rep. 232, 236–39; 2 Ld. Raym. 1106, 1111–12.

<sup>187</sup> See, e.g., *Brass Crosby's Case* (1771) 95 Eng. Rep. 1005, 1010–12; 3 Wils. K.B. 188, 198–201.

<sup>188</sup> See *Alexander Murray's Case* (1751) 95 Eng. Rep. 629; 1 Wils. K.B. 299; 6 WILLIAM COBBETT, *Proceedings of Both Houses in the Great Case of Ashby and White (1703)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 229, 247, 251, 255, 300, 302, 323, 387, 392 & n.\* (T.C. Hansard 1808) [hereinafter *Proceedings of Both Houses in the Great Case of Ashby and White of 1703*].

<sup>189</sup> See generally *Ashby v. White* (1703) 87 Eng. Rep. 808, 810; 6 Mod. 45, 46 (Gould, J., concurring); *id.* at 811–12; 6 Mod. at 47, 48–49 (Powys, J., concurring); *id.* at 813; 6 Mod. at 50 (Holt, C.J., dissenting); ERSKINE MAY, PARLIAMENTARY PRACTICE §§ 15, 16.2 (25th ed. 2019) [hereinafter, “MAY 2019”]; JOSHUA CHAFETZ, DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS 152–55 (2007); M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 108–114 (2d ed. Liberty Fund 1998) (1967); SIR EDWARD COKE, 4 INSTITUTES OF

The scope of legislative contempt power at the time of the American Revolution was broad.<sup>190</sup> Contempt liability extended not only laymen, but also to recalcitrant royal officers and local officials.<sup>191</sup> The types of contempt committed against Parliament are similar to those committed against courts of common law: breach of privileges, disobedience of orders, misbehavior during proceedings, petition riots at Parliament, attacks on its members and officers, disobedience of summons, refusing to take the oaths, bribery, etc.<sup>192</sup> These contempts fell in one of two categories: direct contempt within

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THE LAWS OF ENGLAND (1628 – 1644), in 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 1052, 1091 (Steve Sheppard, ed., Liberty Fund 2003); 1 SIR WILLIAM BLACKSTONE, COMMENTARIES c. 2, § 3, p. 160 (Henry St. George Tucker ed. 1803) (1765) [hereinafter, “BLACKSTONE, 1 COMMENTARIES”]; PETYT’S MANUAL, *supra* note 180, at 2, 17, 236–37 (1689); MAY 1893, *supra* note 181, at 62.

<sup>190</sup> BLACKSTONE, 1 COMMENTARIES, *supra* note 189, at ch. 2 § 3 p. 160.

<sup>191</sup> See 3 WILLIAM COBBETT, *The Lord Mayor Refuses to Proclaim the Act for Abolishing Monarchy (1649)*, in COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 1305 (T.C. Hansard 1808) [hereinafter *The Lord Mayor’s Refusal*].

<sup>192</sup> See, e.g., MAY 2019, *supra* note 189, at §§ 15.3–15.40; MAY 1893, *supra* note 181, at 63; King v. Lord George Gordon [1781], 99 Eng. Rep. 372, 373; 2 Dougl. 590, 592; Lord George Gordon’s Case, 37 House of Commons Journal 903–910 (June 19, 1780); *The Lords’ Report of Precedents of Punishments for Breaches of Privilege and Contempts of their House (1763)*, in 15 WILLIAM COBBETT, COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803 1352–54 (T.C. Hansard 1808) [hereinafter *The Lords’ Contempt Report of 1763*]; Case of the Tumultuous Crowd, 22 House of Commons Journal 115–116 (Apr. 12, 1733); Purser Rioter’s Case, 13 House of Commons Journal 228, 230–31 (Mar. 27, 1699); Silk Rioter’s Case, 11 House of Commons Journal 667–68 (Jan. 21, 1697); *Cholmondeley’s Case (1690)*, in 5 WILLIAM COBBETT, COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803 508 (T.C. Hansard 1808); *Proceedings Against Several Barristers for Pleading Before the Lords in Breach of an Order of the Commons (1675)*, in 4 WILLIAM COBBETT, COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803 731–37, 738–740 (T.C. Hansard 1808); *Hayes’ and Jekell’s Case (1670)*, in WILLIAM COBBETT, 4 COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803 459, 460 (T.C. Hansard 1808); *The Lord Mayor’s Refusal*, *supra* note 191, at 1305; *Case of Colonel Lilburne (1646)*, in 3 WILLIAM COBBETT, COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803 488, 495, 499 (T.C. Hansard 1808) [hereinafter *Case of Colonel Lilburne*]; *Lord Savile’s Case (1642)*, in 2 WILLIAM COBBETT, COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803 1241 (T.C. Hansard 1808) [hereinafter *Lord Savile’s Case*]; *Long’s Case (1629)*, in 2 WILLIAM COBBETT, COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST IN 1066 TO THE YEAR 1803 518 (T.C. Hansard 1808) [hereinafter *Long’s Case*]; Lord Sturton and Lord Mordaunt’s Case (1606) 74 Eng. Rep. 1067, 1068, Noy 102; Memorandum re: Puritans (1604) 79 Eng. Rep. 30, 31, Cro. Jac. 37, 38; Bellew v. Bullocke (1604) 74 Eng. Rep. 1067, Noy 101. 5 William Cobbett, *Cholmondeley’s Case (1690)*, in Cobbett’s Parliamentary History of England from the Norman Conquest, in 1066 to the Year 1803 508 (T.C. Hansard 1808).

Parliament's proximity, and constructive contempt committed beyond.<sup>193</sup> One of the most pernicious species of constructive contempt was election interference, especially by sheriffs; consequently, several acts were passed to deal with election tampering by local law enforcement.<sup>194</sup>

Parliament repeatedly published reports collating its precedents for punishing contempts by category.<sup>195</sup> Typical penalties for contempt of Parliament (i.e., legislative contempt) by an outsider included compelled prostration and apology before the bar of the House assembled, fine, imprisonment, and even corporal punishment.<sup>196</sup> Penalties for contempts committed by peers themselves included censure, suspension, impeachment, and expulsion.<sup>197</sup> Parliament occasionally passed declaratory acts that expressed or modified the use of the inherent contempt power possessed by each House.<sup>198</sup>

Two types of legislative contempt are, from the modern point of view, rather alien to contemporary views of free speech (at least in the United States), and therefore worth noting separately.<sup>199</sup> First, those who breached Parliament's privilege against publishing its deliberations while Parliament was in session were liable for "contempt by publication."<sup>200</sup> This specie of contempt persisted until the end of the eighteenth century when such publication became lawful and normalized.<sup>201</sup> Second, anyone who uttered scandalous words against the members of Parliament (*scandalam*

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<sup>193</sup> See, e.g., *Case of Colonel Lilburne*, *supra* note 192, at 495; 5 WILLIAM COBBETT, *Lord Savile's Case, (1642) 18 Charles I.*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803 1241 (T.C. Hansard 1808); *Long's Case (1629)*, *supra* note 192, at 518.

<sup>194</sup> See 20 WILLIAM COBBETT, *Complaint Against the Duke of Bolton for Concerning Himself in the Southampton Election (1780)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 1305 (T.C. Hansard 1808); 14 WILLIAM COBBETT, *Debate in the Commons Respecting the Westminster Election (1751)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803 870 (T.C. Hansard 1808).

<sup>195</sup> See *The Lords' Contempt Report of 1763*, *supra* note 192, at 1352.

<sup>196</sup> *Id.* at 1354.

<sup>197</sup> See 4 WILLIAM COBBETT, *Impeachment of Lord Mordaunt (1666 – 1667)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803 347 (T.C. Hansard 1808); May 1893, *supra* note 181, at 54–55, 91–92.

<sup>198</sup> See, e.g., Parliamentary Privilege Act of 1603, 1 Jac. 1, c. 13 (Eng.).

<sup>199</sup> See 26 WILLIAM COBBETT, *Sir Elijah Impey's Complaint of Sundry Libels (1788)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803 1429 (T.C. Hansard 1808) [hereinafter *Sir Elijah Impey's Complaint*]; 15 WILLIAM COBBETT, *Proceedings in the Commons on the Expulsion of Mr. Wilkes (1763 – 1764)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803 1386 (T.C. Hansard 1808) [hereinafter *Expulsion of Mr. Wilkes*].

<sup>200</sup> See *Sir Elijah Impey's Complaint*, *supra* note 199, at 1440.

<sup>201</sup> See *Expulsion of Mr. Wilkes*, *supra* note 199, at 1386.

*magnatum*), including members themselves, could be held in contempt.<sup>202</sup> Each House could also discipline its own members for speaking contemptuously about the king or his government.<sup>203</sup> That specie of legislative contempt overlapped with contempt of the sovereign (or what we might also call “the executive”).<sup>204</sup> The only apparent difference was the authority available in administering punishment.<sup>205</sup>

*E. Contempt of the Seigneur.*

Feudal courts, such as courts leet and courts baron, possessed contempt power.<sup>206</sup> The proliferation of feudal tenures by the king in his capacity as Lord Proprietor was an ancient technique for developing patron-client relationships.<sup>207</sup> Feudal dignities imposed reciprocal responsibilities.<sup>208</sup> The royal prerogative was strengthened by giving powerful men skin in the game: greater status for greater loyalty.<sup>209</sup> The nobility was, paradoxically, both rival to the throne and necessary to its survival.<sup>210</sup> The most intriguing feudal franchise granted by the king as a part of this scheme was, by far, the palatinate (*palatinus*).<sup>211</sup>

The most salient feature of a palatinate was its freedom from royal jurisdiction.<sup>212</sup> A palatine lord received his land *imperio in imperium*—as a “kingdom within a kingdom.”<sup>213</sup> The distinctive mark of the Lord Palatine’s freedom was his authority to pardon life and limb.<sup>214</sup> Palatinate jurisdiction

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<sup>202</sup> See, e.g., 17 WILLIAM COBBETT, *Proceedings in the Commons Against the Reverend John Horne for a Libel Upon the Speaker (1774)*, in COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803 1047 (T.C. Hansard) [hereinafter *John Horne’s Case of 1774*].

<sup>203</sup> See 2 GEORGE CROMPTON, PRACTICE COMMON PLACED: OR THE RULE AND CASES OF PRACTICE IN THE COURTS OF KING’S BENCH AND COMMON PLEASE 141 (2nd ed., Uriel, Brooke, Whieldon, and Flexney 1788) (“[F]or the House of Lords have adjudged it a very high contempt and misdemeanor in any person, to charge their noble body with any species of fraud or deceit.”).

<sup>204</sup> See *id.*

<sup>205</sup> See 4 WILLIAM COBBETT, *Debate on Dr. Harrington’s Commitment (1677)*, in COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803 845 (T.C. Hansard 1808).

<sup>206</sup> See *Bathurst v. Coxe* (1638) 83 Eng. Rep. 1056, 1056; 1 Keb. 465, 465.

<sup>207</sup> OSGOOD, 2 THE AMERICAN COLONIES, *supra* note 4, at 5.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 7.

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

<sup>211</sup> *Id.* at 5.

<sup>212</sup> *Id.* at 6.

<sup>213</sup> See OSGOOD, 2 THE AMERICAN COLONIES, *supra* note 4, at 5.

<sup>214</sup> BRACTON, 2 LAWS AND CUSTOMS, *supra* note 23, at 346.

traced its origins back to the Merovingian dynasty.<sup>215</sup> Charlemagne and other Carolingian monarchs used palatinates—“Court Counts”—to maintain the defense of the Holy Roman Empire and the West, that is, medieval Latin Christendom, against bloody incursions by pagan marauders.<sup>216</sup> In the Kingdom of England there were three palatinates: Durham, Chester, and Lancaster.<sup>217</sup> Those fiefdoms bore the brunt of Scottish incursions, therefore, the king granted them special liberties and relief from taxation.<sup>218</sup> The power to punish contempt was as inherent to palatine lords as it was to the kingship that conferred those feudal tenures to begin with.<sup>219</sup>

County Durham was even more independent than Chester or Lancaster.<sup>220</sup> “[N]o other franchise in England,” wrote Gaillard Thomas Lapsley, “was so effectually exclusive of the king’s jurisdiction as was [that] palatinate.”<sup>221</sup> The constitution of the fief was the charter granted by the king.<sup>222</sup> Under the charter, all authority for the executive, legislative, and judicial functions of government flowed from the Lord Bishop.<sup>223</sup> He reigned as the Chief Magistrate and Lord Proprietor of his petty kingdom.<sup>224</sup> Within the bounds of this fiefdom, the king owned no land<sup>225</sup> and the king’s writ did not run.<sup>226</sup> The Lord Bishop was still bound, however, to honor Magna Carta<sup>227</sup> and his power was further limited by legal presumption that Acts of Parliament bound the County Durham as well.<sup>228</sup>

The system of government generated under the aegis of the Lord Bishop included an assembly, council, and court system.<sup>229</sup> The assembly was likely quite small—a shire moot.<sup>230</sup> It wielded no legislative power; it merely promulgated by-laws consistent with the Lord Bishop’s command.<sup>231</sup> The council consisted of important civil servants, barons, and clergy.<sup>232</sup> It met

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<sup>215</sup> GAILLARD THOMAS LAPSLEY, *THE COUNTRY PALATINE OF DURHAM: A STUDY IN CONSTITUTIONAL HISTORY* 3 (Longmans, Green, and Co. 1900).

<sup>216</sup> *Id.* at 4.

<sup>217</sup> *Id.* at 1.

<sup>218</sup> *Id.* at 122.

<sup>219</sup> *Id.* at 31.

<sup>220</sup> *Id.* at 32.

<sup>221</sup> LAPSLEY, *supra* note 215, at 32.

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

<sup>223</sup> *Id.* at 31.

<sup>224</sup> *Id.* at 32.

<sup>225</sup> *Id.* at 54.

<sup>226</sup> *Id.* at 32.

<sup>227</sup> LAPSLEY, *supra* note 215, at 125.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 109.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 110.

<sup>232</sup> *Id.*

with the assembly but acted independently when needed.<sup>233</sup> The county judiciary included commissions of assize, gaol delivery, oyer and terminer, hundred courts, piepowder courts, and a permanent county court held in Durham.<sup>234</sup> The council wielded a judicial function in reviewing appeals from these lower tribunals.<sup>235</sup> In doing so, it punished contempts of lower courts.<sup>236</sup>

### III. CONTEMPT POWER IN THE PROVINCE OF MARYLAND.

The history of the Province of Maryland presents perhaps the purest illustration of how English common law migrated with the settlers of North America.<sup>237</sup> The colonial era of the Province of Maryland can be divided into three periods: the First Proprietary Period (1632–1689), the Royal Period (1692–1715), and the Second Proprietary Period (1715–1776).<sup>238</sup> Several rebellions and wars disturbed and even severed the operations of civil government from proprietary authority during these intervals including: Claiborne’s Rebellion (1644–1646), Fendall’s Rebellion (1669 – 1660), and Coode’s Rebellion (1689–1692).<sup>239</sup> The proprietary nevertheless ultimately held onto the province until the colony declared independence.<sup>240</sup>

It is an ancient maxim that “a historian cannot choose his sources.”<sup>241</sup> He can only inform his study with whatever is not buried by the sands of time.<sup>242</sup> Despite the dearth of legal records from the seventeenth and

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<sup>233</sup> LAPSLEY, *supra* note 215, at 173.

<sup>234</sup> *Id.* at 174.

<sup>235</sup> *Id.* at 185.

<sup>236</sup> *Id.*

<sup>237</sup> 1 J. THOMAS SCHARF, HISTORY OF MARYLAND: 1600-1765 9 (J.B. Piet 1879) [hereinafter 1 SCHARF].

<sup>238</sup> 3 J. THOMAS SCHARF, HISTORY OF MARYLAND: FROM THE EARLIEST PERIOD TO PRESENT DAY 776 (J.B. Piet 1876) [hereinafter 3 SCHARF]. It is well established that the three main types of English colonies in North America were charter colonies, proprietary colonies, and royal colonies. I will not quibble with terminological distinctions one may draw between “provincial” and “colonial” in describing different periods of Maryland history before 1776. I use those terms interchangeably in this Article. I will not use the terms “proprietary” and “colonial” interchangeably because the distinction between them is more apparent—the former, a specie, the latter, a genus. *Imperial Organization*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/American-colonies/American-social-and-cultural-development> (on file with the University of Baltimore Law Forum) (last visited Jan. 4, 2026).

<sup>239</sup> 3 SCHARF, *supra* note 238, at 634, 637, 746-47.

<sup>240</sup> 1 SCHARF, *supra* note 237, at 102-03, 118-19, 128-29.

<sup>241</sup> Christopher J. Tuplin, *Achaemenid Arithmetic: Numerical Problems in Persian History*, 1 TOPOI. ORIENT-OCIDENT 365, 366 (1997), [https://www.persee.fr/doc/topoi\\_1764-0733\\_1997\\_act\\_1\\_1\\_2791](https://www.persee.fr/doc/topoi_1764-0733_1997_act_1_1_2791) (on file with University of Baltimore Law Forum).

<sup>242</sup> See Ezekiel Oladele Adeoti and James Olusegun Adeyeri, *Hist., the Historian and His Work: Issues, Challenges and Prospects*, 3 INT’L J. OF EDUC. RSCH. AND TECH. 36, 37 (2012),

eighteenth centuries, we can likely infer the salience of contempt power in the Province of Maryland from what the sands of time have left behind.<sup>243</sup> The available evidence preserved in the Maryland Archives indicates that the contempt power was indispensable to conserving public order in both the royal and proprietary periods.<sup>244</sup> To make a proper comparison between the colony and its parent, I will trace the development of the contempt power in Maryland from its founding in 1634 to its independence in 1776.<sup>245</sup>

*A. Contempt Power and the Maryland Charter.*

Maryland's legal inception traces back to the Jacobean era. James VI of Scotland ascended to the English throne as James I in 1603.<sup>246</sup> Eager to solidify his reign and expand his resources, he quickly began issuing patents of nobility.<sup>247</sup> In 1623, he granted a charter to the Province of Avalon in Newfoundland to George Calvert, an esteemed civil servant whose career included stints as a clerk of the Royal Privy Council, secretary of state, and member of Parliament.<sup>248</sup> George Calvert's loyalty to the Crown was rewarded again with the Barony of Baltimore in County Longford, Ireland, in 1625.<sup>249</sup> Keen to create a haven for persecuted Catholics in the New World, George Calvert subsequently obtained a charter for the Province of Maryland that replicated of the charter granting him Avalon.<sup>250</sup>

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<https://soeagra.com/ijert/ijertdec2012/6.pdf> (on file with University of Baltimore Law Forum).

<sup>243</sup> Carl N. Everstine, *The Establishment of Legis. Power in Md.*, 12 MD. L. REV. 99, 99 (1951),

<https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1411&context=mlr> (on file with the University of Baltimore Law Forum); G. Duane Holloway, *Const. Law - Contempt Proc. to Punish for Const. Law - Contempt Proc. to Punish for Criticism of Jud. Decision*, 2 WM. & MARY REV. VA. L. 29, 31 (1954), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1061&context=wmrval> (on file with the University of Baltimore Law Forum).

<sup>244</sup> Holloway, *supra* note 243, at 31.

<sup>245</sup> *Id.*

<sup>246</sup> William Charles Thompson, *Monopolies during the reign of James I.*, UNIV. OF RICHMOND 1, 4 (1968), <https://scholarship.richmond.edu/masters-theses/1368> (on file with the University of Baltimore Law Forum).

<sup>247</sup> *Id.*

<sup>248</sup> 1 SCHARF, *supra* note 237, at 29-31.

<sup>249</sup> *Id.* at 40.

<sup>250</sup> NEWTON D. MERENESS, MARYLAND AS A PROPRIETARY PROVINCE, Columbia Univ. 5 (1901); 1 SCHARF, *supra* note 237, at 63; The Charter of Maryland ch. I et seq. (June 20, 1632), *reprinted in* YALE L. SCH. LILLIAN GOLDMAN L. LIBR., [https://avalon.law.yale.edu/17th\\_century/ma01.asp](https://avalon.law.yale.edu/17th_century/ma01.asp) (on file with the Yale L. Sch. Lillian Goldman L. Libr.) [hereinafter The Charter of Maryland (1632)].

James I, in his capacity as Universal Proprietor, bestowed the Province of Maryland to George Calvert's son, Cecilius Calvert, as a feudal grant in free and common socage.<sup>251</sup> The terms of the grant were embodied in the Maryland Charter, the constitution of the colony.<sup>252</sup> The Maryland Charter, like the Avalon Charter, was modeled on the County Palatine of Durham, a quintessential medieval fief.<sup>253</sup> Lord Baltimore held the Province of Maryland as a *palatinus* just as the Bishop of Durham held his county, *in regalem potestatem in omnibus*, "as fully as a king hath in his palace."<sup>254</sup>

Chapter VII of the Maryland Charter specifically granted Lord Baltimore "free, full, and absolute Power" to promulgate laws, with the "[a]dvice, [a]ssent, and [a]pprobation" of freemen of the province, on pain of fine, imprisonment, and "[p]unishment whatsoever", so long as they were "not repugnant or contrary, but (so far as conveniently may be) agreeable to the Laws, Statutes, Customs, and Rights of this Our Kingdom of England."<sup>255</sup> The portions of Magna Carta that were in effect at the time, therefore, were paramount to any provincial or colonial legislation and even the prerogative of Lord Baltimore himself.<sup>256</sup> The definitive characteristic of a palatinate's jurisdiction was reflected in the following terms: the Lord Proprietor was explicitly given the authority to "[r]emit, [r]elease, [p]ardon, and [a]bolish, all [c]rimes and [o]ffences whatsoever against such laws."<sup>257</sup> For the sake of administering his justice, the same chapter gave the Lord Proprietor the authority to establish "Courts, Praetorian Judicatories, and Tribunals, Judicial Forms and Modes of Proceeding," and appoint judges to sit therein.<sup>258</sup> The authority for the three functions of government—executive, judicial, and legislative—were all bound up in the proprietary under Chapter VII.<sup>259</sup>

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<sup>251</sup> AUSPICES OF THE AMERICAN HISTORICAL ASSOCIATION, NARRATIVES OF EARLY MARYLAND, 1633-1684, 67-68 (Clayton Colman Hall ed., 1910).

<sup>252</sup> *Id.* at 66-67.

<sup>253</sup> *Id.* at 67; The Charter of Maryland, *supra* note 250, at art. IV.

<sup>254</sup> MERENESS, *supra* note 250, at 6, 153 (citing JOHN ANDREW DOYLE, ENGLISH COLONIES IN AMERICA: VIRGINIA, MARYLAND, AND THE CAROLINAS 281 (1882)); 1 SCHARF, *supra* note 237, at 60-62; The Charter of Maryland, *supra* note 250, at ch. VII.

<sup>255</sup> 1 SCHARF, *supra* note 237, at 54-55. Note that I use the term "Lord Proprietor" and "Lord Baltimore" interchangeably when referring to the member of the Calvert family entitled to the Province of Maryland under the royal patent at any period of time within the colonial era. See *infra* Sections III B.1-3.

<sup>256</sup> 1 SCHARF, *supra* note 237, at 54-55

<sup>257</sup> *Id.* at 55.

<sup>258</sup> *Id.* at 54-55; The Charter of Maryland, *supra* note 250, at ch. VII.

<sup>259</sup> See the Maryland Charter, *supra* note 250, at ch. VII; C. ASHLEY ELLEFSON, THE COUNTY COURTS AND THE PROVINCIAL COURTS IN MARYLAND, 1733-1763, 3-4 (Garland Publishing, Inc., 1990); CARROLL T. BOND, *The Court of Appeals of Maryland, A History* 1-2 (1928), reprinted in 368 Md. Archives 1 et seq.

The Maryland Charter was the vehicle for transmitting the doctrine of inherent power to the provincial context.<sup>260</sup> The historical record illustrates that the plain meaning of the word “contempt” in the province, as in the motherland, generally meant disobedience or defiance of the law.<sup>261</sup> I glean at least two of the three more technical meanings of the word “contempt” from the text of Chapter VII.<sup>262</sup> First, any violation of law not positively expressed by statute was contempt of the proprietary prerogative.<sup>263</sup> Second, authority delegated to the executive, legislative, and judicial wings of the provincial government by the Lord Proprietor implied the power to punish contempt of his authority as expressed through their duties and dignities.<sup>264</sup>

*B. Contempt of the Lord Proprietor.*

There was no separation of powers under the Maryland Charter, therefore, it is anachronistic to partition contempt into neat categories appurtenant to discrete functions of government—executive, judicial, and legislative—during the colonial era.<sup>265</sup> I will do so here for the sake of analytical convenience and structural clarity.<sup>266</sup> I must qualify, however, that the latter two categories substantially overlap with the former.<sup>267</sup> The executive function of government in the Province of Maryland was normally exercised by the Governor and his privy council, but also to some extent by the provincial judiciary.<sup>268</sup> The county courts of the Province of Maryland, for example, were responsible for a number of administrative duties, including the collection of taxes.<sup>269</sup>

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<sup>260</sup> See the Maryland Charter, *supra* note 250, at ch. VII.

<sup>261</sup> Federal Judicial Ctr., *The Contempt Power of the Federal Courts*, <https://www.fjc.gov/history/work-courts/contempt-power-federal-courts> (on file with the University of Baltimore Law Forum) (last visited Nov. 5. 2025).

<sup>262</sup> The Maryland Charter, *supra* note 250, at ch. VII.

<sup>263</sup> See *id.*

<sup>264</sup> Compare the Charter of Maryland, *supra* note 250, at ch. VII, with HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 21, §§ 1–15; ch. 22, §§ 1–5, and LAPSLEY, *supra* note 215, at 109–11, 115–16, 124, 126–27, 138–39.

<sup>265</sup> See generally the Maryland Charter, *supra* note 250 (distinguishing the Maryland Charter from Maryland’s modern day government structure).

<sup>266</sup> See generally *id.* (distinguishing the Maryland Charter from Maryland’s modern day government structure).

<sup>267</sup> See generally *id.* (distinguishing the Maryland Charter from Maryland’s modern day government structure).

<sup>268</sup> See generally *id.* (distinguishing the Maryland Charter from Maryland’s modern day government structure).

<sup>269</sup> See, e.g., An Act Authorizing the County Court for Cecil County to Tax Inhabitants of 1737, Proc. and Acts of the General Assembly, 40 Md. Arch. 65 (1921).

Contempt of the Lord Proprietor during both proprietary periods was, *mutatis mutandis*, equivalent to the medieval doctrine of contempt of the sovereign.<sup>270</sup> Contempt of the Lord Proprietor can be conceived as the root of all potential liabilities for violating public law and public authority.<sup>271</sup> Nearly any offense, in some sense, was an offense against Lord Baltimore's reign.<sup>272</sup> There are various distinctions between contempt of the executive power in England and Maryland.<sup>273</sup> The only one that need be made at the outset is that there was no analogue in the province to contempt of the king's palace.<sup>274</sup> Lord Baltimore had no palace in the New World.<sup>275</sup>

i. Contempt of the Proprietary Prerogative.

The first genus within the contempt of the Lord Proprietor family was contempt of the proprietary prerogative. Contempt of the proprietary prerogative in Maryland, like contempt of the royal prerogative in England, is so broad a notion that it is difficult to define.<sup>276</sup> It consisted of at least two species. The first specie of contempt of the proprietary prerogative was refusal to engage in martial service when paid a wage to do so.<sup>277</sup> Disobeying a gubernatorial commission to attack nearby Indian tribes, for example, was liable for contempt.<sup>278</sup>

The second specie of contempt of the proprietary prerogative encompassed disobedience proprietor's lawful commands or prohibitions.<sup>279</sup> The notorious rebel, Richard Ingle, apparently committed this specie of contempt when he refused the custody of the Lord Proprietor's agents, fled the province by vessel, and returned to England.<sup>280</sup> Such contempt could also arise from the failure to assist the proprietor's agents in the execution of their

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<sup>270</sup> See *In re Brent*, 4 Md. Arch. 129 (Md. Prov. Ct. 1642); *In re The Reformation*, 4 Md. Arch. 231 (Md. Prov. Ct. 1643).

<sup>271</sup> See *In re Brent*, 4 Md. Arch. at 129; *In re The Reformation*, 4 Md. Arch. at 231.

<sup>272</sup> See *In re Brent*, 4 Md. Arch. at 129; *In re The Reformation*, 4 Md. Arch. at 231.

<sup>273</sup> Federal Judicial Ctr., *supra* note 261.

<sup>274</sup> *Id.*

<sup>275</sup> Maria A. Day, *Archives of Maryland (Biographical Series) Cecilius Calvert (1605-1675)*, MD. STATE ARCH. (Feb. 2003), <https://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/000100/000191/html/191extendedbio.html> (on file with Maryland State Archives).

<sup>276</sup> Compare, e.g., HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, ch. 22, §§ 1-5 p. 59-60, with Section III.B.1, *In re Brent*, 4 Md. Arch. at 129, and *In re The Reformation*, 4 Md. Arch. at 231.

<sup>277</sup> See *In re Brent*, 4 Md. Arch. at 129; *In re The Reformation*, 4 Md. Arch. at 231.

<sup>278</sup> See *In re Brent*, 4 Md. Arch. at 129; *In re The Reformation*, 4 Md. Arch. at 231.

<sup>279</sup> *In re The Reformation*, 4 Md. Arch. at 231.

<sup>280</sup> *Id.*

duties on behalf of the common good of the province.<sup>281</sup> The rule of law meant something different in a feudal society than it means in a modern one, but that did not mean that it meant nothing.<sup>282</sup> There was no constabulary police force in the province, yet we can still say that the province had a system of police.<sup>283</sup> That system, the constable/justice of the peace system, embraced the principle of communal justice, and the contempt power was a decisive weapon for enforcing that system.<sup>284</sup> The doctrine of *posse comitatus* and the “Hue and Cry” of Anglo-Saxon England bound the communities of Maryland together in blood and bone.<sup>285</sup> Failing to assist an officer in enforcing the law upon lawful request for aid was contempt of the executive.<sup>286</sup>

The only specie of prerogative contempt in England for which I could not find a provincial analogue in Maryland is that of preferring the interest of foreigners over that of the Lord Proprietor.<sup>287</sup> That is not to say this specie of contempt was never committed. There may be no trace of it left in the records passed down to us or else it may have been swallowed by overlapping categories of criminality and classified as some other offense.<sup>288</sup> I must note that a violation of a provincial statute or ordinance that prescribed no particular penalty for its violation was often characterized as “contempt.”<sup>289</sup> This appears not to have been contempt of the proprietary prerogative as such.<sup>290</sup> Rather, as in the English context, it appears to have been a principle of statutory construction allowing for indictment of a misdemeanor when a statute had no penalty clause.<sup>291</sup> The provincial law prohibiting adultery,

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<sup>281</sup> See e.g., RAPHAEL SEMMES, *Crime and Punishment in Early Maryland* 10-11 (1938) (listing examples of contemptuous interference with the prerogatives of public servants); MICHAEL DALTON, *The Country Justice: Containing the Practice, Duty and Power of the Justices of the Peace*, 439-41, 453 (1690); *In re Bennett*, 41 Md. Arch. 553 (Md. Prov. Ct. 1661) (hearing appeal of contempt charge brought by Thomas Bassett, Constable of New Town hundred, against Richard Bennett, for refusing to assist him in carrying one Robert Ford before the Justice of the Peace for St. Mary’s County).

<sup>282</sup> See e.g., sources cited *supra* note 281.

<sup>283</sup> See e.g., sources cited *supra* note 281.

<sup>284</sup> See e.g., sources cited *supra* note 281.

<sup>285</sup> See *History of Maryland. Law Enforcement*, MD. DEP’T OF STATE POLICE, <https://mdsp.maryland.gov/Pages/HistoryofMarylandLawEnforcement.aspx#> (on file with the University of Baltimore Law Forum) (last visited on Nov. 5, 2025); Statute of Winchester of 1285, 13 Edward I, c. 1-6 (Eng.).

<sup>286</sup> See ALEXANDER, BRITISH STATUTES IN FORCE IN MARYLAND, *infra* note 311, at 210.

<sup>287</sup> Compare HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 22 § 3 p. 59.

<sup>288</sup> *Id.*

<sup>289</sup> See, e.g., *Doyne v. Wright*, 69 Md. Arch. 189, 190 (Md. Prov. Ct. 1679); *In re Tully*, 91 Md. Arch. 74 (Somerset Cnty. Ct., Md. 1688).

<sup>290</sup> HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 24 § 1-10.

<sup>291</sup> *In re Tully*, 91 Md. Arch. at 74.

fornication, and swearing originally passed in 1650 and subsequently revived throughout the colonial era appears to be the preeminent example.<sup>292</sup>

ii. Contempt of the Lord Proprietor's Person or Government.

The second genus in the contempt of the Lord Proprietor family was contempt of the proprietor's person or government.<sup>293</sup> Contempt of the Lord Proprietor's person or government in Maryland like contempt of the king's person or government in England, was a genus consisting of several species.<sup>294</sup> One such species was the failure to assist the Lord Proprietor's agents in the execution of their duties on behalf of the common good of the province.<sup>295</sup> There were no "police" in the province, or anywhere else for that matter.<sup>296</sup> The constable system in Maryland embraced the principle of communal justice, and the contempt power was a decisive weapon for enforcing that system.<sup>297</sup> The ancient principle of *posse comitatus* and the "Hue and Cry" of Anglo-Saxon England were operative in the province.<sup>298</sup> Failing to assist an officer in enforcing the law upon lawful request for aid appears to have been a contempt of the Lord Proprietor.<sup>299</sup> There are three examples of this specie.

First, in 1661, Thomas Bassett, Constable of New Town Hundred, charged one Richard Bennett for contempt for refusing to help him arrest a wanted man and bring him before the justice of the peace for the county.<sup>300</sup> Bassett approached Bennett at twilight while Bennett was chopping wood outside of his home.<sup>301</sup> Bennett asked to see a warrant.<sup>302</sup> Bassett replied that his oath was his warrant, and commanded Bennett in the name of the Lord

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<sup>292</sup> Compare *supra* Section II.A, with An Act for Punishment of Certain Offenses as Swearing, Cursing, Adultery, & etc., 1 Md. Arch. 286 (June 29, 1650) ("Every person or persons that shall be found or proved by confession of either party to have committed Adultery or fornication, such Offender or Offenders shall be censured or punished, as the Governor and Council or other chief Judge and Commissioner sent in Court (thereunto authorized) not extending to life or Member shall adjudge and think fit.").

<sup>293</sup> Compare, e.g., HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, ch. 23, §§ 1–8 p. 8, with Section III.B.2, and *In re Nutter*, 87 Md. Arch. 158 (Somerset Cnty. Ct., Md. 1671).

<sup>294</sup> E.g., *In re Nutter*, 87 Md. Arch. at 158 (binding one Christopher Nutter to his good behavior for three months for ignoring the hue and cry and refusing to deliver two runaways).

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*; DALTON, *supra* note 281, at 439–41, 453.

<sup>297</sup> *In re Nutter*, 87 Md. Arch. at 158; DALTON, *supra* note 281, at 439–41, 453.

<sup>298</sup> See sources cited *supra* note 296.

<sup>299</sup> *In re Nutter*, 87 Md. Arch. at 158.

<sup>300</sup> *In re Bennett*, 41 Md. Arch. at 553.

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

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

Proprietor to go with him.<sup>303</sup> Bennett refused,<sup>304</sup> and upon hearing this, the Provincial Court pardoned Bennett on his assurance that he would obey in the future and since this was the first time he had run afoul of the law.<sup>305</sup>

Second, in 1677, Ambrose Dixon was approached by an undersheriff attempting to collect taxes in the form of tobacco.<sup>306</sup> Dixon “openly & violently by force & armes & Divers threatening abusive Speeches withstand and oppose y said undersheriffe & would not Suffer him to execute his office but disposed of y said Tobacco as aforesaid.”<sup>307</sup> The County Court for Somerset County, Maryland, commanded Dixon to appear and apologize by getting down on his knees, prostrating himself, acknowledging his error towards the Lord Proprietor, and craving pardon.<sup>308</sup> Dixon humbled himself as directed, was forgiven, and received no further sanction.<sup>309</sup> Both of these anecdotes illustrate the cooperative nature of provincial government.<sup>310</sup> Public order in a young and burgeoning society paradoxically required more from government by requiring more from the individual.<sup>311</sup> Failing to assist the Lord’s man, be it a commissioner, constable, or sheriff, was contempt of the Lord himself.<sup>312</sup>

Third, in 1694, the Sheriff of Somerset County assigned a sub-sheriff, Martin Trontram, to take Peter Whaples into custody.<sup>313</sup> When Trontram arrived at Whaples’ home, he discovered that there were a number of fellows there in addition to Whaples.<sup>314</sup> When Trontram demanded assistance in binding Whaples and taking him into custody, the other men became enraged.<sup>315</sup> Several eye-witnesses testified in their depositions that Charles Tindall, one of Whaples friends, said “[W]ee have gunns as well as you,” and took a gun off a nearby gunrack and pointed the muzzle at Trontram.<sup>316</sup> Trontram responded by grabbing the gun and yelling back “[y]ou Rogue[,] I will run you through.”<sup>317</sup>

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

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

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

<sup>306</sup> *In re Dixon*, 89 Md. Arch. 91–92 (Somerset Cnty. Ct. Md. 1677).

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *See id.*; *In re Bennett*, 41 Md. Arch. at 553.

<sup>311</sup> JULIAN J. ALEXANDER, *BRITISH STATUTES IN FORCE IN MARYLAND* 210 (2d ed. 1912) (incorporating the State of Winchester of 1285, 13 Edw. 1, stat. 2, cap. 1 and explaining what cooperation the government needs from the individual).

<sup>312</sup> *Adams v. Johnson*, 57 Md. Arch. xix (Md. Prov. Ct. 1670).

<sup>313</sup> *In re Tindall*, 407 Md. Arch. 144 (Somerset Cnty. Ct., Md., Sept. 24, 1694).

<sup>314</sup> *Id.*

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

<sup>316</sup> *Id.* at 145.

<sup>317</sup> *Id.*

Tindall responded by grabbing Trontram by the collar and dared him to draw his firearm.<sup>318</sup> The other men managed to break up the fight, disarm Tindall, and move the dispute outside.<sup>319</sup> Trontram repeated his command that Tindall should help him arrest Whaples but Tindall remained obstinate and unwilling to comply.<sup>320</sup> At this point, a man named John Barker and four others arrived.<sup>321</sup> Trontram repeated his command towards John Barker, and Barker likewise refused to comply.<sup>322</sup> At some point in the episode, Whaples declared that he was willing to come with the sheriff the following morning, but not at that present moment.<sup>323</sup> Trontram opted not to escalate the situation any further and departed empty handed.<sup>324</sup>

Both Barker and Tindall were subsequently ordered by the County Court to show cause why they should not be held in contempt for failing to assist in Whaples' arrest.<sup>325</sup> Although the ultimate outcome of the case against Whaples is not clear, it is at least evident that contempt procedures brought against Whaples' comrades were successful in enforcing the court's command.<sup>326</sup> The monopolization of violence by the government, in the Weberian sense, was incomplete, notwithstanding the displacement of feudal suzerainty with direct rule by the royal government after Coode's Rebellion.<sup>327</sup> In more primitive times, fear of public authority was more readily required<sup>328</sup> and the rigor of the contempt power served that need.<sup>329</sup> Therefore, the judiciary flexed its muscle to compensate for the lack of a professional constabulary police force.<sup>330</sup>

Libelous slanderous, scandalous, or otherwise disrespectful remarks made about the Lord Proprietor or his government was another specie of contempt against the Proprietor's person.<sup>331</sup> The offense of *scandalam magnatum*—scandalous words that brought a “great man” of the province into

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<sup>318</sup> *Id.* at 145-46.

<sup>319</sup> *In re Tindall*, 407 Md. Arch. at 146.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *In re Tindall*, 407 Md. Arch. at 146-47.

<sup>326</sup> *See id.* 407 Md. Arch. at 144.

<sup>327</sup> 1 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 314-15 (Guenther Roth & Claus Wittich eds., Uni. Of Cal. Press 1922); Jennifer Copeland, *Archives of Maryland (Biographical Series) John Coode (ca. 1648-1708/9)* (Feb. 2003), <https://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/000200/000269/html/269bio.html> (on file with Md. State Arch.).

<sup>328</sup> WEBER, *supra* note 327, at 279.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at 314, 1013-14.

<sup>331</sup> *Compare* Coursey v. Davis, 54 Md. Arch. 459 (Talbot Cnty. Ct., Md., Mar. 15, 1669), *with* Willan v. Innis, 41 Md. Arch. 602, 603 (Md. Prov. Ct. 1662).

contempt and disrepute—can be fairly classified in retrospect as contempt of the executive when the Governor, members of the Governor’s Privy Council, or the Lord Proprietor himself were the objects of derision.<sup>332</sup> This particular specie—perhaps more than any other—frustrates my tripartite framework for my admittedly anachronistic convention of breaking down contempt power into three discrete families: executive, judicial, and legislative.<sup>333</sup> Instances of this specie of contempt admittedly could often be classified just as well as contempt of the judiciary.<sup>334</sup> Of this specie is the following example.

On May 12, 1692, the Governor’s Privy Council, sitting in its judicial capacity, heard charges regarding Peregrine Brown, a master of a ship ready to sail.<sup>335</sup> Brown had uttered “[s]everal Reproa’chfull and disrespectfull Speeches against the Government.<sup>336</sup> And that both he and his Brother John Brown with Others the Masters of Ships now bound out would go away without Clearing and pay no Duty, unless they could see the Kings Positive Orders so to do. . . .”<sup>337</sup> The brothers Brown ultimately backed down and promised to pay their duties.<sup>338</sup> In return, the Governor’s Privy Council excused them from their mischief and cleared them for sail.<sup>339</sup> Although the Governor’s Privy Council exercised its role as a judicial body in this instance, the contempt lies against the Lord Proprietor rather than themselves; therefore, it can be fairly characterized as a contempt of the executive.<sup>340</sup>

I believe Brown’s is the first recorded instance of *scandalam magnataum* directly against the Lord Proprietor in the history of the province.<sup>341</sup> Though the phrase itself does not appear in the record, the record does not suggest that the Browns’ reproachful words were even tangentially related to an ongoing judicial proceeding.<sup>342</sup> It was not uttered in the court’s presence, therefore, it cannot be classified as ordinary judicial contempt.<sup>343</sup> Nor could it have been ordinary slander, for it implicitly targeted the governor and his privy council, a group of men who possessed the highest dignities of the province.<sup>344</sup>

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<sup>332</sup> See sources cited *supra* note 331.

<sup>333</sup> See *supra* notes text accompanying 37-51.

<sup>334</sup> Compare *Coursey*, 54 Md. Arch. at 459, with *Willan*, 41 Md. Arch. at 603.

<sup>335</sup> See *In re Brown*, 13 Md. Arch. 256, 258 (Md. P.C., May 12, 1692).

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> See *id.*

<sup>341</sup> See *In re Brown*, 13 Md. Arch. at 258.

<sup>342</sup> See *id.*

<sup>343</sup> See *id.* (excusing a master of a ship for committing contempt by peremptorily failing to pay duties upon receiving his assurances that duties would be paid).

<sup>344</sup> See *id.*

Brown's case contrasts with the case of *Coursey v. Davis* (1669), when John Davis was charged with scandalizing the Lord Proprietor by saying that the County Court had not done him justice in a legal proceeding.<sup>345</sup> Once again, since there was no separation of powers, one could say that disrespectful language about any governmental officer or institution was contempt of the executive.<sup>346</sup> I believe words were more directed towards the presiding justices in the heat of the moment than a denouncement meant to ring in their ultimate superior's ears.<sup>347</sup> That, however, was no excuse.<sup>348</sup>

Officials at the highest levels of provincial government like the judges in the cases discussed above were not the only subjects of public scorn.<sup>349</sup> Lesser servants were also raked over the coals of popular disapprobation too.<sup>350</sup> *In re Evans* (1726) provides an interesting case study because it intersects with an important social problem during the colonial era: the relationship between the heightening of ethnic tensions and the influx of migrants.<sup>351</sup> One John Henry insulted a justice of the peace of Irish extraction named John Evans by saying "I value no Irish Justice in Maryland."<sup>352</sup> The County Court disapproved of Henry's insult and fined him two shillings, six pence and one hundred and seventy-seven pounds of tobacco.<sup>353</sup> The monetary fine amounted to roughly fifteen pounds in today's currency, a day's wages back then for a skilled tradesman.<sup>354</sup>

The following year, one John Ambrose declared that Evans was "no more fit for a Majistrate . . . tha[n] my Backside. . . ."<sup>355</sup> For that comment, the court found Ambrose in contempt and fined him two hundred and sixty-five pounds of tobacco and 5 shillings—the monetary fine amounts to two day's wages back then for a skilled tradesman or roughly thirty pounds in today's currency.<sup>356</sup>

These two instances of *scandalam magnatam* were contempts of the lord proprietor's person or government in that they reflected a fundamental

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<sup>345</sup> *Coursey*, 54 Md. Arch. at 459.

<sup>346</sup> The Charter of Maryland, *supra* note 250, at ch. VI-VIII.

<sup>347</sup> See *Coursey*, 54 Md. Arch. at 459 (forgiving John Davis upon his apology upon his knees for scandalizing the Lord Proprietor by stating that the court had not done him justice).

<sup>348</sup> See *id.*

<sup>349</sup> See *Skirven v. Jones*, 548 Md. Arch. 236, 237 (Kent Cnty. Ct., Md., Jul. 10, 1726).

<sup>350</sup> See *id.*

<sup>351</sup> *In re Evans*, 548 Md. Arch. 238, 239 (Kent Cnty. Ct., Md., Nov. 15, 1726).

<sup>352</sup> *Id.*

<sup>353</sup> *Id.* at 239.

<sup>354</sup> See *id.*; *Currency converter: 1270-2017*, THE NAT'L ARCHIVES, <https://www.nationalarchives.gov.uk/currency-converter/#currency-result> (on file with the University of Baltimore Law Forum) (last visited Dec. 3, 2020).

<sup>355</sup> *In re Ambrose*, 548 Md. Arch. 356, 358 (Kent Cnty. Ct., Md., Mar. 17, 1727).

<sup>356</sup> *Id.*

disrespect for an agent of the lord proprietor.<sup>357</sup> These cases also show that poor John Evans and others of Irish descent had a rough go of it in serving out their tenure<sup>358</sup> because anti-Irish antipathy haunted the English colonial milieu.<sup>359</sup> Once again, they could be classified as contempts of the executive or the judiciary, depending on one's perspective.<sup>360</sup> The distinction is theoretical, since in reality, contemptuous language was liable to be punished by a Court of law whatever agent or organ of government was offended.<sup>361</sup>

Finally, encouraging rebellion and spreading false news to the detriment of the proprietary were interrelated species of contempt deemed to be against the Lord Proprietor's person or government.<sup>362</sup> There was a pattern of legislation beginning in the late seventeenth century designed to deal with this problem.<sup>363</sup> The Maryland General Assembly passed "[a]n act against divulgers of fake news" in 1671 that imposed a fine not greater than two thousand pounds of tobacco for "soever shall forge or divulge any fake Reports (Tending to the trouble of the Province). . . ."<sup>364</sup> The act also proscribed, in particular, malicious or false reports or "tales" about judicial officials, on pain of fine or corporal punishment not extending to life or member.<sup>365</sup>

John Coode, arguably the greatest American demagogue of the seventeenth century, was the most conspicuous culprit of this contempt.<sup>366</sup> Coode was written as a red blooded, foul-mouthed, political operative and permanent enemy of Indians, Catholics, the government of Lord Baltimore—virtually anyone who was not a conspirator with his connivances and vain ambitions.<sup>367</sup> On May 7, 1681, Coode attended the home of one Nehemiah Blakistone, drew heavily from the punch bowl, and began ranting against the government.<sup>368</sup> He declared that "there is never a Papist in Maryland will have one foote of land within these four months," that "the [] Indians would doe us noe good," and that he had ten thousand men and could "make it high water when he pleased," meaning ignite an insurrection.<sup>369</sup> The government

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<sup>357</sup> See *id.* at 357; *In re Evans*, 548 Md. Arch. at 239.

<sup>358</sup> *In re Evans*, 548 Md. Arch. at 238, 357.

<sup>359</sup> *Id.* at 238.

<sup>360</sup> Compare *supra* Sections II.B–C, with Sections III.B–C.

<sup>361</sup> Compare *supra* Sections II.B–C, with Sections III.B–C.

<sup>362</sup> An Act Against Divulgers of Fake News, 2 Md. Arch. 273, 274 (Apr. 19, 1671).

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at 274.

<sup>365</sup> *Id.*

<sup>366</sup> See 15 Md. Arch. 6.

<sup>367</sup> *Id.*

<sup>368</sup> Coode's Case, 15 Md. Arch. 391 (Md. P.C., 1681).

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

heard of the incident, detained Coode, and issued a proclamation invoking the fake news statute.<sup>370</sup>

The Governor's Privy Council investigated Coode's fake news campaign<sup>371</sup> and on July 21, 1681, the council assembled at St. Mary's, including the Lord Proprietor himself—Charles Calvert, 3rd Baron Baltimore—Chancellor Philip Calvert, and Secretary William Calvert.<sup>372</sup> The council deposed several individuals who heard rumors disseminated by Coode and his followers that Lord Baltimore furnished Indians with gun powder and shot for the purpose of wiping out the Protestants of the colony.<sup>373</sup> The investigation continued throughout the balance of the summer, uncovering similar allegations of seditious speeches intended to raise mutiny.<sup>374</sup> However, Coode was never ultimately tried for treason, and Lord Baltimore paid the price.<sup>375</sup>

In 1689, Coode finally fulfilled his threat of insurrection.<sup>376</sup> He “made it higher water” as he pleased and launched an insurrection alternately known as “Coode's Rebellion” or the “Protestant Revolution of 1689.”<sup>377</sup> The pretext of the insurrection was to support the ascension of William and Mary.<sup>378</sup> It was fueled by fake reports of a conspiracy between Catholics and Indians to wipe out Protestant settlers.<sup>379</sup> Like Claiborne, Coode initially prevailed and seized control of the colony.<sup>380</sup> However, like Claiborne, he ultimately was defeated when Parliament reinstated the authority of Lord Baltimore, albeit twenty-five years later.<sup>381</sup> Coode and his associates were never charged with contempt of the Lord Proprietor.<sup>382</sup> The problem with fake news and rumors of Indian onslaught never faded either.<sup>383</sup> This case remains arguably the greatest instance of impunity in the provincial and colonial periods.<sup>384</sup>

However, I could not find recorded instances of the other species within this genus of contempt in the Province of Maryland as I did for

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<sup>370</sup> *Id.*

<sup>371</sup> *Id.* at 392.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.* at 392-93.

<sup>374</sup> *Coode's Case*, 15 Md. Arch. at 399.

<sup>375</sup> *Id.* at 407.

<sup>376</sup> See The Narrative of Colonel Henry Darnall, 8 Md. Arch. 155, 156 (Dec. 31, 1689).

<sup>377</sup> *Coode's Case*, 15 Md. Arch. at 391; see sources cited *supra* note 366.

<sup>378</sup> See 8 Md. Arch. 5, 6.

<sup>379</sup> *Id.* at 5.

<sup>380</sup> *Id.*

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

<sup>382</sup> *Coode's Case*, 15 Md. Arch. at 392.

<sup>383</sup> See 15 Md. Arch. at 6.

<sup>384</sup> *Id.*; see also ELIHU S. RILEY, A HISTORY OF THE GENERAL ASSEMBLY OF MARYLAND 1638-1904 158 (Nunn & Co. 1905) (citing Act to Prevent False News of 1712).

England.<sup>385</sup> I found no instance of contempt charged for either attempting to scandalize the Lord Proprietor by invoking public distaste for his policies or accusing the Lord Proprietor of breaching any coronation oath.<sup>386</sup> There was no real analogue to the king's coronation in the colonial context.<sup>387</sup> I also found no instance of a contemptuous refusal to pay a custom in a foreign country to the effect of creating discord between Lord Baltimore and a rival power.<sup>388</sup>

### iii. Contempt of the Lord Proprietor's Title.

The third genus in the contempt of the Lord Proprietor family was contempt of the Lord Proprietor's title. This genus, by analogy to contempt of the king's title, was consisted of two species: denying the Lord Proprietor's title itself or refusing to take an oath of loyalty to the Lord Proprietor and his government.<sup>389</sup> I could not find any recorded instances of contempt of the Lord Proprietor's title by denying it outright.<sup>390</sup> That is not to say the offense was never committed.<sup>391</sup> The three great rebellions of the colonial era: Claiborne's Rebellion, Fendall's Rebellion, and Coode's Rebellion—all created ripe opportunities for such contempt.<sup>392</sup> But the fact remains that I could not find any formal record of a charge of contempt of this type in the records preserved from the colonial era in the Maryland Archives.<sup>393</sup> I was able to find precedents for contempt of the Lord Proprietor's title by failing to swear an oath.<sup>394</sup>

As to the first specie of this genus, denying the Lord Proprietor's title itself, one example that appears to be plausible on its face is William

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<sup>385</sup> See 1 Md. 1 et seq.

<sup>386</sup> *Cf. id.*

<sup>387</sup> *Cf. id.*

<sup>388</sup> *Cf. id.*

<sup>389</sup> Compare HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, ch. 24, §§ 1–10 p. 61–65, with Section III.B.3.

<sup>390</sup> Compare HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, ch. 24, §§ 1–10 p. 61–65, with Section III.B.3.

<sup>391</sup> Compare HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, ch. 24, §§ 1–10 p. 61–65, with Section III.B.3.

<sup>392</sup> Compare HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, ch. 24, §§ 1–10 p. 61–65, with Section III.B.3.

<sup>393</sup> *Codes, Compilations of Laws, Rules and Regulations*, ARCH. OF MD. ONLINE, <https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/html/codes.html> (on file with the University of Baltimore Law Forum) (last visited Sept. 21, 2025).

<sup>394</sup> Assembly Proceedings, 1 Md. Arch. 20 (Md. Gen. Assemb., Mar. 16, 1637).

Claiborne's dispute over the House of Calvert's claim to Kent Island.<sup>395</sup> Claiborne received licenses from the governors of Virginia in 1627 and 1628 to explore the shores of the upper Chesapeake and unsettled parts of Maryland, providing the ostensible foundation for his claim to Kent Island, which he seized control of in 1632.<sup>396</sup> Lord Baltimore's insisted that the island was his by virtue of Maryland Charter granted to him that same year<sup>397</sup> and the Crown agreed.<sup>398</sup> Claiborne, undeterred, initiated a rebellion, the so-called "Plundering Time" between 1644-1646.<sup>399</sup> He and his accomplice, Richard Ingle, led insurgents in an assault on the capital, Saint Mary's, compelled Governor Leonard Calvert to flee, plundered the plantation of Thomas Cornwallis (the finest in the province), and seized control of the colony for two years.<sup>400</sup> There was an attempt in 1646 in the House of Lords to void Lord Baltimore's patent at Claiborne's behest.<sup>401</sup> Ingle even appeared before a House of Commons committee of inquiry to persuade them.<sup>402</sup> However, the measure never passed the House of Commons.<sup>403</sup> Though Claiborne and Ingle's insurgency was treasonous and seditious, it was never indicted as contempt.<sup>404</sup> That they attempted to eliminate Lord Baltimore's patent rather than its legitimacy—and through proper legal channels—may explain why the charge of contempt was never brought.<sup>405</sup>

There are, on the other hand, several recorded instances of charges of contempt for refusal to swear oaths of loyalty to the Lord Proprietor.<sup>406</sup> The proprietary government brought these charges against Quakers who conscientiously objected to swearing oaths of loyalty because of their religious beliefs.<sup>407</sup> A representative case is the prosecution against a Quaker missionary named Thomas Thurston.<sup>408</sup> He and two other Quaker missionaries, Josiah Coale and Thomas Chapman, briefly ministered in

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<sup>395</sup> See 3 HERBERT L. OSGOOD, *THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY* 92–93, 113–14 (The Macmillan Co. 1907) [hereinafter OSGOOD, 3 *THE AMERICAN COLONIES*].

<sup>396</sup> *Id.* at 92-93.

<sup>397</sup> *Id.* at 93.

<sup>398</sup> *Id.* at 95-96.

<sup>399</sup> *Id.* at 113.

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

<sup>401</sup> OSGOOD, 3 *THE AMERICAN COLONIES*, *supra* note 4, at 113.

<sup>402</sup> *Id.* at 114.

<sup>403</sup> *Id.* at 113.

<sup>404</sup> *Id.*

<sup>405</sup> See *id.* at 92, 113.

<sup>406</sup> See sources cited *infra* notes 407-413.

<sup>407</sup> See, e.g., *In re Rigsby*, 41 Md. Arch. 418 (Md. Prov. Ct., 1660; *In re Elliott*, 54 Md. Arch. 220 (Kent Cnty Ct., Md., 1661); SEMMES, *supra* note 281, at 14.

<sup>408</sup> KENNETH L. CARROL, *Persecution of Quakers in Early Maryland (1658-1661)*, 54 *QUAKER HIST.*, 67, 70-71 (1964).

Maryland during the Summer of 1658<sup>409</sup> with force of the government heavily bent against them.<sup>410</sup> On April 13, 1658, the Governor's Privy Council resolved to enter a proclamation requiring that anyone who entered the province on or after March 24 must take an oath of fidelity.<sup>411</sup> On March 24, 1658, the Governor's Privy Council sealed articles, waiving the requirement of swearing an oath of fidelity as to any current resident of the province but imposing it on anyone who entered the province on or after that date.<sup>412</sup> The articles of March 24 put the Quakers in jeopardy because they were theologically opposed to swearing oaths of loyalty, indeed, oaths of any kind.<sup>413</sup>

On August 3, 1659, Thurston appeared before the Governor's Privy Council on charges of contempt and pleaded that as of July 23 the previous year, he was not in the province and therefore not within the letter of the Governor's order.<sup>414</sup> The council agreed, but determined to banish Thurston anyway, he declared that if Thurston ever returned, he would suffer corporal punishment and deportation—he would be whipped with thirty lashes by a justice of the peace and then sent by relay from constable to constable until he was across the border.<sup>415</sup> The council further decreed that anyone who harbored Thurston would be fined five hundred pounds of tobacco.<sup>416</sup> The fact that Philip Morgan was held in contempt of court for disobeying summons rather than for the accusation instigating the summons to begin with suggests, however, that even in the mid-seventeenth century, there was an intuition that different species of contempt—though all equally offensive to the Lord Proprietor at one level—could at another level be delineated according to whatever proprietary institution they principally related.<sup>417</sup>

In 1688, a controversy arose in the General Assembly as to whether members of the lower house were obligated to swear oaths of fidelity.<sup>418</sup> The upper house insisted in the affirmative, stating that it was the equivalent of an oath of allegiance required under English law.<sup>419</sup> The lower house, led by John Coode, protested that this position was untenable unless the upper house could provide explicit statutory authority.<sup>420</sup> Eventually the Houses came to

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<sup>409</sup> *See id.* at 70.

<sup>410</sup> *See id.* at 71.

<sup>411</sup> Governor's Proclamation Regarding Oaths of Fidelity, 3 Md. Arch. 341 (Apr. 13, 1658); Articles of Engagement, 3 Md. Arch. 340 (Mar. 24, 1659).

<sup>412</sup> *Articles of Engagement*, 3 Md. Arch. at 340.

<sup>413</sup> *Cf.* Matthew 5:37.

<sup>414</sup> *See Atty' Gen. v. Thurston*, 3 Md. Arch. 364, 353 (Md. P.C., 1659).

<sup>415</sup> *See id.*

<sup>416</sup> *See id.*

<sup>417</sup> *See Atty' Gen. v. Morgan*, 41 Md. 339 (Md. Prov. Ct., 1659).

<sup>418</sup> OSGOOD, 3 THE AMERICAN COLONIES, *supra* note 4, at 488.

<sup>419</sup> *Id.* at 489.

<sup>420</sup> *Id.* at 488-89.

a compromise: the members of the lower house swore the oaths as individuals, rather than as an institution.<sup>421</sup>

*C. Contempt of the Maryland Judiciary.*

The Governor and his privy council served a judicial function as the high court of appeal for the colony.<sup>422</sup> When operating as a court of appeals, the Governor sat as Chief Justice, and his fellow councilmen as Associate Justices.<sup>423</sup> At the second tier of the judicial hierarchy was the Provincial Court, a court of general jurisdiction for common law claims—and, until 1665, equity claims as well.<sup>424</sup> The General Assembly also erected specialty courts, that courts with limited, and often technical subject matter jurisdiction, such as the Court of Chancery.<sup>425</sup>

There were also courts at the local and municipal levels: courts for counties, manors, and hundreds.<sup>426</sup> Justices of the peace and constables appointed by the Governor administered the hundreds, though as county responsibilities expanded, the courts were ultimately reduced to constablewicks.<sup>427</sup> There was no ecclesiastical jurisdiction in Maryland whatsoever.<sup>428</sup> Appeals from local jurisdictions laid to the Provincial Court, then from the Provincial Court to the Court of Appeals, and then from the Court of Appeals, in very select circumstances, to the Board of Trade and Plantations, a committee of the Royal Privy Council.<sup>429</sup> Contempt power was therefore available to enforce the prerogatives of every level of the provincial judicial apparatus.<sup>430</sup>

i. Procedure for Contempt of Court.

Provincial courts faced an arduous task in determining if and to what extent the *lex terrae angliae* interfaced with the *lex maria terrae*.<sup>431</sup> English

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<sup>421</sup> *Id.* at 389.

<sup>422</sup> JAMES W. THOMAS, CHRONICLES OF COLONIAL MARYLAND: WITH ILLUSTRATIONS 111 (Eddy Press Corp. 1913).

<sup>423</sup> *Id.*

<sup>424</sup> *See* 53 Md. Arch. 9.

<sup>425</sup> *Id.*

<sup>426</sup> *Id.* at 12.

<sup>427</sup> MERENESS, *supra* note 250, at 401.

<sup>428</sup> *See* 2 JOHN THOMAS SCHARF, HISTORY OF MARYLAND FROM THE EARLIEST PERIOD TO PRESENT DAY: 1765 – 1812, 32 (Trad. Press 1879) [hereinafter 2 SCHARF].

<sup>429</sup> *See, e.g.*, Act for Appeals and Regulating Writs of Error of 1699, 22 Md. Arch. 469.

<sup>430</sup> *See supra* Section III.C.

<sup>431</sup> Act Concerning Proceedings at Law of 1662, 1 Md. Arch. 435 (Md. Gen. Assemb., Apr. 9, 1662).

common law oftentimes seemed applicable outright,<sup>432</sup> but even when it was not, or the question was debatable, it still influenced the interpretation of provincial common law.<sup>433</sup> The freeholders of Maryland were more aggressive than the citizenry of any other colony in adopting English common law and defending their rights and liberties under Magna Carta.<sup>434</sup> How far incorporation of English law should go was an evergreen question.<sup>435</sup> The General Assembly never questioned the notion that provincial courts of record possessed contempt power.<sup>436</sup> The provincial judiciary possessed the power to punish contempt through Chapter VII of the Maryland Charter and positive legislation adopting English common law.<sup>437</sup> Contempt power permeated every level of the provincial judiciary and was essential to its operations.<sup>438</sup>

Just before the colony was founded, Sir Henry Finch published his seminal common law treatise, *Nomotexnia*.<sup>439</sup> Finch noted in that work that disobedience or disrespect to the royal prerogative was ultimately a form of contempt, be it violation of a statute, proclamation, or writ.<sup>440</sup> By analogy, disobedience or disrespect shown to any manifestation of the proprietary prerogative, including officers and courts appointed under the Lord Proprietor's authority, could be characterized as a contempt.<sup>441</sup>

We have statutory proof that contempt power of the kind articulated by Finch weaved its way into provincial common law.<sup>442</sup> By the Act for the Better Administration of Justice in the County Courts of this Province of 1678, county courts were commanded to consult Michael Dalton's treatise, *The County Justice: Containing the Practice, Duty, and Power of the Justices of the Peace*, in performing their duties.<sup>443</sup> That treatise references the contempt power.<sup>444</sup> Though not every judge was necessarily an avid student

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<sup>432</sup> PAUL SAMUEL REINSCH, ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES 6, 40-43 (Madison, Wis., 1899).

<sup>433</sup> An Act for Ascertainning the Form of the Oath of Jude or Justice of 1732, 37 Md. Arch. 518 (Md. Gen. Assemb., 1732).

<sup>434</sup> REINSCH, *supra* note 432, at 41.

<sup>435</sup> Act Concerning Proceedings for Appeals, 19 Md. Arch. 83 (Md. Gen. Assemb., Apr. 9, 1694).

<sup>436</sup> An Act for Appeals and Regulating Writs of Error, 13 Md. Arch. 444 (Md. Gen. Assemb., 1692).

<sup>437</sup> *See, e.g.*, The Charter of Maryland, *supra* note 250, at ch. VII.

<sup>438</sup> *See, e.g., id.*

<sup>439</sup> *See* FINCH, *supra*, note 119, at ch. 9 p. 72 *et seq.*

<sup>440</sup> FINCH, *supra* note 119, at ch. 9 p. 72.

<sup>441</sup> *Id.* at 73.

<sup>442</sup> For the Better Administration of Justice in and Regulation of the County Courts Act of 1678, 7 Md. Arch. 70 (Md. Gen. Assemb., 1683).

<sup>443</sup> *Id.*

<sup>444</sup> DALTON, *supra* note 281, at 453.

of the law, many were.<sup>445</sup> Therefore, the judges of the province were strongly inclined to follow English practice and procedure through their studies.<sup>446</sup> The scholarly materials they consulted in doing so gave them clear instruction about their inherent authority to enforce their orders and operations through contempt proceedings.<sup>447</sup>

The provincial judiciary was rigorous in enforcing its procedures,<sup>448</sup> but was also proactive in warning against contempt liability to avoid incident.<sup>449</sup> One way a court could accomplish this was through issuing administrative orders.<sup>450</sup> On September 1, 1658, for example, the County Court for Kent County, Maryland, issued a standing order referencing its contempt power:

Whereas it is the Costome of England gronnded upon the word of God that due respect be giuen to Maiestrates: it is therefore Ordered by this Court, That noe man presume excepte a member of the Court, to stand w[i]th his hat on his head in the pr[e]sence of the Court, whilst the Court is sittinge, or use an unsciuell Language, upon paine of such Fine & other punish[e]nt as th[e] Court shall thinke Fit, It is ordered by the s[ai]d Court that this be Fortwith Published and Recorded.<sup>451</sup>

This is one of the earliest, if not the earliest, example in American history of a “standing order” of court.<sup>452</sup> It also is most likely the first standing order of a Maryland court concerning judicial contempt power<sup>453</sup> and an effectual tool for enforcing custom.<sup>454</sup> Appearing before a public body while wearing a hat, for example, was considered extremely disrespectful and punished under provisions such as this one.<sup>455</sup>

Alternatively, a court might also issue a case specific order warning that failure to comply would automatically result in contempt.<sup>456</sup> In 1659, for

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<sup>445</sup> Garrett Power, *Adoption of English Law in Maryland*, 2 MD. J. INT’L L. & TRADE 1, 2-3 (2011).

<sup>446</sup> *Id.* at 3.

<sup>447</sup> DALTON, *supra* note 281, at 453.

<sup>448</sup> 53 Md. Arch. 15.

<sup>449</sup> *Id.*

<sup>450</sup> *Id.*

<sup>451</sup> *In re Carline*, 54 Md. Arch. 146 (Kent Cnty. Ct., Md., Nov. 15, 1658).

<sup>452</sup> *Id.* at 453.

<sup>453</sup> *Id.*

<sup>454</sup> Assembly Proceedings, 13 Md. Arch. 50 (Md. Gen. Assemb., Apr. 26, 1684) (lower house).

<sup>455</sup> *Id.*

<sup>456</sup> *Ashcomb v. Wright*, 10 Md. Arch. 218 (Md. Prov. Ct. 1650).

example, seven men attacked the *St. George*, a vessel from Amsterdam, as it harbored in Carlyle Bay on the Island of Barbados.<sup>457</sup> The assailants seized the vessel and carried it back to Maryland.<sup>458</sup> The Provincial Court determined that the attack was not authorized by a commission, and therefore constituted piracy, not privateering.<sup>459</sup> These seven men were accordingly banished from the province, with the understanding that if they ever returned in contempt of the court's order, they would be punished as the Governor and his privy council saw fit.<sup>460</sup>

ii. Grounds for Contempt of Court.

Contempt liability extended to parties, third parties, and even their attorneys.<sup>461</sup> Contempts committed against the judiciary during this period included: insults or attacks on judges; insults or attacks on judicial officers; interference with judicial officers in the course of their carrying out their duties; disobedience of judicial orders, judgments, and decrees generally; witness tampering; interference with the discovery process; failure to pay costs; failure to pay damages; 8) failing to perform jury duty; cursing or using profanity in court; 10) wearing a hat in court; speaking out of turn in court; and most especially failing to appear.<sup>462</sup>

The story of one of the Province of Maryland's notorious murders illustrates how contempt was not only applied retrospectively as a punishment, but also as form of coercion, a condition that would apply prospectively in the event of non-compliance with a court order.<sup>463</sup> Christopher Rousby was a royal customs collector recommended to his position by Charles Calvert to fulfill the Plantation Duty Act of 1673.<sup>464</sup> During the 1680s, Rousby drew the ire of Lord Baltimore for allegedly performing his duties in an arbitrary manner. Lord Baltimore eventually laid charges against Rousby before the Board of Trade and Plantations.<sup>465</sup> Rousby was vindicated, however, and after attending his defense returned to Maryland.<sup>466</sup>

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<sup>457</sup> *In re St. George*, 41 Md. Arch. 310 (Md. Prov. Ct., 1659).

<sup>458</sup> *Id.*

<sup>459</sup> *Id.*

<sup>460</sup> *Id.*

<sup>461</sup> *See Simpson v. Peake*, 10 Md. Arch. 491, 491 (Md. Prov. Ct., 1656).

<sup>462</sup> *See, e.g., Cornwallis v. Gerrard*, 10 Md. Arch. 341, 341 (Md. Prov. Ct., 1654); SEMMES, *supra* note 281, at 15-16, 21, 30.

<sup>463</sup> *See Estate of Rousby v. Smith*, 748 Md. Arch. 478-79 (Md. Ch. Ct. 1699) (ordering one Richard Smith to present papers for the Court's review or be held in contempt).

<sup>464</sup> *Id.*

<sup>465</sup> *Id.*

<sup>466</sup> *Id.*

In October 1684, Rousby was involved in an altercation with a drunken colonel by the name of George Talbot aboard a royal ketch called the *Quaker* lying in the Patuxent River and was stabbed to death.<sup>467</sup> Talbot was convicted of murder the following April in Virginia, but Lord Baltimore secured a royal pardon for him, no doubt due to his disdain for Rousby.<sup>468</sup> There was later litigation over Rousby's estate<sup>469</sup> and on October 9, 1699, the Court of Chancery issued a rule *nisi* for Richard Smith to submit accounting books, writings, papers, deeds, evidences, grants, patents, warrants, and other instruments related to the lands of Rousby's estate within fifteen days, on pain of contempt.<sup>470</sup> This may be the first recorded discovery order issued on pain of contempt in the history of Maryland.<sup>471</sup> Smith failed to comply, and three different attachments were issued against him, the latest on May 10, 1703.<sup>472</sup> The cumulative penalty for all three attachments was three thousand six hundred and forty-eight pounds of tobacco.<sup>473</sup>

The provincial judiciary, also, was not afraid to wield the contempt power for supervisory purposes.<sup>474</sup> Superior courts punished misconduct by judicial officers and judges of inferior courts on a relatively frequent basis.<sup>475</sup> Public order takes years, decades, even centuries to build.<sup>476</sup> The dignity, gravity, and authority required to lead public institutions was not natural to every man designated to lead them.<sup>477</sup> The social order needed to break in its leaders just as badly as the virgin soil it was responsible for cultivating.<sup>478</sup> Invariably, a good many scoundrels came to the fore.<sup>479</sup>

The historical record gleams with instances in which contempt power was used to punish misconduct committed by those holding judicial office.<sup>480</sup> Thomas Jones, for example, a justice for the County Court of Worcester County, Maryland, was held to have exceeded the limits of his commission for Indian Trade in 1672.<sup>481</sup> He seized the property of Dutch traders under the pretense of a Maryland statute when the property in question was actually

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<sup>467</sup> *Id.*

<sup>468</sup> *Id.*

<sup>469</sup> *Estate of Rousby*, 748 Md. Arch. at 478-79.

<sup>470</sup> *Id.*

<sup>471</sup> *Id.*

<sup>472</sup> *Id.*

<sup>473</sup> *Id.*; cf. OSGOOD, 3 AMERICAN COLONIES IN THE SEVENTEENTH CENTURY, *supra* note 389, at 225-28.

<sup>474</sup> See 53 Md. Arch. 17-18.

<sup>475</sup> See 54 Md. Arch. 9.

<sup>476</sup> *Vaughan v. Gresham*, 54 Md. Arch. 2, 15-16 (Kent Cnty. Ct., Md., Feb. 1652).

<sup>477</sup> *In re Rigsby*, 41 Md. Arch. 418 (Md. Prov. Ct., Mar. 4, 1658).

<sup>478</sup> *Att'y Gen. v. Stone*, 60 Md. Arch. 515, 515 (Charles Cnty. Ct., Md., Jan. 14, 1674).

<sup>479</sup> *In re Garrett*, 91 Md. Arch. 46 (Somerset Cnty. Ct., Md., 1688).

<sup>480</sup> SEMMES, *supra* note 281, at 19-20.

<sup>481</sup> See *Jones v. Smith*, 65 Md. Arch. 36, 52, 57 (Md. Prov. Ct., 1672).

located beyond the borders of the province.<sup>482</sup> Jones' seal of commission was torn up in open court and he was ordered to pay compensation to the Dutch traders as well as court costs.<sup>483</sup>

Judges of inferior courts and judicial officers were occasionally held in contempt for disobeying the orders of superior courts.<sup>484</sup> In 1692, the Provincial Court issued a show cause order to the judges of a County Court, demanding that they appear at its next session and explain why they should not be held in contempt for flagrantly disobeying a writ of habeas corpus.<sup>485</sup> However, the outcome of that controversy is unknown.<sup>486</sup> Furthermore, that same year, another County Court considered a contempt indictment against a constable of Nanticoke Hundred, Samuel Fluellin, who failed to attend a grand jury during the March and November sessions.<sup>487</sup> The indictment was quashed but Fluellin still paid court fees.<sup>488</sup> Corrupt sheriffs likewise were often held to account for misconduct through contempt proceedings.<sup>489</sup>

### iii. Punishment for Contempt of Court.

Typical penalties for contempt of court in the province included either individually or in combination of the following: reprimand; compelled apology; fine, typically imposed in the form of tobacco, beaver skins, or currency; sequestration of property real or personal, including servants and slaves; incarceration; default judgment; disbarment; and corporal punishments, including the pillory, the stocks, the ducking stool, and the whipping post.<sup>490</sup> Even the mildest of penalties, compelled apology, subjected the contemnor to severe public humiliation.<sup>491</sup> A man would typically need to beg forgiveness on his knees before the court or walk about publicly with paper attached to his person declaring the offense he committed.<sup>492</sup> Public stigma was a powerful tool of public authority.<sup>493</sup> The provincial judiciary had no problem crowning the fools of the colony with dunce caps.<sup>494</sup>

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<sup>482</sup> *Id.* at 52.

<sup>483</sup> *Id.*

<sup>484</sup> *Baker v. Thompson*, 53 Md. Arch. 234, 234–240 (Charles Cnty. Ct., Md., 1655).

<sup>485</sup> *Taylor v. Llewellyn*, 1 Harris & McHenry 19 (Md. Prov. Ct., 1692).

<sup>486</sup> *Id.*

<sup>487</sup> *In re Fluellin*, 406 Md. Arch. 51 (Somerset Cnty. Ct., Md., Oct. 15, 1692).

<sup>488</sup> *Id.*

<sup>489</sup> SEMMES, *supra* note 281, at 13-14.

<sup>490</sup> 53 MD. ARCH. 30.

<sup>491</sup> 2 SCHARF, *supra* note 428, at 40-42.

<sup>492</sup> *Id.* at 40.

<sup>493</sup> *Id.*

<sup>494</sup> *See, e.g.*, 53 MD. ARCH. 30; 2 SCHARF, *supra* note 428, at 40-42.

Fines and sequestered property could be awarded to the court or to an opposing party as compensation for harm inflicted by contemptuous conduct.<sup>495</sup> Incarceration could be imposed for a definite period or for a rolling period until the contemnor “purged” his contempt by performing some atoning action, such as complying with a court order or paying a fine.<sup>496</sup> In spite of disciplinary norms that might be considered harsh by modern standards, the sufficiency of an apology in recorded cases demonstrates that the judiciary was capable of equity and leniency.<sup>497</sup> The judiciary also duly considered grounds for mitigation.<sup>498</sup> When an appropriate excuse or justification was provided by the accused, or, alternatively, insufficient affirmative evidence of the contempt was averred by an opposing party, the court would dismiss the contempt and remit any punishment imposed.<sup>499</sup>

A combination of fine and incarceration was the most commonly employed penalty for contempt of court: the fine insured the party prejudiced by the contempt would be made whole and the incarceration ensured that the fine would be paid.<sup>500</sup> Corporal punishment was imposed less frequently—typically only in cases where the contempt arose from an offense against the court’s dignity.<sup>501</sup> In some cases, there was no punishment because the contemnor was unavailable.<sup>502</sup>

In 1678, for example, Tobias Wells filed suit in the Court of Chancery to recover real and personal property from the estate of the decedent Bartholomew Glevin.<sup>503</sup> The estate was administered by a married couple, John and Mary Wright.<sup>504</sup> The court issued a decree in Wells’ favor, awarding him one thousand four hundred and sixty pounds of tobacco and ordering Wrights to pay all costs and damages.<sup>505</sup> The Wrights did not obey and were attached for contempt.<sup>506</sup> The Wrights, however, died before they could be forced to purge their contempt.<sup>507</sup> It came to light that while they were alive, they had arranged to escape the decree by selling off real and personal property that Wells’ was entitled to.<sup>508</sup> The court therefore ordered sheriffs to

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<sup>495</sup> See *In re Sybrey*, 51 Md. Arch. 8, 8 (Md. Ch. Ct. Apr. 20, 1669).

<sup>496</sup> *See id.*

<sup>497</sup> *In re Winchester*, 557 Md. Arch. 229, 229 (Kent Cnty. Ct., Md., Dec. 8, 1686).

<sup>498</sup> *See id.*

<sup>499</sup> *See id.*

<sup>500</sup> *Haselwood ex rel. Avery v. Granger*, 51 Md. Arch. 235, 237, 552 (Md. Ch. Ct., Mar. 8, 1678).

<sup>501</sup> *Wells v. Wright*, 51 Md. Arch. 165, 165–67, 215–18 (Md. Ch. Ct., Dec. 29, 1678).

<sup>502</sup> *See id.*

<sup>503</sup> *See id.*

<sup>504</sup> *Id.*

<sup>505</sup> *Id.*

<sup>506</sup> *See id.*

<sup>507</sup> *Wells*, 51 Md. Arch at 165-67, 215-18.

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

sequester the Wrights' property and seize "the Goods & Chattells merchandizes Sums of money or Tobacco Servants or Slaves Cattle hogs horses mares or other the p[e]rsonall Estate of the sd [sic] Bartholomew Glevin & John Wright or either of them in your County."<sup>509</sup> These things were seized and sold to satisfy the judgment in Wells' favor.<sup>510</sup>

Another example takes place in 1679, where John Haselwood brought an estate action against Benjamin Granger in the Court of Chancery and obtained a decree in his favor.<sup>511</sup> However, Granger fled the province, but not before he fraudulently and privately sold the real and personal property at issue belonging now to Haselwood.<sup>512</sup> The Chancery Court held that Granger's conduct was contempt and directed the justices of the peace for Dorchester County to seize and sequester the real and personal property belonging to Granger at the time the decree was awarded to satisfy the decree and costs of the suit.<sup>513</sup> Both of Wells and Haselwood's cases reveal the utility of sequestration as an alternative to making an injured party whole when a contemnor was not available to pay or perform.<sup>514</sup>

There is one instance where a court had occasion to impose a relatively rare penalty: hard labor.<sup>515</sup> On February 10, 1691, the County Court for Somerset County, Maryland, heard three cases concerning men who were statutorily obligated to work on highways passing through Money Hundred.<sup>516</sup> For failure to do their work and failure to appear in court, all three men were held in contempt and, in addition to paying court costs, were also fined two days hard labor on the roads.<sup>517</sup> It appears that the particular penalty of hard labor was a type of judgment related to the underlying dispute, rather than a general penalty for contempt as such, hence it is unsurprising that hard labor does not appear frequently in contempt cases.<sup>518</sup> One should not infer that hard labor was a customary penalty for civil infractions, let alone contempt.<sup>519</sup> This was a fact specific purge condition.

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

<sup>509</sup> *See id.*

<sup>510</sup> *Id.*

<sup>511</sup> *Haselwood ex rel. Avery v. Granger*, 51 Md. Arch. at 237.

<sup>512</sup> *See id.*

<sup>513</sup> *See id.*

<sup>514</sup> *See id.*; *Wells*, 51 Md. Arch. at 165–67, 215–18 (Md. Ch. Ct., Dec. 29, 1678).

<sup>515</sup> *E.g.*, *In re Little*, 191 Md. Arch. 36 (Somerset Cnty. Ct., Md., Feb. 10, 1690) (holding one Christopher Little in contempt for failure to appear in a suit instigated by his master and fining him two additional days' work for his master and ordering him to pay court charges).

<sup>516</sup> *See id.*

<sup>517</sup> *See id.*

<sup>518</sup> *C.f.*, *e.g.*, *id.*

<sup>519</sup> *Id.*

## iv. Legislation and Contempt of Court.

Provincial common law governing judicial contempt power was mediated by declaratory acts.<sup>520</sup> The Maryland General Assembly passed a bill entitled “An Act Concerning Striking Officers and Other Offences” in 1654, for example, effectively codifying direct criminal contempt of court.<sup>521</sup> The typical justification for promulgating positive law concerning contempt power was to regulate poundage fees—fees that judicial officers collected for serving attachments<sup>522</sup> and could take the form of currency or tobacco.<sup>523</sup> The Act for Limitation of Officers Fees of 1676, for example, limited the fee for serving attachments for contempt to eighteen pounds of tobacco.<sup>524</sup>

Statutes touching the contempt power were occasionally enacted for other purposes too.<sup>525</sup> For example, statutes could fix the liability for a judicial officer’s contempt of their duties.<sup>526</sup> The Act for the Better

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<sup>520</sup> See, e.g., An Act Concerning Striking Officers and Other Offenses, 1 Md. Arch. 350 (Oct. 20, 1654) (providing penalties for certain crimes, including striking an officer, juror, or witness, and perjury); An Act for Punishment of Some Offenses Not Capital, 1 Md. Arch. 158, 159 (Aug. 2, 1642) (providing penalties for certain crimes, including striking an officer, juror, witness, magistrate, or sheriff, counterfeiting a signature or seal, and falsifying documents).

<sup>521</sup> An Act Concerning Striking Officers and Other Offenses, 1 Md. Arch. at 350.

<sup>522</sup> See, e.g., An Act for Limitation of Officers Fees, 2 Md. Arch. 532–33 (May 15—June 15, 1676).

<sup>523</sup> See *id.*

<sup>524</sup> See *id.*

<sup>525</sup> See An Act Requiring the Agents of the Lord Baltimore to Certify Into the Secretary’s Office, the Instructions and Conditions of His Plantations, with Fees by them Demanded; and Obliging his Lordship’s Deputy-Surveyors to Qualify Themselves According to Law, § 3, 75 Md. Arch. 173-174 (Apr. 15, 1707) (providing penalties, an oath, and other duties for agents and surveyors who handled land grants in Maryland); An Act for the Better Administration of Justice in Testamentary Affairs, Granting Administrations, Recovery of Legacies, Securing Filial Portions, and Distribution of Intestates Estates § 3, 75 Md. Arch. 240-42 (June 3, 1715) (providing for the administration of estates and other related matters); see also An Act for the Better Regulating Attachments, 63 Md. Arch. 410, 411 (Jul. 2, 1773) (providing mechanism for creditors to recover debts); An Act for the Appointment of Certain Officers, 13 Md. Arch. 515-18 (Jun. 4, 1692) (providing for the appointment and authority of constables and penalties for refusing to serve); An Act for the Constables Taking a List of Taxables of 1692, 13 Md. Arch. 538-39 (Jun. 2, 1692) (regulating constables list of taxable persons and providing penalties for hiding or concealing information); An Act Appointing Court days in Each Respective County in this Province, 2 Md. Arch. 222 (Apr.-May 1669) (providing court days for certain counties and penalties for a commissioner’s absence); An Act for the Administration of Justice of 1663, 1 Md. Arch. 496-97 (Sept.-Oct. 1663) (providing also court days for certain counties and penalties for a commissioner’s absence).

<sup>526</sup> See An Act Requiring the Agents of the Lord Baltimore to Certify Into the Secretary’s Office, the Instructions and Conditions of His Plantations, with Fees by them Demanded; and Obliging his Lordship’s Deputy-Surveyors to Qualify Themselves According to Law, § 3, 75 Md. Arch. at 173-174; An Act for the Appointment of Certain Officers, 13 Md. Arch.

Administration of Justice in the County Courts of this Province of 1678 empowered county commissioners to make rules and orders regulating county courts and their employees, and their suitors on pain of discretionary fines not to exceed one hundred pounds of tobacco.<sup>527</sup> Statutes creating a court of law or modifying it in some way could also explicitly authorize the court to wield the contempt power.<sup>528</sup> The statute authorizing the city court for Annapolis did precisely that.<sup>529</sup> These statutes did not give what the courts did not already have; arguably they merely *declared* the scope of their inherent power for the purpose of clarity and efficiency.<sup>530</sup>

*D. Contempt of the Maryland General Assembly.*<sup>531</sup>

The Lords Baltimore remained in England for much of the lifespan of the colony.<sup>532</sup> Their prerogative as lawgivers, therefore, was principally delegated to the provincial government, including Maryland General Assembly.<sup>533</sup> The assembly initially consisted of one body including ordinary freeholders and gubernatorial appointees.<sup>534</sup> It met for the first time on February 26, 1634.<sup>535</sup> The assembly later split into two chambers in 1646—

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at 515, 516–18; An Act Appointing Court Days in Each Respective County in this Province, 2 Md. Arch. at 222; An Act for the Administration of Justice of 1663, 1 Md. Arch. at 496, 497.

<sup>527</sup> See An Act for the Better Administration of Justice in the County Courts of this Province of 1678, 7 Md. Arch. 70, 70 (Oct.-Nov. 1678).

<sup>528</sup> See An Additional and Supplementary Act to the Several Acts for the Administration of Justice in Testamentary Affairs, § VI, 75 Md. Arch. 393 (Aug. 8, 1729); An Act for Keeping Good Rules and Orders in the Port of Annapolis, § XII, 75 Md. Arch. 111 (Oct. 2, 1696).

<sup>529</sup> See An Act for Keeping Good Rules and Orders in the Port of Annapolis, § XII, 75 Md. Archives 111 (Oct. 2, 1696).

<sup>530</sup> See *id.*; An Additional and Supplementary Act to the Several Acts for the Administration of Justice in Testamentary Affairs, § VI, 75 Md. Archives 393 (Aug. 8, 1729).

<sup>531</sup> I recognize that scholars may quibble about at what point the Maryland General Assembly technically became a “legislature.” This Article does not address that delve into that issue. Suffice it to say that the Maryland General Assembly was always a legislature in the sense that it involved representative persons involved in the lawmaking process, whether as a deliberative body or else in a lesser, more advisory role. See *legislature*, WORDORIGINS.ORG, *supra* note 180.

<sup>532</sup> See MERENESS, *supra* note 250, at 194.

<sup>533</sup> See *id.* at 194-95.

<sup>534</sup> See *id.*

<sup>535</sup> Maryland State Archives, *House of Delegates, Origin and Functions*, MD. MANUAL ONLINE (Nov. 8, 2023), <https://msa.maryland.gov/msa/mdmanual/06hse/html/hsef.html> (on file with the University of Baltimore Law Forum) [hereinafter Maryland State Archives, *House of Delegates*].

one for the freeholders—the other consisting of the Governor’s Privy Council.<sup>536</sup>

The upper chamber of the General Assembly was formally entitled the “House of the Governor and Council” and the lower chamber was known alternately as the “House of Burgesses” or “House of Delegates.”<sup>537</sup> The lower chamber became a representative body: each freeholder represented a hundred until 1658 and afterward, they represented counties.<sup>538</sup> The upper chamber represented the proprietary prerogative.<sup>539</sup> The Governor was the mouthpiece of Lord Baltimore: he exercised the right of veto over any legislation introduced by the lower chamber that was disagreeable to the proprietary and could prorogue the assembly at will.<sup>540</sup>

The General Assembly exercised a judicial function in two capacities.<sup>541</sup> First, the House of Delegates, like the medieval English Parliament, could operate as a court of general common law and apply the law of the land.<sup>542</sup> In this capacity, it could punish general common law crimes and contempts against the proprietary prerogative, such as treason and murder.<sup>543</sup> Second, the House of Delegates was the high court of its own privileges and the elections and qualifications of its own members.<sup>544</sup> In 1678, the House created a Committee on Elections and Privileges for the purpose of keeping track of precedents governing its privileges and investigating contested political races.<sup>545</sup> Both chambers frequently squabbled over the exact boundaries of their respective rights and privileges that they evolved over time.<sup>546</sup> The House of Delegates was the provincial inquest and was empowered to conduct impeachment proceedings and each House could also expel its own members.<sup>547</sup> Liability for criminal trial, contempt, and impeachment proceedings by the House could arise from the

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<sup>536</sup> See *id.* The split may have occurred as a matter of practice, rather than positive law, as early as 1646. 1 SCHARF, *supra* note 237, at 194.

<sup>537</sup> See RILEY, *supra* note 384, at 10, 98-99; BOND, *supra* note 259, at 3.

<sup>538</sup> Maryland State Archives, *House of Delegates*, *supra* note 535.

<sup>539</sup> See MERENESS, *supra* note 250, at 197.

<sup>540</sup> *Id.* at 197-98; MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 220 (1971); Bond, *supra* note 259, at 3.

<sup>541</sup> See CLARKE, *supra* note 540, at 29, 35-36, 145, 217-18.

<sup>542</sup> See *id.* at 29, 46-47.

<sup>543</sup> See *id.* 17-19, 29; RILEY, *supra* note 384, at 51; Mary Hemsley’s Case, 30 Md. Arch. 134, 138-39 (Md. Gen. Assembly, May 9-10, 1715); Thomas Smith’s Case, 1 Md. Arch. 16 (Md. Gen. Assembly, Mar. 14, 1637); Thomas Cornwallis’ Case, 1 Md. Arch. 17-18 (Md. Gen. Assembly, Mar. 14, 1637).

<sup>544</sup> See CLARKE, *supra* note 540, at 145, 217-18; RILEY, *supra* note 384, at 53, 180.

<sup>545</sup> See CLARKE, *supra* note 540, at 145-47; see, e.g., Stephen Bordley’s Case, 44 Md. Arch. 71, 74-75 (Md. Gen. Assembly, Aug. 6 and 10, 1745).

<sup>546</sup> See CLARKE, *supra* note 540, at 18-19; RILEY, *supra* note 384, at 53, 56, 58-59, 180, 182.

<sup>547</sup> See CLARKE, *supra* note 540, at 147; RILEY, *supra* note 384, at 48, 51; Governor of Md., Governor’s Address to Md. Gen. Assembly, 42 Md. Arch. 78, 79 (July 29, 1740).

same underlying allegations.<sup>548</sup> It must be said that at the end of the seventeenth century, the role of trying common law crimes migrated to the executive.<sup>549</sup> The tension between the two Houses pulled at the seams of the Maryland Charter until a formal separation of powers was recognized upon the ratification of the Constitution of Maryland in 1776.<sup>550</sup>

Just as the English Parliament was governed by a discrete enclave of common law, the *lex parlamentaria angliae*, the provincial legislature operated under its own rules and procedures from the earliest of times.<sup>551</sup> The *lex parlamentaria angliae* and the *lex parlamentaria durhelme* were cited as persuasive authority by the General Assembly in generating its own precedents, procedures, and privileges.<sup>552</sup> The very year that the Houses split, the Governor guaranteed the lower body privileges to the House of Commons at that time as freedom of speech and debate and freedom from arrest.<sup>553</sup> House resolutions issued in 1661 and 1662 assimilated the *lex parlamentaria angliae* into the customs of the assembly.<sup>554</sup> The freemen of Maryland were guaranteed “as much liberty as any Burgesses had or have in the Parliament of England or Magna Carta did afford them in England,” and that to the extent that any member committed an offense in his House, that offense was triable by his House only and not by “any Court whatsoever.”<sup>555</sup>

The appropriation of English common law through the Maryland Charter itself, as well as positive legislation and legislative precedent generated under its auspices, resulted in the creation of a unique enclave of parliamentary law for the province: the *lex parlamentaria maria terrae*.<sup>556</sup> The lower chamber, of course, claimed the right to depart from precedent as changing circumstances required.<sup>557</sup> This position was concordant with the

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<sup>548</sup> See, e.g., Daniel Sherwood’s Case, 27 Md. Arch. 416-17 (Md. Gen. Assembly, Oct. 28, 1709); Charles James’ Case, 2 Md. Arch. 483, 484, 490-91, 496, 499 (Md. Gen. Assembly, May 26, 1676).

<sup>549</sup> See CLARKE, *supra* note 540, at 48-49.

<sup>550</sup> See *id.* at 47-48 (citing Case of the Charles County Mutineers, 1 Md. Arch. 402 (Apr. 25, 1661)); Assembly Proceedings, 30 Md. Arch. 106 (Apr. 30, 1715) (describing situations where the general assembly requested the executive or judicial branches take actions to prosecute or punish crimes).

<sup>551</sup> See CLARKE, *supra* note 540, at 70-71, 80-81, 108-11, 152-53.

<sup>552</sup> See *id.* at 70-71, 80-81, 108-11, 152-53; Joseph H. Smith, *The Foundations of Law in Maryland: 1634 - 1715*, in SELECTED ESSAYS ON LAW AND AUTHORITY IN COLONIAL AMERICA 102-03 (George Athan Billias ed. 1965).

<sup>553</sup> See Joint Resolution, 1 Md. Arch. 429, 430 (Md. Gen. Assembly, Apr. 2, 1662); Lord Proprietor’s Resolution, 1 Md. Arch. 397, 398 (Md. Gen. Assembly, Apr. 18, 1661); Governor’s Declaration, 1 Md. Arch. 209 (Md. Gen. Assembly, Dec. 29, 1646).

<sup>554</sup> See Joint Resolution, 1 Md. Arch. 429 at 430; Lord Proprietor’s Resolution, 1 Md. Arch. 397 at 398.

<sup>555</sup> See CLARKE, *supra* note 540, at 64.

<sup>556</sup> See *id.* at 80, 108, 110, 153; SMITH, *supra* note 552, at 102-03.

<sup>557</sup> See SMITH, *supra* note 552, at 102-03.

ancient maxim—*consuetudo, contra rationem introducta, potius usurpation quam consuetudo appellari debet*—a custom introduced against reason ought to be called rather a usurpation than a custom.<sup>558</sup> The lower chamber fought for this maxim over the course of nearly two centuries, in a precipitous effort republicanize the colony.<sup>559</sup>

The assembly customarily promulgated official rules governing its proceedings at the beginning of each session.<sup>560</sup> The rules established for the assemblies of 1647 and 1745—assemblies nearly a century apart—asserted the authority of the legislature to fine and censure misdemeanors occurring in its presence, non-attendance, and bringing weapons into session.<sup>561</sup> Evolving precedent generated a substantial corpus of construction for these rules over time.<sup>562</sup> Although the phrase “contempt” was not explicitly included in legislative rules, the assembly quickly confirmed that it possessed inherent authority not only to punish contempts of the proprietary prerogative as such, but also a discrete power to punish contempts of its own dignity and the efficacy of its legislative and judicial functions as well.

In the Spring of 1697, the Speaker of the House of Delegates received a small mace representing his right to order the Sergeant-at-Arms to arrest a wanted person.<sup>563</sup> At a higher level of abstraction, the mace represented the

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<sup>558</sup> Cf. I DICTIONARY OF AMERICAN AND ENGLISH LAW 274 (Stewart Rapalje & Robert L. Lawrence eds. 1888).

<sup>559</sup> See House of Delegates Resolution, 40 Md. Arch. 69-70 (Md. Gen. Assembly, Aug. 6, 1745); House of Delegates Committee of Laws Report re: Complaint Against Thomas McNamara, 33 Md. Arch. 426, 429 (Md. Gen. Assembly, May 22, 1719); Philip Clarke’s Case, 22 Md. Arch. 166-67 (Md. Gen. Assembly, Oct. 29, 1698); Complaint of the Members of this House for Kent County, Maryland, 7 Md. Arch. 572 (Md. Gen. Assembly, Oct. 25, 1683); Joint Resolution, 1 Md. Arch. 429, 430 (Md. Gen. Assembly, Apr. 2, 1662); Lord Proprietor’s Resolution, 1 Md. Arch. 397, 398 (Md. Gen. Assembly, Apr. 18, 1661); Governor’s Declaration, 1 Md. Arch. 209 (Md. Gen. Assembly, Dec. 29, 1646); see also CLARKE, *supra* note 540, at 70–71, 79–81, 108–09, 110 & n. 44, 152–53 & n.42, 239–40 (illustrating Maryland’s adoption of the British custom to formally recognize and grant privilege); SMITH, *supra* note 552, at 102–03 (noting the House of Delegates’ adoption of the rights and privileges custom to the English House of Commons); RILEY, *supra* note 384, at 62–64 (citing a dispute between the Lower and Upper Houses when the Upper House would not assent to a Lower House Bill and an instance where the Lower House granted leave to members to serve as attorneys in Upper House as it sat as Court of Appeals); cf. I DICTIONARY OF AMERICAN AND ENGLISH LAW, *supra* note 558 (defining Latin terms related to custom).

<sup>560</sup> See, e.g., RILEY, *supra* note 384, at 18–19.

<sup>561</sup> See *id.*; House of Delegates Rules, 1 Md. Arch. 215, 216 (Md. Gen. Assembly, Jan. 21, 1647).

<sup>562</sup> See CLARKE, *supra* note 540, at 190-91, 205–07; Richard Hill’s Case, 22 Md. Arch. 213 (Md. Gen. Assembly, Oct. 26, 1698); Robert Burle’s Case, 1 Md. Arch. 430 (Md. Gen. Assembly, Apr. 3, 1662).

<sup>563</sup> RILEY, *supra* note 384, at 115.

contempt power inherent to the House's constitutional authority.<sup>564</sup> The penalties for legislative contempt were substantially the same as those for judicial contempt, but they also included, in the case of members, forfeiture of their public allowance and even suspension or outright expulsion from the assembly.<sup>565</sup>

On November 6, 1770, the House of Delegates publicly memorialized its contempt power via public proclamation:

*Resolved, unanimously, That this House is constitutionally invested with a power to commit to the public Goal by Way of Punishment any Person for Breach of Privilege or Contempt, there to remain till discharged by Order of this House.*<sup>566</sup> *Resolved, nemine contradicente, That this House, as the grand Inquest of the Province, has an unquestionable Authority founded on Precedent, and long uninterrupted usage to hear and inquire into all Complaints and Grievances, and, as incidental to that Authority, has constitutionally a power to commit any person for any Crime whatsoever to the publick Gaol, there to remain till he be discharged by due course of Law.*<sup>567</sup>

The language of this proclamation seems to confirm the House's view that its contempt power was inherent: the text of Chapter VII of the Maryland Charter and precedent merely "declared" and clarified the contours of this power which it must possess as a matter of natural law and right reason.<sup>568</sup>

The most frequent types of infractions incurring legislative contempt liability were non-attendance and disrespectful remarks made in or about the assembly.<sup>569</sup> On May 1, 1666, for example, the House of Delegates considered the case of Edward Erbery, a merchant from Bristol who disturbed the house by calling it a "whole howse [of] Papists, Rogues, Turdy rogues,"

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<sup>564</sup> *Cf. id.* (granting the speaker the power to use the mace and give it to a sergeant-at-arms, which, in turn, granted the sergeant at arms the authority to detain anyone the speaker or house ordered and bring them before the speaker).

<sup>565</sup> *See, e.g.,* CLARKE, *supra* note 540, at 205–07; Governor of Md., Governor's Address to Md. Gen. Assembly, 42 Md. Arch. 78, 79 (July 29, 1740).

<sup>566</sup> RILEY, *supra* note 384, at 296; House of Delegates Resolution, 62 Md. Arch. 431 (Md. Gen. Assembly, Nov. 6, 1770).

<sup>567</sup> RILEY, *supra* note 384, at 296; House of Delegates Resolution, 62 Md. Arch. 431 (Md. Gen. Assembly, Nov. 6, 1770).

<sup>568</sup> *See* RILEY, *supra* note 384, at 296; House of Delegates Resolution, 62 Md. Arch. 431 (Md. Gen. Assembly, Nov. 6, 1770).

<sup>569</sup> *See, e.g.,* Richard Snowden's Case, 44 Md. Arch. 517 (Md. Gen. Assembly, May 26, 1747).

a “Turdy shitten assembly,” and a “Company of turdy fellows . . . ashamed of the place from whence wee came.”<sup>570</sup> His tirade included a “greate many of other Extravagant words,” including that “Charles Calvert was a Rogue.”<sup>571</sup> Erbery fumed that the whole “Assembly were a Company of pittifull Rogues & puppyes & there is not one in the Cuntry deserves to keepe me Company but Charles Calvert who owes me ten thousand pounds of tobacco.”<sup>572</sup> For this outburst, Erbery was tied to apple trees, publicly whipped with thirty-nine lashes on the bare back, and then forced to beg forgiveness of both Houses.<sup>573</sup> The use of the sheriff supports the inference that judicial officers executed the role of the Sergeant-at-Arms before 1697.<sup>574</sup>

The General Assembly zealously guarded the integrity of its elections and had occasionally held civil servants in contempt for failure to fulfill their election-related duties.<sup>575</sup> As in England, a bulk of contested election precedent accumulated from sheriff malfeasance.<sup>576</sup> Misconduct of local sheriffs was a severe problem in the province as in the motherland.<sup>577</sup> In the Fall of 1712, for example, the House of Delegates’ Committee on Privileges and Elections investigated allegations of election interference in Baltimore County, Maryland.<sup>578</sup> The General Assembly ultimately determined that one James Presbury, Sheriff of Baltimore County, was guilty of election interference.<sup>579</sup> The members of the House of Delegates who took their seats thanks to his malfeasance—Richard Colegate, Edward Stevenson, Thomas Hammond, and William Talbot—were expelled.<sup>580</sup> Presbury was held in contempt, censured, made to apologize at the bar of the House, and fined a total of one thousand and seven hundred pounds of tobacco.<sup>581</sup>

Contempt power could be brought to bear against the staff of the General Assembly for shirking their duties.<sup>582</sup> On August 19, 1681, for example, the upper chamber found John Bloomfield, the late crier of the Provincial Court guilty of contempt towards the Lord Proprietor and the

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<sup>570</sup> *Edward Erbery’s Case*, 2 Md. Arch. at 55; *Thomas Adams’ Case*, 1 Md. Arch. at 92.

<sup>571</sup> An Additional Act for the Sowing of English Grain, 2 Md. Arch. 120, 88 (Md. Gen. Assembly, May 1, 1666).

<sup>572</sup> *Id.*

<sup>573</sup> *Id.* at 89-90.

<sup>574</sup> *Id.*

<sup>575</sup> See *James Presbury’s Case*, 29 Md. Arch. 136, 136–37 (Md. Gen. Assembly, Oct. 31, Nov. 3, 1712).

<sup>576</sup> *Id.*

<sup>577</sup> *Id.*

<sup>578</sup> *Id.*

<sup>579</sup> *Id.*

<sup>580</sup> *Id.*

<sup>581</sup> *James Presbury’s Case*, 29 Md. Arch. at 136–37.

<sup>582</sup> See *In re Bloomfield*, 7 Md. Arch. 116, 117 (Md. Gen. Assembly, Aug. 19, 1681).

Governor's Privy Council for failure to fulfill his duty to sweep and kept clean public buildings, including the assembly rooms and the Provincial Court itself.<sup>583</sup> Bloomfield was dismissed and replaced by James Cullin, who was charged to do better than his predecessor.<sup>584</sup>

On October 14, 1728, the House of Delegates held sheriff, James Woolford, in contempt for interfering with the return of one Colonel William Enalls to the House.<sup>585</sup> Out of consideration for the fact that Woolford had a large family, he only had to pay a five pound fine and apologize at the bar of the House.<sup>586</sup> On October 9, 1757, sheriff, Hercules Coutts, was held in contempt by the House of Delegates for being intoxicated at the polls on election day.<sup>587</sup> Once again, out of consideration for coutts' family and "lower circumstances," he was only required to apologize and pay costs.<sup>588</sup>

The General Assembly employed the legislative contempt power as an extension of its duty to supervise the other branches of government.<sup>589</sup> Complaints about the integrity of public officials not related to elections were reported to the House of Delegates Committee on Grievances.<sup>590</sup> Misconduct by local officials, such as sheriffs and justices of the peace, was unfortunately quite common.<sup>591</sup> Albert Venn Dicey incisively observed that a critical distinction between the rule of law imposed under the English Constitution and that by the Second Empire was the greater availability of a remedy in the former against oppressive civil servants.<sup>592</sup> The liberality of the English Constitution is thus manifest not only Britannia herself, but also through her offspring—even before they reached the age of emancipation.<sup>593</sup> The General Assembly's vigilant police of provincial officials witnesses the kindling of a republican spirit in the breasts of the freeholders.<sup>594</sup>

A worthy example of the assembly's careful police of local jurisdictions is the case of John Leeds.<sup>595</sup> In 1738, Leeds, a justice of the peace, was summoned to appear before the assembly on charges of various improprieties.<sup>596</sup> His audacity was so great that he saw fit to thump his chest in the House and make "reviling speeches" against the legislature:

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<sup>583</sup> *Id.*

<sup>584</sup> *Id.*

<sup>585</sup> *See In re Woolford*, 36 Md. Arch. 208 (Md. Gen. Assembly, Oct. 14, 1728).

<sup>586</sup> *Id.*

<sup>587</sup> *In re Hercules Coutts*, 55 Md. Arch. 225 (Gen. Assemb., Oct. 9, 1757).

<sup>588</sup> *Id.*

<sup>589</sup> *See DICEY*, *supra* note 184, at 224.

<sup>590</sup> *See id.* at 116.

<sup>591</sup> *See id.* at 174.

<sup>592</sup> *See id.* at 111, 302.

<sup>593</sup> *See id.*

<sup>594</sup> *See supra* Part I.

<sup>595</sup> *John Leeds' Case*, 40 Md. Arch. 205, 205–07 (Gen. Assemb., May 22, 1738).

<sup>596</sup> *Id.*

You have been charged here with having said that you know not by what Authority this House called you before Them.<sup>597</sup> That you thought as a Magistrate You were for any Misdemeanour in your Office only answerable to the Government, and not to this House: And that you valued not a button or fart what this House could do to you, and were it not, you thought people wou'd think you were fearful of appearing here, you would not attend Them on their Summons; and that you further said, this House had no more Authority to call you before Them than your horse had; also that you have grosly abused Mr Nicholas Goldsborough a member of this House by calling Him a Son of a bitch, and Saying 'twas by his means you were called here.<sup>598</sup> Which matters have been fully proved against you.<sup>599</sup>

The Clerk of the House requested that Leeds sign a written apology crafted by the legislature.<sup>600</sup> Leeds' ego would not yield. He was therefore remanded to the custody of the sheriff and resided in jail until his pride broke.<sup>601</sup> No one can dispute that the mace of the Sergeant-at-Arms was put to good use here.<sup>602</sup>

*E. Contempt of the Seigneur.*

Chapter XIX of the Maryland Charter granted the proprietary the right of subfeudation<sup>603</sup> and it was not idle language.<sup>604</sup> Lord Baltimore aimed to conserve his prerogative by filling elite government positions with friends and fellow Catholics.<sup>605</sup> He also envisioned, at least in the beginning, the creation of a vast manorial system.<sup>606</sup> The system consisted of magnates of the landed class would sit in the upper chamber of the provincial legislature in a manner akin to the House of Lords, while the freeholders would sit in a lower chamber akin to the House of Commons.<sup>607</sup> His entire policy was animated by a spirit of clique and political cunning evocative of the Stuart

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<sup>597</sup> *Id.*

<sup>598</sup> *Id.*

<sup>599</sup> *Id.*

<sup>600</sup> *Id.*

<sup>601</sup> *John Leeds' Case*, 40 Md. Arch. at 205–07.

<sup>602</sup> *Id.*

<sup>603</sup> See OSGOOD, 2 THE AMERICAN COLONIES, *supra* note 4, at 8–9.

<sup>604</sup> *See id.*

<sup>605</sup> *See id.* at 10.

<sup>606</sup> *See id.* at 9, 21.

<sup>607</sup> *See id.* at 25.

King who granted his patent.<sup>608</sup> His dream was never realized, but that it was plausible underscores the fact that Maryland was a fiefdom in the strongest sense word.<sup>609</sup>

Though the manorial system did not absorb into the political economy of the province to the extent preferred by the House of Calvert, it nevertheless formed a vital component of the cultural landscape.<sup>610</sup> Violating the rights of a manorial lord was, in effect, a contempt of the Lord Proprietary himself.<sup>611</sup> Records of manorial courts—courts leet and courts baron—are scarce. We have one illustrative example from 1659, however, when a manorial tenant was found in contempt of his lord.<sup>612</sup> The Court Leet of St. Clement's Manor assembled to adjudicate the charge that Luke Gardyner caught two wild hogs and neglected to give the lord his rightful share of the bounty.<sup>613</sup> The jury found against Gardyner, characterizing his offense as a contempt of his lord, and fined him two hundred pounds of tobacco.<sup>614</sup> Though we can barely speculate from sparse records of this kind, we can at least infer that contempt proceedings were available to enforce lawful authority in every level of the feudal system in Maryland.<sup>615</sup>

#### IV. CONTEMPT POWER IN COMPARATIVE PERSPECTIVE.

Common law contempt doctrine in the Kingdom of England and the Province of Maryland in the seventeenth and eighteenth centuries was largely coextensive.<sup>616</sup> The source of contempt power gradually attenuated from the king and the Lord Proprietor respectively, however, and became appurtenant to various governmental institutions as such.<sup>617</sup> The tipping point in England was the Glorious Revolution of 1689.<sup>618</sup> The equivalent in Maryland was the Maryland Declaration of Rights and Maryland Constitution of 1776.<sup>619</sup> The Maryland Constitution of 1776 formally invested the judicial and legislative branches of government with contempt power.<sup>620</sup> The constitutional fate of

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<sup>608</sup> See *id.* at 8–9, 21, 25.

<sup>609</sup> See OSGOOD, 2 THE AMERICAN COLONIES, *supra* note 4, at 8–9, 21, 25.

<sup>610</sup> See *id.* at 58–59.

<sup>611</sup> See *id.*

<sup>612</sup> Cole v. Gardyner, 53 Md. Arch. 628 (St. Clement's Manor, Ct. Leet, 1659).

<sup>613</sup> *Id.*

<sup>614</sup> *Id.*

<sup>615</sup> *Id.*

<sup>616</sup> See DE LOLME, *supra* note 11, at 44; 1 SCHARF, *supra* note 237, at 63, 278–79, 513.

<sup>617</sup> See OSGOOD, 2 THE AMERICAN COLONIES, *supra* note 4, at 8–9.

<sup>618</sup> See DE LOLME, *supra* note 11, at 44.

<sup>619</sup> See generally 3 SCHARF, *supra* note 237 (explaining the effect of the American Revolutionary War on Maryland).

<sup>620</sup> See *id.* at 278–79.

what, in modern parlance, we might call “executive contempt power,” however, is less clear.<sup>621</sup>

*A. Contempt Power in Imperial Perspective.*

The dominant theme in the story of contempt power’s migration from the Palace of Westminster to the shores of St. Mary’s is continuity, not change.<sup>622</sup> That it is the flag of the State of Maryland alone that bears the symbols of feudal heraldry from its proprietary past is a testament to the fact that Maryland was and is a vessel for an impressive legal tradition.<sup>623</sup> The Province of Maryland was a child of the English culture and the Anglo-Saxon legal tradition: the deep imprint of the English common law tradition is a birth mark that distinguishes the contemporary constitution and common law of the State of Maryland to this very day.<sup>624</sup> Contempt power is a vestige of empire, an empire of law.<sup>625</sup>

i. Contempt of the Executive.

A doctrine that in modern parlance we might call “contempt of the executive power” existed in both the Kingdom of England and the Province of Maryland.<sup>626</sup> I refer to this family of contempt in the Kingdom of England as “contempt of the sovereign.” I refer to this family of contempt in the Province of Maryland as “contempt of the Lord Proprietor”.<sup>627</sup> Contempt of the executive power in England consisted of four genera: contempt of the king’s palace, contempt of the royal prerogative, contempt of the king’s person or government, and contempt of the King’s title.<sup>628</sup> There is affirmative evidence that all but the first existed in both jurisdictions.<sup>629</sup> The first genus did not exist in the Province of Maryland per se because there was no proprietary “palace”; moreover, I found no evidence of any analogous building, such as a proprietary residence or even the governor’s residence, being treated equivalently for the purposes of contempt doctrine with the

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<sup>621</sup> See *infra* Section IV.A.1.

<sup>622</sup> Compare *supra* Part II, with *supra* Part III.

<sup>623</sup> Compare *supra* Part II, with *supra* Part III.

<sup>624</sup> Compare *supra* Part II, with *supra* Part III.

<sup>625</sup> Compare *supra* Part II, with *supra* Part III.

<sup>626</sup> Compare *supra* Section II.B, with Section III.B.

<sup>627</sup> Compare *supra* Section II.B, with Section III.B.

<sup>628</sup> Compare *supra* Section II.B, with Section III.B.

<sup>629</sup> Compare *supra* Section II.B, with Section III.B (detailing that three of the four genera within the family of contempt of the executive existed in both Maryland and England).

king's palace.<sup>630</sup> Intrusions and disruptions of the provincial judiciary and the General Assembly, though ultimately contempts of the Lord Proprietor, are more appropriately classified as discrete contempts of those specific institutions as grantees of the Lord Proprietor's authority.<sup>631</sup>

Prerogative contempt in the Kingdom of England and the Province of Maryland had at least two co-extensive species: refusing to assist the executive and his servants achieve public good, such as by refusing to serve in foreign war for pay;<sup>632</sup> and disobedience of the executive's lawful commands or prohibitions.<sup>633</sup> I believe any statute without a penalty clause was technically indictable as a misdemeanor in in both jurisdictions at all relevant times, though it appears that rule was a principle of statutory interpretation, not a form of contempt of the executive (i.e., the royal prerogative and proprietary prerogative respectively) as such.<sup>634</sup> The lone specie in England within this genus for which no provincial equivalent was found is the preference of foreign interest over the executive.<sup>635</sup> The absence of evidence, as they say, is not the evidence of absence.<sup>636</sup> I could not find any instances when a Marylander engaged in acts savoring in treason or trade that would advantage a foreign power over their own countrymen.<sup>637</sup> The Maryland treasons preserved in the historical record tended to involve Marylander's acting for their own subversive motives rather than as agents of foreign powers.<sup>638</sup>

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<sup>630</sup> *But see supra* text accompanying note 616 (noting that there were offenses against certain institutions in England that can be considered "contempt of the Executive," but for which an analogous colonial Maryland examples cannot not be found).

<sup>631</sup> *See supra* text accompanying notes 617-19.

<sup>632</sup> *Compare* Act of 1495, 11 Hen. 7, ch. 18, § 1 (requiring subjects to serve in war on pain of forfeiting and losing their offices, fees, and annuities), *with In re Brent*, 4 Md. Arch. 129, 129 (Md. Prov. Ct. 1642) (dismissing an accusation of contempt against one Giles Brent because his decision to discharge soldiers hired for an Indian expedition was made in good faith).

<sup>633</sup> *Compare* King v. Earl of Nottingham, (1609) 145 Eng. Rep. 284, 285 (holding that it is contempt of the sovereign to not return from beyond the sea upon sigh of the privy seal), *with In re Nutter*, 87 Md. Arch. 158, 159 (Somerset Cnty. Ct., Md. 1671).

<sup>634</sup> *Compare* MCBAIN, *supra* note 31, at 104, *with* An Act for Punishment of Certain Offenses as Swearing, Cursing, Adultery, & etc., 1 Md. Arch. 286, 286 (June 29, 1650).

<sup>635</sup> *Contra supra* text accompanying notes 623-25 (citing occurrences of contempt where people preferred foreign ideals over the kings in England, for which an analogous Maryland example could not be found).

<sup>636</sup> *E.g.*, CARL SAGAN, THE DEMON-HAUNTED WORLD: SCIENCE AS A CANDLE IN THE DARK 200 (Headline Book Publishing, 2nd ed. 1997).

<sup>637</sup> *Contra supra* text accompanying notes 623-25 (citing occurrences of contempt where people preferred foreign ideals over the kings in England, for which an analogous Maryland example could not be found).

<sup>638</sup> *See In re* The Reformation, 4 Md. Arch. 231, 231 (Md. Prov. Ct. 1643).

Contempt of the chief executive's person or government in England and Maryland was coextensive as to at least two species: seditious libel and slander scandalizing the chief executive and his government,<sup>639</sup> encouraging rebellion,<sup>640</sup> and spreading fake news to undermine the executive.<sup>641</sup> I found no Maryland analogues for contempts arising from swaying the king's policy through intimidation, accusing the king of violating his coronation oath, or refusing to pay custom in a foreign port.<sup>642</sup> Since there is no analogue to coronation for the fief, there is no plausible provincial expression for that specie.<sup>643</sup> I also found no precedents affirmatively standing for the proposition that refusing to pay a custom in a foreign port or attempting to sway the Lord Proprietor's policy by threateningly alluding to popular opinion was contempt either.<sup>644</sup>

Contempt of the chief executive's title in the Kingdom of England and the Province of Maryland was coextensive for at least one specie.<sup>645</sup> Denying the king's title was contempt; I found no corollary case where someone was charged or held in contempt by denying Lord Baltimore's title.<sup>646</sup> I did find cases where refusal to swear oaths of loyalty to the proprietary required by law were punished as contempt.<sup>647</sup>

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<sup>639</sup> Compare Fuller's Case, (1607) 77 Eng. Rep. 1322; 12 Co. Rep. 41,43 (resolving that an attorney who scandalizes the king or his government in court is liable for contempt), with Willan v. Innis, Md. Arch. 602, 603 (Md. Prov. Ct. 1662) (detailing an attack on a Sheriff of St. Mary's County, Maryland).

<sup>640</sup> King v. Anonymous, (1684) 87 Eng. Rep. 33; 3 Mod. 53 (indicting a man for contempt for drinking to the pious memory of a man executed for high treason, sentencing him to pay a £1,000.00 fine and stand in the pillory).

<sup>641</sup> Compare HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 23§ 5, p. 60 (noting that spreading fake news to undermine the king is contempt), with An Act Against Divulgers of Fake News, 2 Md. Arch. 273, 274 (Apr. 19, 1671).

<sup>642</sup> *C.f. supra* text accompanying notes 627-32 (citing contempt in England for attempting to sway the king's policy, accusing the king of violating his oath, or refusing to pay custom, for which an analogous Maryland occurrence could not be found).

<sup>643</sup> *C.f. supra* notes text accompanying 627-32 (citing contempt in England for attempting to sway the king's policy, accusing the king of violating his oath, or refusing to pay custom, for which an analogous Maryland occurrence could not be found).

<sup>644</sup> *C.f. supra* text accompanying notes 627-32 (citing contempt in England for attempting to sway the king's policy, accusing the king of violating his oath, or refusing to pay custom, for which an analogous Maryland occurrence could not be found).

<sup>645</sup> *C.f. supra* HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 24 §§ 1-10, p. 61-65 (noting that denying the king's title was contempt, but an analogous Maryland contempt within that genus could not be found).

<sup>646</sup> Compare *id.* at ch. 24 §§ 1-10, pp. 61-65 (noting that refusing to take an oath of loyalty to the King was contempt), with Atty' Gen. v. Thurston, 3 Md. Arch. 364, 353 (Md. P.C., 1659) (expelling Quaker Thomas Thurston from the Province for refusal to swear oath of fidelity to Lord Baltimore on pain of whipping).

<sup>647</sup> Compare HAWKINS, 1 PLEAS OF THE CROWN, *supra* note 25, at ch. 24 §§ 1-10, pp. 61-65 (noting that refusing to take an oath of loyalty to the King was contempt), with Atty' Gen. v.

## ii. Contempt of the Judiciary.

The family of contempt known as contempt of the judiciary was largely coextensive between the Kingdom of England and the Province of Maryland.<sup>648</sup> Every court of record in both jurisdictions wielded the contempt power.<sup>649</sup> There are two genera within this family of contempt—direct contempt and constructive contempt. Each genus—consisted of practically an infinite number of species.<sup>650</sup> Contempts eventually characterized as “direct” or within the court’s presence included many offenses, including anyone who insulted the presiding judge.<sup>651</sup> Contempts eventually characterized as “indirect” or “constructive,” that is, interfering with judicial process beyond the court’s proximity, also included a myriad of offenses, such as failure to appear or a judicial officer serving an order or subpoena.<sup>652</sup>

Contempt power was an instrument of internal accountability within judicial institutions in England and Maryland.<sup>653</sup> Judges of superior courts in both jurisdictions therefore could hold judges of inferior courts in contempt for injustice, delay, or dereliction of duty; moreover, judges could hold judicial officers in contempt for the same reasons.<sup>654</sup> The other two species of contempt of court that I previously noted are exceptional from a modern point of view, though well precedented in England, have no precedent in the Province of Maryland to my knowledge.<sup>655</sup> I found no instance in Maryland history before the American Revolution when a man was found guilty of *scandalam magnatum*—uttering words scandalizing the character of a judge

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Thurston, 3 Md. Arch. 364, 353 (Md. P.C., 1659) (expelling Quaker Thomas Thurston from the Province for refusal to swear oath of fidelity to Lord Baltimore on pain of whipping).

<sup>648</sup> Compare *supra* Section II.C, with *supra* Section III.C.

<sup>649</sup> Compare *supra* Section II.C, with *supra* Section III.C.

<sup>650</sup> Compare *supra* Section II.C, with *supra* Section III.C.

<sup>651</sup> Compare King v. Mayo, (1663) 83 Eng. Rep. 1081; 1 Keble 508 (holding a man in contempt for insulting the court), with *In re* Bowles, 54 Md. Arch. 350, 350 (Kent Cnty. Ct., Md., Oct. 12, 1676) (on file with the Arch. of Md. Online) (attacking John Bowles for uttering scandalous words in an unseemly manner against Justice Joseph Wickes).

<sup>652</sup> Compare Rove v. West, (1558) 21 Eng. Rep. 21; Cary 39 (holding a defendant in contempt for disobeying a writ of subpoena and beating and wounding the person who served it), with Att’y Gen. v. Causin, 60 Md. Arch. 590, 590, contempt for insulting the court), and *In re* Bowles, 54 Md. Arch. 350, 350 (Charles Cnty. Ct., Md., Nov. 10, 1674) (holding two commissioners in contempt and fining them 1,000 pounds of tobacco for failure to appear).

<sup>653</sup> Compare *Beardmore*, 97 Eng. Rep. at 564; 2 Burr. at 792 (holding under-sheriffs in contempt for not executing a sentence), with Taylor v. Llewellyn, 375 Md. Arch. 929, 929 (Md. Prov. Ct., 1692) (issuing a show cause order to the justices of the County Court for Anne Arundel County, Maryland for disobeying a writ of habeas corpus).

<sup>654</sup> Compare *Beardmore*, 97 Eng. Rep. at 564; 2 Burr. at 792, with *Llewellyn*, 375 Md. Arch. 929, 929 (Md. Prov. Ct., 1692).

<sup>655</sup> Compare Section II.C, with Section III.C.

or court.<sup>656</sup> Likewise, I found no instance in Maryland history before the American Revolution when a member of the press was found guilty of contempt by publication for making public the proceedings of a pending case.<sup>657</sup>

Contempt in both jurisdictions was punishable by fine, humiliation, corporation punishment, and incarceration.<sup>658</sup> In both jurisdictions, punishment could be mitigated or withdrawn altogether by a forthright apology, explanation, or excuse.<sup>659</sup> Both the English Parliament and the Maryland General Assembly passed legislation regulating judicial contempt power, for example, through statutes prescribing specific penalties for contempt in specific situations.<sup>660</sup>

### iii. Contempt of the Legislature.

The family of contempt known as contempt of the legislature was largely coextensive between the Kingdom of England and the Province of Maryland.<sup>661</sup> Contempts within this family are so various they can only be reduced to two genera consisting of practically infinite species: what eventually came to be known as direct contempt and constructive contempt.<sup>662</sup> Both genera ordinarily involved violations of parliamentary privileges, including the privileges of speech and debate and judgment of elections.<sup>663</sup> Contempts eventually characterized as “direct” or within the legislature’s presence included a variety of offenses, most commonly by disruption of proceedings on the floor during session.<sup>664</sup> Contempts eventually characterized as “indirect” or “constructive,” that is, interfering

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<sup>656</sup> Compare Section II.C, with Section III.C.

<sup>657</sup> Compare Section II.C, with Section III.C.

<sup>658</sup> Compare *Dangerfield*, 87 Eng. Rep. at 43; 3 Mod. at 68, with *In re Mayle*, 54 Md. Arch. 566, 566 (Talbot Cnty. Ct., Md., June 17, 1673) (fining county commissioner Anthony Mayle five hundred pounds of tobacco for using abusive language in the presence of the court).

<sup>659</sup> See *Roach*, 26 Eng. Rep. at 685; 2 Atk. at 472.

<sup>660</sup> Compare The Offenses Within the Court Act of 1541, 33 Hen. VIII. ch. 12 (prescribing penalty for contemptuous fighting in the court’s presence), with An Act Concerning Striking Officers and Other Offenses, 1 Md. Arch. 350, 350, (Oct. 20, 1654) (providing that anyone who struck a judicial officer, juror, or witness in the presence of the court or any other person with a drawn weapon in the presence of the court was liable to suffer corporal punishment, fine, or incarceration).

<sup>661</sup> Compare Section II.D, with Section III.D.

<sup>662</sup> Compare Section II.D, with Section III.D.

<sup>663</sup> *Id.*

<sup>664</sup> Compare *Silk Rioter’s Case*, 11 House of Commons Journal 667–68 (Jan. 21, 1697) (holding rioters on Parliament grounds in contempt), with *Edward Erbery’s Case*, 2 Md. Arch. 55–57 (Md. Gen. Assemb., Apr. 26, 1666) (holding a man in contempt for making indecent speeches and ordering him whipped).

with legislative process beyond the legislature's proximity, also included a myriad of offenses, including election interferences and the disobedience of summonses or subpoenas.<sup>665</sup>

I previously noted that there were two types of legislative contempt that are distinguishable from a modern point of view.<sup>666</sup> Anyone who violated the parliamentary privilege of publishing deliberations while Parliament was in session was liable for "contempt by publication."<sup>667</sup> Anyone who uttered scandalous words (*scandalam magnatum*) about a member of either House of Parliament was likewise liable for contempt.<sup>668</sup> I did not, however find any analogous precedents from Maryland during the colonial era.<sup>669</sup>

#### iv. Contempt of the Seigneur.

Though not a discrete family of contempt, contempts that can be characterized as executive or judicial were committed against lower authorities—lords who received patents of nobility from the king and manorial sub-lords who were enfeoffed lands from the Lord Proprietor.<sup>670</sup> The County Durham and the Province of Maryland were both palatinates.<sup>671</sup> The Bishop of Durham and the Lord Baltimore had tremendous power—absolute power so long as its exercise did not usurp Magna Carta or an Act of Parliament.<sup>672</sup> Disobedience or disrespect shown seignorial authorities, such as the Bishop of Durham's council or the courts leet of Maryland manors were liable for contempt.<sup>673</sup>

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<sup>665</sup> Compare *Alexander Murray's Case*, 26 House of Commons Journal at 31–32, with *James Presbury's Case*, 29 Md. Arch. at 137.

<sup>666</sup> Compare Section II.D, with Section III.D.

<sup>667</sup> See, e.g., 4 WILLIAM COBBETT, *Dr. Cary's Case (1677)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803 825 (T.C. Hansard 1808).

<sup>668</sup> *John Horne's Case of 1774*, *supra* note 202, at 1003.

<sup>669</sup> Compare Section II.D, with Section III.D.

<sup>670</sup> Compare LAPSLEY, *supra* note 215, at 173–74, 185, 195–96 (noting that the council of the Bishop of Durham punished contempt of lower courts in the County Durham, including hundred courts and the permanent county court), with *Cole v. Gardyner*, 53 Md. Arch. 628, 628 (Ct. Leet of St. Clement's Manor, Maryland, 1659 (fining Luke Gardyner 200 pounds of tobacco for catching two wild hogs and contemptuously refusing to give the Lord of St. Clement's Manor his rightful share)).

<sup>671</sup> Compare Section II.E, with Section III.E.

<sup>672</sup> Compare Section II.E, with Section III.E.

<sup>673</sup> Compare Section II.E, with Section III.E.

*B. Contempt Power in Constitutional Perspective.*

There is an interesting question of whether contempt power was wielded by any legal or quasi-legal bodies between the First Continental Congress and the signing of Maryland Declaration of Rights.<sup>674</sup> The records of the Committee of Observation for Harford County dated July 21, 1775, note that one Thomas Chalmers was charged with speaking about it in a contemptuous manner.<sup>675</sup> Chalmers apologized and explained that he spoke in the heat of passion without evil intent.<sup>676</sup> It appears this satisfied the committee, so no further sanctions were imposed.<sup>677</sup> This is the only record of this kind that I could find.<sup>678</sup> It at least demonstrates that the notion of inherent power, including contempt power, was at work in the context of revolutionary bodies conducting proceedings in the horizon between two constitutional regimes.<sup>679</sup>

On August 14, 1776, a convention of Maryland freeholders assembled in Annapolis to frame the new constitution of Maryland.<sup>680</sup> They completed their labors on November 11, 1776.<sup>681</sup> The Maryland Declaration of Rights of 1776 consisted of forty-two articles, the Maryland Constitution of 1776 consisted of sixty.<sup>682</sup> The first article of the Maryland Declaration of Rights—in a single sentence—dealt the deathblow to the palatinate and feudalism by enshrining the principle of popular sovereignty which stated, “[t]hat all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole.”<sup>683</sup> Article VI of the Maryland Declaration of Rights went on to formally institute the principle of the separation of powers: legislative executive, and judicial.<sup>684</sup> Both overarching principles frame our general understanding of the Maryland Constitution and how contempt power integrates into it specifically.<sup>685</sup>

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<sup>674</sup> Compare Section II.E, with Section III.E.

<sup>675</sup> 1774 – 1777, Committee of Observation, Harford County Record Book, Maryland Center for History and Culture MS 2159, at 29.

<sup>676</sup> *Id.*

<sup>677</sup> *Id.*

<sup>678</sup> *See id.*

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

<sup>680</sup> Convention of Delegates, 78 Md. Arch. 209, 209 (Md. Prov. Ct., 1776).

<sup>681</sup> *Id.* at 375.

<sup>682</sup> *See generally* MD. DECL. OF RIGHTS (1776) (explaining the format and structure of the Maryland Constitution of 1776).

<sup>683</sup> *Id.* at art. I.

<sup>684</sup> *Id.* at art. IV.

<sup>685</sup> *Id.* at arts. I, VI.

## i. Contempt of the Maryland Legislature.

Article I of the Maryland Constitution established the legislative branch of government.<sup>686</sup> The Maryland General Assembly retained its unique body of common law—the *lex parliamentaria maria terrae*—through the extension of common law protection guaranteed under Article III and more particularly Article VIII of the Maryland Declaration of Right.<sup>687</sup> I lay greater emphasis on Article VIII because it explicitly states that the proceedings of the legislature “ought not to be impeached in any other court of judicature.”<sup>688</sup> It therefore appears to have adopted the rule from the case of the *Aylesbury Men, Brass Crosby’s Case*, and others that the courts of common law cannot encroach upon parliamentary proceedings, including contempt proceedings.<sup>689</sup> Article VIII of the Declaration of Rights also implicitly recognized the common law principle that each House of the General Assembly is the high court of its own elections and privileges, as was further explicated under Articles IX and XIV of the Maryland Constitution for the House of Delegates and the Senate, respectively.<sup>690</sup>

This unique enclave of common law—the law of the Maryland parliament—subsumed the heritage of contempt power belonging to both its provincial predecessor and its imperial parent.<sup>691</sup> In 1776, that heritage was simply passed down to an assembly that now bore inherent authority as a convention of popular sovereignty, rather than royal or seignorial prerogative.<sup>692</sup> Contempt power was also implicated by Article X of the Maryland Declaration of Rights because it was and is the traditional means for safeguarding the Maryland General Assembly’s parliamentary privileges possessed by each House, including freedom of speech and debate and freedom from arrest.<sup>693</sup>

The highest proof of the incorporation of contempt power as to not only the legislature, but the entire framework of government, is its explicit

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<sup>686</sup> *Id.*

<sup>687</sup> *Id.*

<sup>688</sup> MD. DECL. OF RIGHTS, arts. I, VI (1776).

<sup>689</sup> See 6 WILLIAM COBBETT, *Proceedings in the Case of the Aylesbury Men (1704)*, in COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST IN 1066, TO THE YEAR 1803, 376 (T.C. Hansard 1808); *Brass Crosby’s Case*, 95 Eng. Rep. at 1006–12; 3 Wils. K.B. at 198–201.

<sup>690</sup> Compare MD. DECL. OF RIGHTS, art. III, VIII (1776), and MD. CONST., arts. I, IX, XIV (1776), with *Brass Crosby’s Case*, 95 Eng. Rep. at 1010–12, 3 Wils. K.B. at 198–201, and *Proceedings of Both Houses in the Great Case of Ashby and White of 1703*, *supra* note 188, at 229–40, 247, 251, 255–57, 300, 302, 323–24, 387–90, 392.

<sup>691</sup> See *supra* Section IV.A.1.

<sup>692</sup> See *supra* Section IV.A.1.

<sup>693</sup> See MD. DEC. OF RIGHTS, arts. I, VI, X (1776).

reference in Article XII of the Maryland Constitution.<sup>694</sup> Article XXII explicitly granted the General Assembly authority to initiate contempt proceedings against direct contempts committed within its presence.<sup>695</sup> These contempts encompassed anyone guilty of “disorderly or riotous behavior, or by threats to, or abuse of their members, or by any obstruction to their proceedings.”<sup>696</sup> It also granted the legislature authority to punish constructive contempts, contempts committed beyond its proximity.<sup>697</sup> These contempts encompassed the “assaulting any of their members, during their sitting, or on their way to, or return from the House of Delegates, or by any assault of, or obstruction to their officers, in the execution of any order or process, or by assaulting or obstructing any witness, or any other person, attending, or on their way to or from the House, or by rescuing any person committed by the House.”<sup>698</sup>

ii. Contempt of the Maryland Executive.

Article XXXIII of the Maryland Constitution established the executive branch of government.<sup>699</sup> Of all the three families of contempt, contempt of the executive intuitively appears to be the doctrinal branch that is least compatible with republican principles.<sup>700</sup> But that intuition does not necessarily have a basis in actual fact.<sup>701</sup> The question presented is whether the doctrine of contempt of the sovereign (king) revolved into contempt of the sovereign (people) as constitutionally expressed in the executive branch of government in 1776.<sup>702</sup> A full exploration of this question under the Maryland Constitution of 1867—the iteration of the Maryland Constitution currently in effect—is for another paper strictly dedicated to that worthy subject. I do answer this question as to the Maryland Constitution of 1776 here in the affirmative.<sup>703</sup>

Although Article I and Article VI of the Maryland Declaration of Rights of 1776 grounded the state in modern republican principles like popular sovereignty and the separation of powers, the Anglo-Saxon legal tradition permeated and enlightened every corner of the new framework of

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<sup>694</sup> *See id.* at art. XII.

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

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

<sup>697</sup> *Id.*

<sup>698</sup> *Compare* MD. CONST., art. XII (1776), *with Alexander Murray’s Case*, 26 House of Commons Journal at 31, *and Silk Rioter’s Case*, 11 House of Commons Journal at 667–68.

<sup>699</sup> MD. CONST., art. XXXIII (1776).

<sup>700</sup> *See supra* Section IV.A.1.

<sup>701</sup> *See supra* Section IV.A.1.

<sup>702</sup> *See supra* Section IV.A.1.

<sup>703</sup> *See supra* Section IV.A.1.

government.<sup>704</sup> Article III of that same declaration proudly asserted that the inhabitants of Maryland were entitled to the common law of England and the benefit of English statutes in effect as of June 1, 1774.<sup>705</sup> Given that the doctrine of contempt of the sovereign is nowhere expressly abrogated in either the Maryland Declaration of Rights of 1776, the Maryland Constitution of 1776, or in any judicial opinion by the Maryland Court of Appeals contemporaneous with the Founding, I believe the proper assumption should be that the doctrine remained in effect bar any robust countervailing evidence to the contrary.<sup>706</sup> We should believe by default, in other words, that the doctrine of contempt of the sovereign—contempt of the executive, as this Article phrases it—remained in effect. We should believe that it persisted in some form under the new republican constitution.<sup>707</sup>

One might object at the outset that contempt of the executive derives from medieval notions of the royal prerogative that are antithetical to the modern republican principles of popular sovereignty and the separation of powers.<sup>708</sup> One might argue that the common law, though preserved by Article III of the Declaration of Rights, was an insufficient vessel to keep contempt of the executive power alive in the new order.<sup>709</sup> That the doctrine of contempt of the sovereign survived the Glorious Revolution of 1689 in England, however, is actually one of the highest proofs that it could and indeed did survive the Revolution of 1776 in Maryland. But this view is mistaken,<sup>710</sup> proven by the fact that the doctrine of contempt of the sovereign survived the Glorious Revolution of 1689 in England is actually one of the highest proofs that it could and indeed did survive the Revolution of 1776 in Maryland.<sup>711</sup> It did not die, rather, it transformed from the principles of royal government and assent to the principles of limited government and popular sovereignty.<sup>712</sup>

The precise nature of this transformation in Maryland is most strongly suggested in Articles LVII and LVIII of the Maryland Constitution.<sup>713</sup> Article LVII of the Maryland Constitution provided that all laws be styled “[b]e it enacted by the General Assembly of Maryland,” and that all public commission and grants be styled according to “[t]he State of Maryland.”<sup>714</sup>

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<sup>704</sup> MD. CONST., arts. I, VI. (1776).

<sup>705</sup> *Id.* at art. III.

<sup>706</sup> *See supra* Section IV.A.1.

<sup>707</sup> *See supra* Section IV.A.1.

<sup>708</sup> *See supra* Section IV.A.1.

<sup>709</sup> *See* MD. DECL. OF RIGHTS art. III (1776).

<sup>710</sup> *See supra* Section IV.A.1.

<sup>711</sup> *See supra* Section IV.A.1.

<sup>712</sup> *See supra* Section IV.A.1.

<sup>713</sup> *See* MD. CONST., arts. LVII, LVIII (1776).

<sup>714</sup> *Id.*

These conventions implicitly contrast with the provincial and colonial periods when laws were enacted by the colonial assembly technically under the aegis of the Lord Proprietor's authority pursuant to the terms of the Maryland Charter granted by King James I.<sup>715</sup> Formerly all indictments derived from the authority and dignity of the Lord Proprietor.<sup>716</sup> Before 1776, all indictments concluded not that the violations of law at issue were "against the peace and government of the proprietary;" after 1776, all indictments concluded that the violations of law at issue were "[a]gainst the peace, government, and dignity of the State."<sup>717</sup> There was therefore a shift in the conception of "dignity" from medieval or feudal sense denoting some level of authority ultimately derived from the king that through a patent of nobility to a feudal lord to a more modern sense denoting some level of authority rooted ultimately derived from the Constitution of the State of Maryland and the sovereignty of the people.<sup>718</sup>

Article LVIII of the Maryland Constitution follows a similar vein in declaring "[t]hat all penalties and forfeitures, heretofore going to the king or proprietary, shall go to the State-save only such, as the General Assembly may abolish or otherwise provide for."<sup>719</sup> This particular provision is critical to our understanding of the doctrine of contempt of the executive's adaptability.<sup>720</sup> The Maryland Constitution did not assume that all penalties and forfeitures were abolished through independence by default.<sup>721</sup> It did not assume that popular sovereignty must set to work with a blank slate.<sup>722</sup> Rather, it assumed that all penalties and forfeitures known during the provincial and colonial periods were now merely derived from the state instead of the proprietary unless the General Assembly decreed otherwise.<sup>723</sup> In my view, these penalties and forfeitures included penalties for contempt of the executive.<sup>724</sup> There is no affirmative evidence suggesting why this doctrine could not translate to the new legal order.<sup>725</sup> It is true that Article XXXIII states that the Governor cannot possess any prerogative by virtue of any statute, law, or custom of England or Great Britain.<sup>726</sup> The "by virtue" clause, however, in my view, simply means that the prerogative cannot

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<sup>715</sup> See *supra* Section IV.A.1.

<sup>716</sup> See *supra* Section IV.A.1.

<sup>717</sup> See MD. CONST., art. LVII (1776).

<sup>718</sup> See *id.*

<sup>719</sup> See *id.*

<sup>720</sup> See *supra* Section IV.A.1.

<sup>721</sup> See MD. CONST., art. LVII (1776).

<sup>722</sup> See *id.*

<sup>723</sup> See *id.*

<sup>724</sup> See *id.*

<sup>725</sup> See *id.*

<sup>726</sup> See *id.*

descend directly from foreign law.<sup>727</sup> It does not preclude the state from having an analogous prerogative by virtue of its own law, statute, or custom.<sup>728</sup>

The Maryland Declaration of Rights enshrined the principle of popular sovereignty into the state's new framework of government. Sovereignty was distributed across three co-equal powers: executive, legislative, and judicial.<sup>729</sup> Each coordinate branch of state government was an expression of the sovereignty of the state.<sup>730</sup> The purpose of criminal indictments under Article VIII of the Maryland Constitution of 1776 was to vindicate the dignity of the state as an expression of that sovereignty.<sup>731</sup> The common law, as of June 1, 1774, was the law of the land, and therefore the effectual instrument for vindicating assaults on that dignity.<sup>732</sup> The presumption we should have is that that penalties that formerly arose from disobeying or disrespecting the executive power of the king or the Lord Proprietor at common law now derive from disobeying or disrespecting the executive power of the State as such.<sup>733</sup> The plain meaning and structure of Maryland's constitutional texts therefore compels the conclusion that contempt of the sovereign—or contempt of the executive as we may more appropriately call it today—remained a cognizable offense in 1776.<sup>734</sup> Contempt of the sovereign was no longer contempt of the sovereign king but the sovereign people through their popularly elected chief magistrate—the governor—and his agents.<sup>735</sup> There is therefore no general theoretical obstacle to contempt of the executive being an indictable common law offense in Maryland after the American Revolution.<sup>736</sup>

The final inquiry is to consider whether there are any particular genera or species of executive contempts that are disqualified by republican principles of government.<sup>737</sup> There is no case law from the Maryland Court of Appeals, now called the Supreme Court of Maryland, addressing the doctrinal status of contempt of the sovereign whatsoever.<sup>738</sup> My judgments are therefore based strictly on the text of the Maryland Declaration of Rights and Constitution of 1776 in juxtaposition with the principles of the Maryland

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<sup>727</sup> See MD. CONST., art. LVII (1776).

<sup>728</sup> See *id.*

<sup>729</sup> See *id.*

<sup>730</sup> See *id.*

<sup>731</sup> See MD. DECL. OF RIGHTS, art. XIX (1776).

<sup>732</sup> See *id.* at art. III.

<sup>733</sup> See MD. CONST., art. LVIII (1776).

<sup>734</sup> See *supra* Section IV.A.1.

<sup>735</sup> See MD. CONST., art. XXV (1776).

<sup>736</sup> See MD. DECL. OF RIGHTS, art. I–VI (1776); MD. CONST., art. LVII–LVIII (1776).

<sup>737</sup> See *supra* Section IV.A.1.

<sup>738</sup> See *supra* Section IV.A.1.

Charter and the English Constitution.<sup>739</sup> I will examine each of the four genera within the contempt of the executive family in turn.

First, contempt of the king's palace as a genus of executive contempt was *void ab initio* under the Maryland Constitution.<sup>740</sup> There are no state spaces so sacrosanct that they can be deemed analogous to the king's palace such that they could be defended with the contempt power of the executive except, perhaps, statehouses and courthouses.<sup>741</sup> Those buildings now belong to coordinate branches of government with their own "powers" and inherent prerogatives as institutional expressions of popular sovereignty, not merely as agents of a Sovereign King.<sup>742</sup> I therefore deem this genus of executive contempt void under Article I of the Maryland Declaration of Rights.<sup>743</sup>

Second, contempt of the king's title as a genus of executive contempt was at least partially voided by the Maryland Declaration of Rights and the Maryland Constitution.<sup>744</sup> There is no royal or proprietary title in a republic that can be contemptuously denied because there is no royalty or proprietary.<sup>745</sup> I find it difficult to believe, moreover, that contempt of state governor's title is a fair analogy given the free speech and procedural due process protections provided under the new regime.<sup>746</sup> I cannot safely say that this entire genus went extinct as a direct consequence of the Revolution, however, because Article XXXV and XXVI of the Maryland Declaration of Rights explicitly required two oaths or affirmations on admission to any office of public trust: oaths or affirmations of support and fidelity to the state and oaths declaring a belief in the Christian religion.<sup>747</sup> The particular requirements for these oaths for particular public positions in particular seasons were further prescribed by Articles XVIII–XXVI, XXVIII–XXXIX, XLIII, L, LII, and LV of the Maryland Constitution.<sup>748</sup> Recall that refusal to swear such oaths is another specie within this genus.<sup>749</sup> I am of the opinion that the oaths clauses of these foregoing articles contemplated contempt

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<sup>739</sup> See *supra* Section IV.A.1.

<sup>740</sup> See *supra* Section IV.A.1.

<sup>741</sup> See MD. DECL. OF RIGHTS, art. I (1776).

<sup>742</sup> See *id.* at art. VI.

<sup>743</sup> See *id.* at art. I.

<sup>744</sup> See *supra* Section IV.A.1; see also MD. DECL. OF RIGHTS, art. XL (1776) (explaining titles of nobility are not to be given); MD. CONST., art. LV (1776) (emphasizing the allegiance to Maryland and dislike of king).

<sup>745</sup> See MD. DECL. OF RIGHTS, arts. I, II, XL (1776).

<sup>746</sup> Compare *id.* at VIII (encouraging freedom of speech), with MD. CONST., art. XII (1776) ("[T]he House of Delegates may punish, by imprisonment, any person who shall be guilty of a contempt in their view.").

<sup>747</sup> See MD. CONST., arts. XXXV, XXXVI (1776).

<sup>748</sup> See *id.* at arts. XVIII–XXVI, XXVIII–XXXIX, XLIII, L, LII, LV.

<sup>749</sup> See *supra* Section III.B.3.

liability for refusal to swear or affirm when required.<sup>750</sup> This manifestation of executive contempt must have survived the Revolution, at least initially.<sup>751</sup> Whether it survived subsequent federal and state doctrinal changes precipitated by changes to the federal and state constitutions as well is a topic for another time.<sup>752</sup>

Third, contempt of the king's person or government, yet another genus of executive contempt, was similarly reduced, though not extinguished, by the Revolution.<sup>753</sup> Any attempt to sway the Governor into changing his policy by alluding to public uneasiness about his present policy is a form of executive contempt that is now certainly void—there is no more stark example of a violation of the principle of popular sovereignty and accountability to the people than that.<sup>754</sup> Accusing the governor of the state of breaching his oath of office is no fair analogy to making the same accusation about the king and his coronation oath, therefore, that form of contempt was rendered void as well.<sup>755</sup> Such liability would otherwise certainly run into troubles with constitutional rights to freedom of speech.<sup>756</sup> That refusal to pay a custom in a foreign land remained liable for executive contempt under the Maryland Constitution is also doubtful under principles of federalism.<sup>757</sup> But a true threat against the governor or any public officer remained, in my view, indictable as a contempt of the executive in 1776.<sup>758</sup> This specie of contempt must have survived, at least initially, to the same extent that common law incitement and seditious libel persisted as valid offenses.<sup>759</sup>

Fourth, contempt of the royal prerogative, more than any other genus of executive contempt, persisted through the republican transition into the new order.<sup>760</sup> The preference of foreigners over the governor and the general interest of the state does seem to be void *ab initio*.<sup>761</sup> The other species within this genus, I believe, were very much alive.<sup>762</sup> In 1776, the hue and cry concept of public order and communal policing facilitated through the justice

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<sup>750</sup> See MD. CONST., arts. XVIII–XXVI, XXVIII–XXXIX, XLIII, L, LII, LV (1776).

<sup>751</sup> See MD. DECL. OF RIGHTS, arts. XXV–XXVI (1776).

<sup>752</sup> See *id.*; MD. CONST., arts. XVIII–XXVI, XXVIII–XXXIX, XLIII, L, LII, LV (1776).

<sup>753</sup> See *supra* Section IV.A.1.

<sup>754</sup> See MD. DECL., arts. I, II (1776).

<sup>755</sup> See MD. CONST., art. LV (1776).

<sup>756</sup> See MD. DECL., art. VIII (1776).

<sup>757</sup> See *id.* at arts. I–VI.

<sup>758</sup> See MD. CONST., art. XII (1776).

<sup>759</sup> See MD. DECL., art. III (1776).

<sup>760</sup> See *supra* Section IV.A.1.

<sup>761</sup> See *supra* Section IV.A.1.

<sup>762</sup> See *supra* Section IV.A.1.

of the peace system remained in effect.<sup>763</sup> I am therefore sure that refusal to assist agents of the state achieve the public good in the context of that system remained liable for contempt of the executive just as refusal to assist agents of the Lord Proprietor did before the American Revolution.<sup>764</sup>

Finally, there remains the question of whether any vestige of contempt of the sovereign lingered in the Maryland Constitutions of 1851, 1864, and 1867.<sup>765</sup> Although this is a topic merits comprehensive treatment elsewhere, I believe we can find a modern illustration of contempt of the executive in any violation of gubernatorial order or decree for public safety during a public health crisis.<sup>766</sup> Chapter 34 of the Laws of Maryland of 1766, for example, articulated the power of the Governor to compel any vessel to ride quarantine in a time of plague,<sup>767</sup> including any captain who swore an oath attesting that their passengers were free of plague when such was not the case were criminally liable for perjury;<sup>768</sup> any free man who breached quarantine was liable for a civil statutory fine of one hundred pounds; and any servant or slave who breached quarantine was liable for a whipping not

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<sup>763</sup> Compare, e.g., Md. Decl. R. art. II (1776) (entitling the inhabitants of Maryland with the common law of England), with The Statute of Winchester of 1285, 13 Edward I, c. 1-6 (Eng.) and the Outrages Against Certain Franchises Act of 1414, 2 Hen. 5, c. 8.

<sup>764</sup> See sources cited *supra* note 763.

<sup>765</sup> See generally MD. CONST., art. 1 *et seq.* (1851) (adopting to re-apportion the Maryland General Assembly and establish the relationship between Baltimore County and Baltimore City); MD. CONST., art. 1 *et seq.* (1864) (outlawing slavery in Maryland, prohibiting former Confederate supporters from voting or holding office, and reapportioning the General Assembly based on the white population); MD. CONST., art. 1 *et seq.* (1867) (focuses on establishing a stable government, incorporates requirement of three-fifth vote from General Assembly to pass constitutional amendments).

<sup>766</sup> Compare MD. CONST. art. XXXIII (1776) (“That the Governor. . . may also order and compel any vessel to ride quarantine, if such vessel, or the port from which she may have come, shall, on strong grounds, be suspected to be infected with the plague; but the Governor shall not, under any presence, exercise any power or prerogative by virtue of any law, statute, or custom of England or Great Britain.”), with An Act to Oblige Infected Ships and Other Vessels Coming into this Province to Perform Quarantine of 1766, 61 Md. Arch. 262, *superseded by the Laws of Maryland ch. 34* (1793) (“The governor may order and compel any vessel to ride quarantine, if such vessel, or the port from which he shall have come, that on strong grounds, be suspected to be infected with the plague. Whensoever and as often as the governor shall have strong grounds to apprehend, from the information of physicians, or otherwise, that there is danger of the plague or other malignant contagious disease being introduced not this state from foreign parts, or from any of the United States, he may compel any vessel coming to any of our ports, shores or harbors, to ride quarantine, and to forbid, either by land or water, all intercourse or communication under such regulations and restrictions as he may think advisable, and to take all measures, and do all things, which may appear to him to be necessary for giving effect to the objects of this act.”).

<sup>767</sup> An Act to Oblige Infected Ships and Other Vessels Coming into this Province to Perform Quarantine of 1766, 61 Md. Arch. 262, *superseded by*, The Laws of Maryland ch. 34 (1793).

<sup>768</sup> *Id.*

exceeding thirty-nine lashes.<sup>769</sup> The statute also included a qui tam provision to ensure its provisions were enforced.<sup>770</sup>

In 1793, the General Assembly superseded the statute with more concise language that eliminated, among other things, all the penalty provisions.<sup>771</sup> Breach of a quarantine order is a classic example of prerogative contempt.<sup>772</sup> Though the proprietary prerogative, like the royal prerogative, were abolished in 1776, the common law principal that violation of a statute lacking any precise penalty provision is technically still indictable to this day as a misdemeanor.<sup>773</sup> Breach of a quarantine order in the state of Maryland is contempt of the executive because it violates the state's general police power dispensed through executive orders.<sup>774</sup>

The contempt cannon is particularly salient in light of an opinion written by Supreme Court Justice Clarence Thomas calling into question the validity of the void-for-vagueness doctrine under the Procedural Due Process Clause of the Fifth Amendment of the United States Constitution.<sup>775</sup> Although this is also a topic for another day, I cannot help but remark that the contempt canon lends credit to his skepticism.<sup>776</sup> Contempt was the mace of the proprietary prerogative in the provincial and colonial periods.<sup>777</sup> It may be the mace of the state's police power even to this day, dormant perhaps, but not dead.<sup>778</sup>

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<sup>769</sup> *Id.* at 263.

<sup>770</sup> *Id.* at 264.

<sup>771</sup> Laws of Maryland ch. 34 (1793).

<sup>772</sup> Compare *supra* Section IV.A.1 (describing prerogative contempt), with Laws of Maryland ch. 34 (1793).

<sup>773</sup> Compare MD. CONST., art. XXXIII (1776), with An Act to Oblige Infected Ships and Other Vessels Coming into this Province to Perform Quarantine of 1766, 61 Md. Arch. 262, superseded by, The Laws of Maryland ch. 34 (1793).

<sup>774</sup> Compare MD. CONST., art. XXXIII (1776), with An Act to Oblige Infected Ships and Other Vessels Coming into this Province to Perform Quarantine of 1766, 61 Md. Arch. 262, superseded by, The Laws of Maryland ch. 34 (1793).

<sup>775</sup> See *United States v. Johnson*, 576 U.S. 591, 607-08 (2015) (Thomas, J., concurring in the judgment).

<sup>776</sup> *Id.*

<sup>777</sup> See *supra* Section III.B.

<sup>778</sup> Compare U.S. CONST. amend. V (describing the Procedural Due Process Clause), and *Johnson*, 576 U.S., at 607-08 (Thomas, J., concurring in the judgment) (questioning validity of void-for-vagueness under the Procedural Due Process Clause), with MD. DECL. OF RIGHTS, art. XVII (1776).

## iii. Contempt of the Maryland Judiciary.

Articles LVI established the judicial branch of government.<sup>779</sup> The investiture of the state judiciary with contempt power is the simplest and easiest to describe because it is the most apparent vestige of the doctrine of inherent power in the state constitution.<sup>780</sup> The State courts possess the same fundamental contempt power that English courts and provincial courts possessed both inherently and implicitly through Article III.<sup>781</sup> The preservation of the common law tradition in Maryland through the Revolution enshrined the judicial contempt power into the constitutional new order.<sup>782</sup> The new court system was in one sense incredibly old and could not do without its most treasured and most procedure for enforcing its new constitutional prerogatives.<sup>783</sup>

## V. CONCLUSION.

Maryland was conceived as a feudal society and bore the cultural and legal likeness of its imperial parent.<sup>784</sup> “The weight of the law,” Max Weber observed, “lies in its staff.”<sup>785</sup> The mace presented to the General Assembly in 1697 was referred to as a “staff.”<sup>786</sup> And it represented not only the absolute power of the Lord Proprietor, but the medieval conception of the rule of law undergirding his feudal grant as well.<sup>787</sup> Just as the mace was the symbol of the power wielded by proto-Indo-European chieftains—the *\*weik-potis* of the Pontic Steppe—it was also the literal and metaphorical expression of Lord Baltimore’s feudal rights over the Province of Maryland.<sup>788</sup> The contempt power was the iron rod of Lord Baltimore’s palatine sovereignty, a consummation of ten thousand years of history and tradition tying Old Europe, Medieval Europe, and Modern Europe together.<sup>789</sup>

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<sup>779</sup> See MD. CONST., art. LVI (1776).

<sup>780</sup> *Id.*

<sup>781</sup> See MD. DECL. OF RIGHTS, art. III (1776).

<sup>782</sup> *Id.*

<sup>783</sup> Compare *id.* (signifying federalism and power to the states), with *King v. Barber* [1758], 96 Eng. Rep. 1185, 2 Keny 287 (discussing disregard to common law habeas corpus and the necessity of showing cause necessary for contempt), and *West v. Stigar*, 1 Harris & McHenry 247, 250 (Md. Prov. Ct., 1767) (explaining that attachment of contempt is not appropriate because the act of attainder is unjust and parties are entitled to a defense).

<sup>784</sup> See *supra* Part I.

<sup>785</sup> WEBER, *supra* note 327, at 33-34.

<sup>786</sup> RILEY, *supra* note 384, at 115.

<sup>787</sup> See WEBER, *supra* note 327, at 33-34; RILEY, *supra* note 384, at 119.

<sup>788</sup> See *supra* Section III.A.

<sup>789</sup> Cf. KATHERINE CARTER, THE EVOLUTION OF THIRD MOLAR AGENESIS AND IMPACTION 81-82, 127 (Doc. Diss. 2016) (describing the evolution of different areas of the world

Maryland's constitutional revolution in 1776 precipitated a revolution in the doctrine of contempt.<sup>790</sup> Contempt of the proprietary prerogative, like contempt of the royal prerogative, fell into desuetude.<sup>791</sup> The Founding Fathers effectively narrowed the notion of contempt from a broader legal construction rooted in a theory of medieval kingship into a narrower, more residual enforcement mechanism grounded by a constitutive text.<sup>792</sup> Contempt power was a vestige of feudal authority marking at least some continuity between the state's proprietary past and republican future.<sup>793</sup> That continuity is remarkable and illustrates an important lesson applicable to the broader legacy of Anglophone imperialism.<sup>794</sup> The British settlers recovered the medieval construct of contempt from first principles of sovereignty when they began colonizing the New World.<sup>795</sup> The Western legal tradition became a child again.<sup>796</sup> The rule of law walked before it could run.<sup>797</sup>

## VI. APPENDIX A: ENGLISH CONTEMPT AUTHORITIES.

### A. *Select English Statutes.*

1. Frivolous Arrests Act of 1725, 12 Geo. I. c. 29.
2. Escape of Debtors from Prison Act of 1702, 1 Ann. 2, c. 6.
3. Escape of Debtors Act of 1696, 8 & 9 Gul. III c. 27.
4. The Offenses Within the Court Act of 1541, 33 Hen. VIII. c. 12.
5. Arbitration Act of 1697, 9 Will. III c. 15.
6. Ordinance for the State of the Land of Ireland of 1359, 31 Edw. 3 Stat. 4, c. 11.
7. Annullers of Judgments of the King's Court Act of 1353, 27 Edw. 3

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through third molar agenesis and impaction); DAVID W. ANTHONY, *THE HORSE, THE WHEEL AND LANGUAGE: HOW BRONZE-AGE RIDERS FROM THE EURASIAN STEPPES SHAPED THE MODERN WORLD* 90, 222, 258–59, 395, 460 (Princeton Univ. Press 2007) (explaining the prehistoric link to the development of language from Europe to other countries); 1 JOHN STUART MILL, *Civilization*, in *DISSERTATIONS AND DISCUSSIONS: POLITICAL, PHILOSOPHICAL, AND HISTORICAL* 160, 161–62, 177 (J.W. Parker 1859); Psalm 2:9 (“You shall break them with a rod of iron and dash them in pieces like a potter’s vessel.”); Revelation 2:27 (“ . . . and he will rule them with a rod of iron, as when earthen pots are broken in pieces . . .”).

<sup>790</sup> See *supra* Part IV.

<sup>791</sup> See *supra* Part IV.

<sup>792</sup> See *supra* Sections IV.A.1–2.

<sup>793</sup> See MD. CONST., arts. 1 et seq. (1776); OSGOOD, 2 *THE AMERICAN COLONIES*, *supra* note 4, at 72–73.

<sup>794</sup> See *supra* Section III.B.2.

<sup>795</sup> Compare *supra* Part II, with *supra* Parts III–IV.

<sup>796</sup> See *supra* Section III.B.2.

<sup>797</sup> Compare *supra* Part I, with *supra* Part V.

Stat. 1, c. 1.

8. Statute of Westminster II of 1285, 13 Edw. I. c. 26.

9. Statute of Marlborough of 1267, 52 Hen. III c. 8.

10. Statute of Merton of 1236, 20 Hen. III c. 3.

*B. House of Commons.*

1. 26 WILLIAM COBBETT, *Sir Elijah Impey's Complaint of Sundry Libels (1788)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 1429 (T.C. Hansard 1808).

2. Lord George Gordon's Case, 37 House of Commons Journal 903–910 (June 19, 1780).

3. 20 WILLIAM COBBETT, *Complaint Against the Duke of Bolton for Concerning Himself in the Southampton Election (1780)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 1305 (T.C. Hansard 1808).

4. 17 WILLIAM COBBETT, *Proceedings in the Commons Against the Reverend John Horne for a Libel Upon the Speaker (1774)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 1047 (T.C. Hansard).

5. 17 WILLIAM COBBETT, *J. Wheble's Case (1771)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 58 (T.C. Hansard 1808).

6. 15 WILLIAM COBBETT, *Proceedings in the Commons on the Expulsion of Mr. Wilkes (1763 – 1764)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 1386 (T.C. Hansard 1808).

7. 15 WILLIAM COBBETT, *The Lords' Report of Precedents of Punishments for Breaches of Privilege and Contempts of their House (1763)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 1352 (T.C. Hansard 1808).

8. 14 WILLIAM COBBETT, *Debates in the Commons on the Clandestine Marriage Bill (1753)*, in PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 1, 5 (T.C. Hansard 1808).

9. 14 WILLIAM COBBETT, *Debate in the Commons Respecting the Westminster Election (1751)*, in COBBETT'S PARLIAMENTARY

HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 870 (T.C. Hansard 1808).

10. Alexander Murray's Case, 26 House of Commons Journal 31 (Feb. 6, 1751).

11. Case of the Tumultuous Crowd, 22 House of Commons Journal 115 (Apr. 12, 1733).

12. 8 WILLIAM COBBETT, *Resolution Forbidding the Publication of the Proceedings of the House (1729)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 682 (T.C. Hansard 1808).

13. 6 WILLIAM COBBETT, *Proceedings in the Case of the Aylesbury Men (1704)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST IN 1066, TO THE YEAR 1803, 376 (T.C. Hansard 1808).

14. 6 WILLIAM COBBETT, *Proceedings of Both Houses in the Great Case of Ashby and White (1703)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 229, 247, 251, 255, 300, 302, 323, 387, 392 (T.C. Hansard 1808).

15. Purser Rioter's Case, 13 House of Commons Journal 228 (Mar. 27, 1699).

16. Silk Rioter's Case, 11 House of Commons Journal 667 (Jan. 21, 1697).

17. 5 WILLIAM COBBETT, *Cholmondeley's Case (1690)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 508 (T.C. Hansard 1808).

18. 4 WILLIAM COBBETT, *Dr. Cary's Case (1677)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 825 (T.C. Hansard 1808).

19. 4 WILLIAM COBBETT, *Debate on Dr. Harrington's Commitment (1677)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 845 (T.C. Hansard 1808).

20. 4 WILLIAM COBBETT, *Proceedings Against Several Barristers for Pleading Before the Lords in Breach of an Order of the Commons (1675)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST IN 1066, TO THE YEAR 1803, 731 (T.C. Hansard 1808).

21. 4 WILLIAM COBBETT, *Hayes' and Jekell's Case (1670)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 459 (T.C. Hansard).

22. 4 WILLIAM COBBETT, *Impeachment of Lord Mordaunt (1666 – 1667)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 347 (T.C. Hansard 1808).
23. 3 WILLIAM COBBETT, *The Lord Mayor Refuses to Proclaim the Act for Abolishing Monarchy (1649)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 1305 (T.C. Hansard 1808).
24. 3 WILLIAM COBBETT, *Case of Colonel Lilburne (1646)*, in 3 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 488 (T.C. Hansard 1808).
25. 2 WILLIAM COBBETT, *Lord Savile's Case (1642)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 1241 (T.C. Hansard 1808).
26. 2 WILLIAM COBBETT, *Long's Case (1629)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST IN 1066 TO THE YEAR 1803, 518 (T.C. Hansard 1808).
27. 2 WILLIAM COBBETT, *Complaint Against Doctor Montagu (1625)*, in COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066 TO THE YEAR 1803, 5 (T.C. Hansard 1808).

C. *House of Lords.*

1. *Ashby v. White* 917030, 1 Eng. Rep. 417, 1 Brown.

D. *Court of King's Bench.*

1. *King v. Flower* (1799) 101 Eng. Rep. 1408; 8 T.R. 314.
2. *King v. Shipley* (1784) 99 Eng. Rep. 774; 4 Doug. 347.
3. *King v. Lord George Gordon* (1781) 99 Eng. Rep. 372; 2 Dougl. 590, 592.
4. *Ratcliffe v. Eden* (1776) 98 Eng. Rep. 1200; 2 Cowp. 485.
5. *Brass Crosby's Case* (1771) 95 Eng. Rep. 1005; 3 Wils. K.B. 188.
6. *King v. Wilkes* (1770) 98 Eng. Rep. 327; 4 Burr. 2527.
7. *Millar v. Taylor* (1769) 98 Eng. Rep. 201; 4 Burr. 2303.
8. *King v. Almon* (1765) 97 Eng. Rep. 94; Wilm 243.
9. *King v. Beardmore* (1759) 97 Eng. Rep. 564; 2 Burr. 792.
10. *King v. Barber* (1758) 96 Eng. Rep. 1185; 2 Keny. 287.
11. *Alexander Murray's Case* (1751) 95 Eng. Rep. 629; 1 Wils. K.B. 299.

12. King v. Carroll (1744) 95 Eng. Rep. 500; 1 Wils. K. B. 74.
13. Morgan's Case (1724) 88 Eng. Rep. 211; 8 Mod. 296.
14. King v. Dr. Middleton (1723), 92 Eng. Rep. 818; Fortescue 201.
15. King v. Wiatt (1723) 88 Eng. Rep. 96; 8 Mod. 123.
16. King v. Revel (1721) 93 Eng. Rep. 609; 1 Strange 421.
17. King v. Jones (1719) 93 Eng. Rep. 462; 1 Strange 185.
18. Thomas's Case (1719) 88 Eng. Rep. 1043; 11 Mod. 285.
19. Burdett's Case (1710) 91 Eng. Rep. 289; 1 Salkeld 327.
20. Queen v. Wrightson (1719) 91 Eng. Rep. 591; 2 Salkeld 699.
21. Queen v. Paty (1705) 92 Eng. Rep. 232; 2 Ld. Raym. 1106.
22. Queen v. Paty (1705) 90 Eng. Rep. 1189; Holt, K.B. 525.
23. Queen v. Langley (1704) 87 Eng. Rep. 882; 6 Mod. 125.
24. Ashby v. White (1703) 92 Eng. Rep. 1188; Holt, K.B. 624.
25. Ashby v. White (1703) 92 Eng. Rep. 126; 2 Ld. Raym. 938.
26. Ashby v. White (1703) 87 Eng. Rep. 808; 6 Mod. 45.
27. Ashby v. White (1701) 92 Eng. Rep. 710; 3 Ld. Raym. 319.
28. King v. Dominum Preston (1692) 91 Eng. Rep. 243; 1 Salkeld 278.
29. King v. Berchet (1690) 89 Eng. Rep. 480; 1 Show. K.B. 106.
30. King v. Darby (1688) 87 Eng. Rep. 89; 3 Mod 139.
31. King v. Dangerfield (1685) 87 Eng. Rep. 43; 3 Mod. 68.
32. King v. Anonymous (1684) 87 Eng. Rep. 33; 3 Mod.
33. Long's Case (1677) 86 Eng. Rep. 1012; 2 Mod. 182.
34. Lake v. R. (1672) 84 Eng. Rep. 506; 2 Keble 801.
35. Hall's Case (1671) 86 Eng. Rep. 744; 1 Mod. 76.
36. Harrison v. Burwell (1670) 86 Eng. Rep. 278; 2 Ven. 16.
37. Anon (1669) 86 Eng. Rep. 8; 1 Ventris 10.
38. King v. Baker (1669) 86 Eng. Rep. 711; 1 Mod. 35.
39. King v. Baker (1669) 84 Eng. Rep. 374; 2 Keble 594.
40. King v. Burford (1669) 84 Eng. Rep. 310; 2 Keb. 494.
41. King v. Winne (1667) 84 Eng. Rep. 210; 2 Keb. 336.
42. King. v. Mayo (1663) 83 Eng. Rep. 1081; 1 Keb. 508.
43. King v. Buckenham (1663) 83 Eng. Rep. 1223; 1 Keble 751
44. Bockenham's Case (1663) 83 Eng. Rep. 320; 1F Lev. 106.
45. Wingfield's Case (1633) 79 Eng. Rep. 819; Cro. Car. 251.
46. Carleton v. Hutton (1650) 74 Eng. Rep. 1045; Noy, 78.
47. King v. Bellingham (1649) 82 Eng. Rep. 582; Style, 126.
48. King v. Buckenham (1640) 86 Eng. Rep. 1223; 1 Keble 751.
49. Harrison's Case (1639) 79 Eng. Rep. 1034; Cro. Car. 504.
50. Bathurst v. Coxe (1638) 83 Eng. Rep. 1056; 1 Keb. 465.
51. Bathurst v. Coxe, (1638) 83 Eng. Rep. 1047; 1048, 1 Keb. 451.
52. Royson's Case (1629) 79 Eng. Rep. 729; Cro. Car. 146.

53. Rabbetts v. Stoker (1620) 81 Eng. Rep. 740; 2 Rolle. Ab. 187.
54. Savage's Case (1620) 81 Eng. Rep. 647; 2 Rolle 43.
55. Curson's Case (1619) 81 Eng. Rep. 678; 2 Rolle 90.
56. Countess of Shrewsbury's Case (1618) 80 Eng. Rep. 381; Hob. 235.
57. Hollis's Case (1618) 80 Eng. Rep. 417; Hob. 271.
58. Bagg's Case (1615) 77 Eng. Rep. 1271; 11 Co. Rep. 93b.
59. Coddess Case (1615) 81 Eng. Rep. 463; 1 Rolle, 245.
60. Godfrey's Case (1615) 77 Eng. Rep. 1199; 11 Co. Rep. 42a.
61. Breerton & Townsend Upon a Special Day (1614) 74 Eng. Rep. 1069; Noy 104.
62. John de Northampton's Case (1613) 77 Eng. Rep. 1407; 12 Co. Rep. 132.
63. Countess of Shrewsbury's Case (1612) 77 Eng. Rep. 1369; 12 Co. Rep. 94.
64. Berisford v. Presse (1610) 80 Eng. Rep. 130; Yelverton 197.
65. Oldfield & Gerling's Cases (1610) 77 Eng. Rep. 1349; 12 Co. Rep. 71.
66. Dr. Bonham's Case (1610) 77 Eng. Rep. 646; 3 Co. Rep. 113b.
67. Beecher's Case (1609) 97 Eng. Rep. 559; 8 Co. Rep. 58a.
68. Blanchflower v. Atwood 1607 80 Eng. Rep. 73, Yelverton 107.
69. Fuller's Case (1607) 77 Eng. Rep. 1322; 12 Coke Rep. 41.
70. De Libellis Famosis (1606) 77 Eng. Rep. 250; 5 Co. Rep. 125a.
71. Lord Sturton and Lord Mordaunt's Case (1606) 74 Eng. Rep. 1067; Noy 102.
72. Thomlinson's Case (1605) 77 Eng. Rep. 1379; 12 Co. Rep. 104.
73. Memorandum re: Puritans (1604) 79 Eng. Rep. 30; Cro. Jac. 37.
74. Hall v. Fettiplace (1604) 72 Eng. Rep. 887; Moore K.B. 758.
75. Carus' Case (1594) 74 Eng. Rep. 944; Owen, 120.
76. Hall v. Turbett (1591) 78 Eng. Rep. 497; Cro. Eliz. 242.
77. Case of the Abbot of Strata Mercella (1591) 77 Eng. Rep. 765: 9 Co. Rep. 24a.
78. Griesley's Case (1588) 77 Eng. Rep. 530; 8 Co. Rep. 38a.
79. Mead v. Cross (1579) 21 Eng. Rep. 51; Cary 96.
80. Knowles v. Luce (1571) 72 Eng. Rep. 472; Moore K.B. 109.
81. Bronker's Case (1555) 73 Eng. Rep. 369; 2 Dyer 168b.

*E. Court of Exchequer.*

1. King v. Earl of Nottingham (1609) 145 Eng. Rep. 284; 285, Lane 42, 43.

*F. Court of Common Pleas.*

1. Hutton v. Harison (1638) 123 Eng. Rep. 1151; Hutton 131.

*G. Court of Chancery.*

1. Cann v. Cann (1754) 28 Eng. Rep. 332; 2 Ves. Sen. 520.
2. Roach v. Govan (1742) 26 Eng. Rep. 683; 2 Atk. 469.
3. Mr. Justice Eyre v. Countess of Shaftesbury (1722) 2 Eq. Ca. Abr. 485 (Eng.).
4. Earl of Oxford's Case (1615) 1 Chancery Rep. 1a (Eng.).
5. Dastouines v. Apprice (1579) 21 Eng. Rep. 49; Cary 92.
6. Rove v. West (1558) 21 Eng. Rep. 21; Cary 39.

*H. Court of Star Chamber.*

1. Hollis's Case (1618) 80 Eng. Rep. 417; Hob. 271.

**VII. APPENDIX B: CONTEMPT AUTHORITIES FOR THE PROVINCE OF MARYLAND.***A. Maryland Statutes.*

1. An Act Concerning Striking Officers and Other Offences, 1 Md. Arch. 350 (Oct. 20, 1654).
2. An Act for Punishing Some Other Offenses, 1 Md. Arch. 286, 287 (Apr. 20, 1650)
3. An Act for Punishment of Some Offenses Not Capital, 1 Md. Arch. 193 (Sept. 13, 1642).
4. An Act for Punishment of Some Offenses Not Capital, 1 Md. Arch. 158, 159, (Aug. 2, 1642).
5. Md. Charter c. VII (1632).

*B. Maryland General Assembly.*

1. Richard Snowden's Case, 44 Md. Arch. 517 (Md. Gen. Assembly, 1747).
2. Henry Brooks' Case, 44 Md. Arch. 531 (Md. Gen. Assembly, 1747).
3. Thomas Ireland Jr.'s Case, 44 Md. Arch. 134 (Md. Gen. Assembly, 1745).

4. Peter Taylor's Case, 40 Md. Arch. 338 (Md. Gen. Assembly, 1739).
5. John Smith's Case, 35 Md. Arch. 330 (Md. Gen. Assembly, 1725).
6. James Presbury's Case, 29 Md. Arch. 136 (Md. Gen. Assembly, 1712).
7. John Gresham's Case, 27 Md. Arch. 525 (Md. Gen. Assembly, 1710).
8. William Cood's Case, 27 Md. Arch. 410, 455 (Md. Gen. Assembly, 1708).
9. Thomas Martin's Case, 19 Md. Arch. 332 (Md. Gen. Assembly, 1696).
10. John Saxon's Case, 17 Md. Arch. 228 (Md. Gen. Assembly, 1684).
11. John Bloomfield's Case, 7 Md. Arch. 116, 117 (Md. Gen. Assembly, 1681).
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14. James Lewis' Case, 2 Md. Arch. 253 (Md. Gen. Assembly, 1671).
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17. William Bretton's Case, 2 Md. Arch. 86 (Md. Gen. Assembly, 1666).
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22. Green's Case, 1 Md. Arch. 16 (Md. Gen. Assembly, 1637).

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13. *In re Bailey*, 57 Md. Arch. 613 (Md. Prov. Ct., 1669).
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36. *Att’y Gen. v. Holliday (II)*, 41 Md. Arch. 333 (Md. Prov. Ct., 1659)

37. Att’y Gen. v. Holliday (I), 41 Md. Arch. 316 (Md. Prov. Ct., 1659).
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51. In re Cornelius, 10 Md. Arch. 220 (Md. Prov. Ct., 1650).
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53. Ashcomb v. Wright, 10 Md. Arch. 218 (Md. Prov. Ct., 1650).
54. Greene v. Jonson, 4 Md. Arch. 515 (Md. Prov. Ct., 1649).
55. Brent v. Commins, 4 Md. Arch. 434, 435 (Md. Prov. Ct., 1649).
56. Brent v. Manners, 4 Md. Arch. 529 (Md. Prov. Ct., 1649).
57. Morgan v. Monday, 4 Md. Arch. 395 (Md. Prov. Ct., 1648).
58. In re Goneere, 4 Md. Arch. 393 (Md. Prov. Ct., 1648).
59. Bushell v. Kedger, 4 Md. Arch. 275 (Md. Prov. Ct., 1644).
60. In re Dandy, 4 Md. Arch. 215 (Md. Prov. Ct., 1643).
61. In re Pope, 4 Md. Arch. 229, 230 (Md. Prov. Ct., 1643).
62. In re The Reformation, 4 Md. Arch. 231 (Md. Prov. Ct., 1643).
63. In re Neale, 4 Md. Arch. 250 (Md. Prov. Ct., 1643).
64. Cockshott v. Asiter, 4 Md. Arch. 158 (Md. Prov. Ct., 1642).
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67. Lewger v. Beane, 4 Md. Arch. 188 (Md. Prov. Ct., 1642).

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60. In re Smock, 90 Md. Arch. 2 (Somerset Cnty. Ct., Md., 1683).
61. In re Dixon, 89 Md. Arch. 91 (Somerset Cnty Ct., Md., 1677).
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66. *In re Ball*, 87 Md. Arch. 550 (Somerset Cnty. Ct., Md., 1675).
67. *Att’y Gen. v. Causin*, 60 Md. Arch. 590 (Charles Cnty. Ct., Md., 1674).
68. *Att’y Gen. v. Stone*, 60 Md. Arch. 515 (Charles Cnty. Ct., Md., 1674).
69. *In re Evans*, 87 Md. Arch. 253 (Somerset Cnty. Ct., Md., 1673).
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82. *In re Lisston*, 54 Md. Arch. 649 (Somerset Cnty. Ct., Md., 1666).
83. *In re Absent Witnesses*, 54 Md. Arch. 396 (Talbot Cnty. Ct., Md., 1666).
84. *Lee v. Lendsey*, 53 Md. Arch. 511 (Charles Cnty. Ct., Md., 1664).
85. *In re Elliott*, 54 Md. Arch. 220 (Kent Cnty. Ct., Md., 1661).
86. *In re Dickes*, 54 Md. Arch. 170 (Kent Cnty. Ct., Md., 1659).
87. *In re Carline*, 54 Md. Arch. 146 (Kent Cnty. Ct., Md., 1658).
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89. *In re Absent Witness*, 54 Md. Arch. 84–85 (Kent Cnty. Ct., Md., 1656).
90. *Baker v. Thompson*, 53 Md. Arch. 234, 234–240 (Charles Cnty. Ct., Md., 1655).
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## COMMENT

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### REFORMING MARYLAND’S LOSS OF CHANCE DOCTRINE: EXPANDING RECOVERY FOR CANCER PATIENTS WITH SURVIVAL CHANCES BELOW FIFTY PERCENT

By Iman Aziz<sup>1</sup>

#### I. INTRODUCTION.

Stephanie Wadsworth had every reason to believe her battle with breast cancer was behind her.<sup>2</sup> After being diagnosed in 2006, Ms. Wadsworth underwent a grueling course of treatment, including a mastectomy, chemotherapy, and radiation.<sup>3</sup> By 2008, follow-up scans confirmed what she had hoped for, no sign of cancer.<sup>4</sup> Yet, in 2013, a routine positron emission tomography (“PET”)/computerized tomography (“CT”) scan revealed a suspicious lesion on her clavicle.<sup>5</sup> Her oncologist reviewed the scan but decided against informing Ms. Wadsworth or ordering any further tests.<sup>6</sup> Three years later, Ms. Wadsworth fell and injured her shoulder.<sup>7</sup> This fall resulted in a trip to the hospital, where tests confirmed the lesion had metastasized, marking the unfortunate return of her cancer.<sup>8</sup> Despite undergoing treatment, Ms. Wadsworth passed away in 2017.<sup>9</sup>

Her family sought justice, filing a wrongful death claim, but Maryland’s “all-or-nothing” approach to medical malpractice law offered

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<sup>1</sup> **Iman Aziz:** J.D. Candidate, May 2026, the University of Baltimore School of Law; B.S., 2021, Virginia Commonwealth University. I would like to thank my faculty advisor, Professor Scott Kurlander, for his thoughtful guidance and unwavering support throughout the development of this Comment. His insight into medical malpractice law and policy reform was instrumental in shaping the arguments presented in this piece. I would also like to thank the University of Baltimore Law Forum editorial board and staff for their dedication and diligence in preparing this Comment for publication, as well as my family and friends for their constant encouragement throughout law school and the writing process.

<sup>2</sup> *Wadsworth v. Sharma*, 278 A.3d 1269, 1273–74 (Md. 2022).

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

<sup>4</sup> *Id.* at 1273.

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

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

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

<sup>8</sup> *Wadsworth*, 278 A.3d at 1273.

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

no solace.<sup>10</sup> Currently, Maryland rejects the loss of chance doctrine.<sup>11</sup> Further, under the Wrongful Death statute, patients must prove that their survival odds were greater than fifty percent at the time of the alleged negligence to satisfy the “proximate causation” requirement of a negligence action.<sup>12</sup> Ms. Wadsworth’s odds were not high enough.<sup>13</sup> Her family’s claim was dismissed, not because Dr. Sharma’s inaction was insignificant, but because the law failed to recognize the value of the lost opportunity for earlier intervention, a chance that could have extended Ms. Wadsworth’s life by years.<sup>14</sup>

Ms. Wadsworth’s story is not unique.<sup>15</sup> Maryland’s “all-or-nothing” approach to medical malpractice claims disproportionately affects patients with terminal illnesses, particularly cancer patients whose survival odds often fall below the arbitrary fifty percent threshold at the time of the alleged negligence.<sup>16</sup> This strict standard ignores the profound human cost of lost chances to prolong life.<sup>17</sup>

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<sup>10</sup> *Id.* at 1274, 1285 (explaining that under Maryland’s “all-or-nothing” approach, plaintiffs whose chances of survival are below fifty percent at the time of the alleged negligence are barred from recovery because proximate cause cannot be established by a preponderance of the evidence).

<sup>11</sup> *Id.* at 1273, 1285 (explaining that the “loss of chance” doctrine allows recovery when a defendant’s negligence deprives a patient of a substantial possibility of achieving a better outcome, even if the likelihood of survival is less than fifty percent).

<sup>12</sup> *Id.* at 1284-85; see MD. CODE ANN., CTS. & JUD. PROC. § 3-902(a) (West 2024).

<sup>13</sup> *Wadsworth*, 278 A.3d at 1284-85 (explaining that Ms. Wadsworth did not have a greater than fifty percent chance of survival prior to the alleged act of negligence).

<sup>14</sup> See *id.* (holding that Ms. Wadsworth’s family could not recover because they had not established that her chance of survival exceeded fifty percent, even though her oncologist’s failure to disclose a suspicious lesion deprived her of the opportunity for earlier intervention that could have prolonged her life).

<sup>15</sup> Compare *Weimer v. Hetrick*, 525 A.2d 643, 650 (Md. 1987) (rejecting the loss of chance doctrine and showing that proximate causation for negligence cannot be established where the decedent had a less than fifty percent chance of survival), with *Fennell v. S. Md. Hosp. Ctr.*, 580 A.2d 206, 216-17 (Md. 1990) (reaffirming *Weimer* and refusing to recognize loss of chance recovery in a survival action where the decedent’s chance of survival, prior to a negligent act, was below fifty percent).

<sup>16</sup> Compare *Weimer*, 525 A.2d at 650 (rejecting recovery where the parents of a premature infant who died hours after birth failed to prove that negligent resuscitation, rather than prematurity, more likely than not caused the infant’s death, thereby declining to recognize loss of chance recovery), with *Fennell*, 580 A.2d at 216-17 (declining to adopt the loss of chance doctrine where a hospital’s negligent delay in treating a patient suffering from bacterial meningitis eliminated her forty percent chance of survival, but recovery was barred because the plaintiffs could not establish that the decedent had a greater than fifty percent chance of survival).

<sup>17</sup> See *Weimer*, 525 A.2d at 650; *Fennell*, 580 A.2d at 216-17 (illustrating how Maryland’s all-or-nothing approach barred recovery in both cases, where the parents of a premature infant in *Weimer* could not prove that negligent resuscitation more likely than not caused death, and where the hospital’s delay in treating a meningitis patient in *Fennell* eliminated

This comment argues that Maryland’s refusal to adopt the loss of chance doctrine in cancer cases is outdated and unjust.<sup>18</sup> Part II begins with a historical background on the loss of chance doctrine in Maryland, highlighting its consistent rejection of the doctrine.<sup>19</sup> Part III examines the methods for calculating survivability, including the use of tools like the Cancer Staging Manual by the American Joint Committee on Cancer (“AJCC Staging Manual”).<sup>20</sup> Part IV includes a detailed problem analysis, identifying the ethical and legal shortcomings of Maryland’s “all-or-nothing” approach, including the effects of delayed diagnosis on negligence suits and the limitations of Maryland’s current framework.<sup>21</sup> Part V of this comment proposes a legislative solution to reform Maryland’s application of the loss of chance doctrine through an amendment to the Wrongful Death statute, allowing recovery based on an “increased risk of harm” standard, or by adopting a proportional damages system.<sup>22</sup> Finally, this comment concludes with a call to action for a more equitable legal standard in Part VI.<sup>23</sup>

## II. HISTORICAL DEVELOPMENT.

### A. *Wrongful Death Action in Maryland.*

Maryland’s Wrongful Death Act (the “Act”), enacted in 1852, was a departure from the common law principle that a “personal action dies with the person.”<sup>24</sup> The Act allows certain beneficiaries to recover damages against a party whose wrongful act or neglect caused the decedent’s death, thereby creating an independent cause of action for the losses suffered by the decedent’s family.<sup>25</sup> At common law any actions by a person against another were terminated once the person passed away.<sup>26</sup> The Act was based on England’s Lord Campbell’s Act, which modified the same common law principle.<sup>27</sup> This Act was a pioneering legislative effort to compensate

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her forty percent chance of survival because her likelihood of survival did not exceed fifty percent).

<sup>18</sup> See *infra* Parts II-VI.

<sup>19</sup> See *infra* Part II.

<sup>20</sup> See *infra* Part III.

<sup>21</sup> See *infra* Part IV.

<sup>22</sup> See *infra* Part V.

<sup>23</sup> See *infra* Part VI.

<sup>24</sup> *Wadsworth v. Sharma*, 278 A.3d 1269, 1272 (Md. 2022).

<sup>25</sup> MD. CODE ANN., CTS. & JUD. PROC. § 3-902(a) (West 2024).

<sup>26</sup> *Wadsworth*, 278 A.3d at 1272.

<sup>27</sup> *Id.* at 1276 (citing Lord Campbell’s Act (1846) (Eng.)).

families for the untimely death of a loved one caused by the wrongful act of another.<sup>28</sup>

Today, wrongful death claims in Maryland are governed by Section 3-902 of the Courts and Judicial Proceedings Article, otherwise known as the Wrongful Death Statute (the “Statute”), which states that “[a]n action may be maintained against a person whose wrongful act causes the death of another.”<sup>29</sup> The Statute defines “wrongful act” broadly as any “act, neglect, or default” that would have entitled the decedent to damages had they survived.<sup>30</sup> The statutory framework ensures that surviving family members can seek justice and compensation for losses when a causal link is proved between the wrongful act and the resulting death.<sup>31</sup>

Judicial interpretations of the Statute have consistently emphasized the necessity of proximate causation.<sup>32</sup> For instance, in *Weimer v. Hetrick*, the Supreme Court of Maryland stated that “evidence must not leave the causal connection a matter of conjecture.”<sup>33</sup> The court held that “a plaintiff beneficiary in an action under the wrongful death statute must show *by a preponderance of the evidence* that the conduct of a defendant was negligent and that such negligence was a *proximate cause* of the death of the decedent.”<sup>34</sup> In *Weimer*, the plaintiffs, parents of a premature infant, alleged that the defendant physicians were negligent in their care and treatment of their son, Jason, who died shortly after his birth.<sup>35</sup> The mother, who had severe pre-eclampsia, agreed to deliver her baby via a cesarean section at thirty-two weeks, despite being told that her baby would likely not survive the birth.<sup>36</sup> The plaintiffs introduced expert testimony from Dr. Harkavy, a physician and neonatologist, stating that Dr. Weimer departed from the standard of care for physicians by making inadequate efforts to resuscitate the infant, using improper dosages of medication, prematurely removing the umbilical cord, failing to adequately monitor the infant, and

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

<sup>29</sup> MD. CODE ANN., CTS. & JUD. PROC. § 3-902(a) (West 2024).

<sup>30</sup> *Id.* § 3-901(e).

<sup>31</sup> *Id.* § 3-902(a).

<sup>32</sup> *Wadsworth*, 278 A.3d at 1278 (explaining that to satisfy proximate cause, the wrongful act or omission must be “(1) a cause in fact, and (2) a legally cognizable cause” of the injury).

<sup>33</sup> *Weimer v. Hetrick*, 525 A.2d 643, 648 (Md. 1987) (quoting 30 AM. JURIS. 2D *Evidence* § 1121, at 288-89 (2025)) (holding that the parents of a premature infant who died shortly after birth could not prove proximate causation because, under Maryland’s fifty percent rule, the infant’s fragile condition made it more likely that her death resulted from natural complications rather than the doctor’s negligence).

<sup>34</sup> *Id.* at 652 (emphasis added).

<sup>35</sup> *Id.* at 644.

<sup>36</sup> *Id.* at 644-45 (describing the mother’s hospital stay and events leading toward delivery of her child via a cesarean section).

more, ultimately decreasing the child's odds of survival.<sup>37</sup> Dr. Harkavy further opined that the child would have survived with proper care.<sup>38</sup> The court, however, held that such claims require proof that negligence was the proximate cause of the death.<sup>39</sup> This decision reinforced the principle that proximate causation must be established as a matter of probability or reasonable certainty, not mere possibilities.<sup>40</sup>

*B. The Loss of Chance Doctrine in Maryland.*

The loss of chance doctrine allows for recovery when a defendant's negligent conduct reduces one's chance of survival.<sup>41</sup> The loss of chance doctrine has been adopted in different jurisdictions with various approaches on its application.<sup>42</sup> Some jurisdictions allow for full recovery based on relaxed standards to establish causation where plaintiffs have established that the defendant's negligence led to a less than fifty percent chance of recovery.<sup>43</sup> Other jurisdictions have kept the traditional approach to causation and apply loss of chance to the calculation of proportional damages.<sup>44</sup> While many jurisdictions have adopted the doctrine to try and bridge gaps under traditional causation approaches, Maryland has consistently rejected the doctrine.<sup>45</sup>

In *Fennell v. Southern Maryland Hospital Center*, the Supreme Court of Maryland, explicitly declined to adopt the loss of chance doctrine.<sup>46</sup> The court held that adopting the doctrine would result in "damages [that] are really being awarded for the *possibility* that the

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<sup>37</sup> See *id.* at 645 (describing Dr. Harkavy's expert testimony explaining how Dr. Weimer deviated from the standard of care).

<sup>38</sup> *Id.* ("I can tell you that at the birth weight with an Apgar of two that the baby's survival chances would still be considered good . . . the likelihood of survival still that we're talking about is 80% to 90%.").

<sup>39</sup> *Weimer*, 525 A.2d at 652 (denying recovery because the plaintiffs could not show that the doctor's negligence, rather than the infant's fragile condition and low chance of survival, more likely than not caused her death).

<sup>40</sup> *Id.* at 650 (quoting *Pierce v. Johns-Manville Sales*, 464 A.2d 1020, 1026 (Md. 1983)).

<sup>41</sup> *Wadsworth v. Sharma*, 278 A.3d 1269, 1280 (Md. 2022).

<sup>42</sup> *Fennell v. S. Md. Hosp. Ctr.*, 580 A.2d 206, 210 (Md. 1990) (quoting the various approaches to the loss of chance doctrine described in *Cooper v. Hartman*, 533 A.2d 1294, 1297 (Md. 1987)).

<sup>43</sup> *Id.* at 210.

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

<sup>45</sup> *Wadsworth*, 580 A.2d. at 1273 ("[I]n favor of maintaining well-settled proximate causation principles, thus leaving to the state legislature the decision of whether to alter the proximate causation standard. . .").

<sup>46</sup> *Fennell*, 580 A.2d at 211.

negligence was a cause of the death.”<sup>47</sup> The court further held that “damages must be proven by a preponderance of the evidence.”<sup>48</sup> The Supreme Court of Maryland believed that permitting loss of chance recovery is an issue that should be resolved by the legislature.<sup>49</sup>

The Supreme Court of Maryland reaffirmed its position in *Wadsworth v. Sharma*, where the court once again refused to extend Maryland law to include the loss of chance doctrine in a wrongful death action.<sup>50</sup> The *Wadsworth* court emphasized that Maryland law requires proof, by a preponderance of evidence, “that the defendant’s negligence proximately caused the death.”<sup>51</sup> Further, without evidence showing that the decedent had a greater than fifty percent chance of survival absent the alleged negligence, recovery is barred from the plaintiff.<sup>52</sup>

In addition to reaffirming its rejection of the loss of chance doctrine, the *Wadsworth* decision also analyzed the legislative history of Maryland’s Wrongful Death Statute.<sup>53</sup> The court noted that while the Maryland General Assembly has amended the Statute three times since its enactment, it has never altered the requirement of proximate causation or adopted the loss of chance doctrine.<sup>54</sup> The legislature has only amended the Statute to extend the statute of limitations, the period in which a plaintiff can bring suit.<sup>55</sup> This legislative inaction was interpreted as an implicit agreement with the court’s longstanding interpretation of the Statute.<sup>56</sup>

### C. *Relevance of the Loss of Chance Doctrine in Cancer Cases.*

In medical malpractice cases, the loss of chance doctrine “allows the plaintiff to recover if the plaintiff can prove that the defendant’s negligence caused the loss of chance of a better outcome, including survival.”<sup>57</sup> Moreover, in cases where the patient dies from cancer, absent a showing

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<sup>47</sup> *Id.* at 213.

<sup>48</sup> *Id.* at 214.

<sup>49</sup> *See id.* at 214-15 (explaining why the Maryland legislature is better equipped to resolve the issue of permitting loss of chance recovery).

<sup>50</sup> *Wadsworth*, 278 A.3d at 1285.

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

<sup>52</sup> *Id.* at 1284-85.

<sup>53</sup> *See id.* at 1279-80 (explaining the legislative history behind Maryland’s Wrongful Death statute).

<sup>54</sup> *Id.* at 1279 (“In thirty-five years, the General Assembly has not passed legislation modifying our decision to reject the loss of chance doctrine. This inaction supports a conclusion that the General Assembly has acquiesced to our holdings. . . .”).

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

<sup>56</sup> *Wadsworth*, 278 A.3d at 1279 (“This inaction supports a conclusion that the General Assembly has acquiesced to our holdings. . . .”).

<sup>57</sup> *Id.* at 1273.

that the patient had survival odds greater than fifty percent at the time of the alleged negligent act, the plaintiff is barred from recovery.<sup>58</sup> Additionally, if a patient's chance of survival was less than fifty percent at the time of the alleged negligence, the plaintiff would be unable to prove by a preponderance of the evidence that the negligence was the proximate cause of the resulting death or injury.<sup>59</sup> The rationale behind barring recovery for these plaintiffs is that when a patient already had a less than fifty percent chance of survival at the time of the alleged negligence, "it was probably the pre-existing medical condition, not the negligence, that killed the patient."<sup>60</sup>

This reasoning reflects Maryland's adherence to a rigid causation framework that demands clear proof of probability rather than possibility.<sup>61</sup> Maryland, unlike some jurisdictions, applies a strict two-part test in determining causation in cancer malpractice cases.<sup>62</sup> First, the patient must prove, at the time the negligence occurred, they had a greater than fifty percent chance of survival.<sup>63</sup> Second, they must demonstrate that by the time of diagnosis, this chance had diminished below fifty percent, effectively rendering the condition incurable.<sup>64</sup> This "curable to incurable" framework presents a narrow window of recoverability and is often impractical given the evolving and interpretative nature of the survivability assessments.<sup>65</sup>

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<sup>58</sup> *Id.* at 1279-80.

<sup>59</sup> *Id.* at 1284-85 ("Without evidence to dispute that Ms. Wadsworth had a greater than fifty percent chance of survival, Mr. Wadsworth, as a matter of law, cannot meet his burden to prove by a preponderance of the evidence that Dr. Sharma's alleged negligence caused Ms. Wadsworth's death.").

<sup>60</sup> *Fennell v. S. Md. Hosp. Ctr.*, 580 A.2d 206, 214 (Md. 1990).

<sup>61</sup> *See id.* (holding that the plaintiff could not recover where a hospital's delay in treating a patient with bacterial meningitis eliminated her forty-percent chance of survival because the pre-existing condition was deemed the more probable cause of death); *Weimer v. Hetrick*, 525 A.2d 643, 650 (Md. 1987) (denying recovery where a premature infant's low survival odds made it more likely that her fragile condition, rather than the doctor's alleged negligence, caused her death).

<sup>62</sup> *Fennell*, 580 A.2d at 214; *Weimer*, 525 A.2d at 650.

<sup>63</sup> *Fennell*, 580 A.2d at 214; *Weimer*, 525 A.2d at 650.

<sup>64</sup> *Fennell*, 580 A.2d at 214; *Weimer*, 525 A.2d at 650.

<sup>65</sup> *See Fennell*, 580 A.2d at 214 (explaining Maryland's two part test for establishing causation in cancer malpractice cases); *Weimer*, 525 A.2d at 650 (rejecting recovery where the decedent's chance of survival was below fifty percent and explaining that Maryland's rule limits recovery to cases where negligence reduces a patient's odds from above fifty percent, which is "curable", to below fifty percent, which is "incurable"); *Fennell*, 580 A.2d at 216-17 (applying the same reasoning and illustrating that once a patient's survival odds fall below fifty percent, Maryland law deems the condition legally "incurable," thereby precluding recovery).

### III. CALCULATING SURVIVABILITY IN CANCER CASES.

#### A. *The Role of the AJCC Staging Manual.*

One of the methods in measuring survivability in cancer cases is through the AJCC Staging Manual.<sup>66</sup> This manual serves as the standard reference for cancer survival rates based on “how much cancer is in the body and where it is located.”<sup>67</sup> Cancer Staging Systems, like the manual, use the following four main factors to determine the stage of cancer: location of the tumor, size of the tumor, lymph node involvement, and whether the cancer has spread to other areas of the body or metastasized.<sup>68</sup> The most common staging system, the TNM system, is used by medical professionals to determine a patient’s prognosis and treatment options.<sup>69</sup> This system categorizes cancer into stages based on “extent of the tumor (T), extent of spread to the lymph nodes (N), and presence of metastasis (M).”<sup>70</sup>

The AJCC Staging Manual’s TNM system’s significance lies in its standardized approach, which facilitates consistent evaluation and communication among healthcare providers.<sup>71</sup> For example, a patient with Stage I cancer is expected to have a higher survival rate than a patient with Stage IV cancer.<sup>72</sup> However, this reliance on the staging system for survivability calculations raises questions about its accuracy in light of medical advancements, available treatments, and its use within the legal system for medical negligence cases.<sup>73</sup> Treatments, such as immunotherapy

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<sup>66</sup> *AJCC Cancer Staging Manual, Seventh Edition*, AM. JOINT COMM. ON CANCER (2010), [https://www.facs.org/media/j30havyf/ajcc\\_7thed\\_cancer\\_staging\\_manual.pdf](https://www.facs.org/media/j30havyf/ajcc_7thed_cancer_staging_manual.pdf) (on file with the University of Baltimore Law Forum) [hereinafter *AJCC Cancer Staging Manual*] (providing a resource for medical professionals on methods of cancer staging that rank different survival levels).

<sup>67</sup> *Id.* at 23.

<sup>68</sup> *Cancer Staging Systems*, AM. COLL. OF SURGEONS, <https://www.facs.org/quality-programs/cancer-programs/american-joint-committee-on-cancer/cancer-staging-systems/> (on file with the University of Baltimore Law Forum) (last visited Jan. 7, 2025).

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

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

<sup>71</sup> See generally *AJCC Cancer Staging Manual*, *supra* note 66 (providing a resource for medical professionals on methods of cancer staging that rank different survival levels).

<sup>72</sup> See *id.* at 5.

<sup>73</sup> See Anna Weiss et al., *Validation Study of the American Joint Committee on Cancer Eighth Edition Prognostic Stage Compared with the Anatomic Stage in Breast Cancer*, JAMA ONCOLOGY 203-09 (2017), <https://jamanetwork.com/journals/jamaoncology/fullarticle/2665174> (on file with the University of Baltimore Law Forum) (explaining that the traditional TNM staging system does not account for biologic factors that contribute to accurate survival predictions in breast cancer). See generally Li-Ju Chen et. al., *Survival Predictability Between the*

and targeted therapy, have dramatically improved outcomes for many cancers even in advanced stages, suggesting that survivability metrics tied strictly to staging may no longer accurately reflect a patient's prognosis.<sup>74</sup>

While the AJCC Staging Manual system remains foundational, it is not treated as infallible or singular by providers.<sup>75</sup> The medical community does not treat any one system as the "bible" for prognosis.<sup>76</sup> The variation in clinical judgement and reliance on multiple tools reinforces that survivability assessments are inherently subject to interpretation and clinical experience.<sup>77</sup> This indicates that survivability thresholds should not be primarily used as dispositive legal cutoffs for recovery.<sup>78</sup>

### *B. Survival Metrics and Staging.*

The AJCC Staging Manual process categorizes cancers into stages I through IV based on data collected via the TNM system.<sup>79</sup> This classification has a significant impact on survival rates.<sup>80</sup> To clarify, survival rates decline as the stage progresses from Stage I, representing localized disease, to Stage IV, indicating widespread metastasis.<sup>81</sup>

Once a cancer stage is assigned at the time of diagnosis, it remains fixed throughout treatment regardless of its progression or response to treatment.<sup>82</sup> This "staging at diagnosis" approach provides a baseline for clinical decision-making but does not account for the dynamic nature of

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*American Joint Committee on Cancer 8<sup>th</sup> Edition Staging System and the Barcelona Clinic Liver Cancer Classification in Patients with Hepatocellular Carcinoma*, THE ONCOLOGIST (2021), <https://theoncologist.onlinelibrary.wiley.com/doi/epdf/10.1002/onco.13535> (on file with the University of Baltimore Law Forum) (describing discrepancies in survival calculations between the AJCC TNM system and other systems, suggesting that other systems may be more accurate).

<sup>74</sup> See generally Cynthia Weiss, *Mayo Clinic Q and A: 5 Advances in Cancer Treatment*, MAYO CLINIC NEWS NETWORK (Aug. 15, 2023), <https://newsnetwork.mayoclinic.org/discussion/mayo-clinic-q-and-a-5-advances-in-cancer-treatment/> (on file with the University of Baltimore Law Forum) (describing advances in cancer treatments leading to higher survivability rates).

<sup>75</sup> See *infra* Section III.C (describing additional systems relied on by practitioners).

<sup>76</sup> See *infra* Section III.C (describing practitioner discretion when selecting a staging system to use).

<sup>77</sup> See *infra* Section III.C.

<sup>78</sup> Compare *supra* Part III (describing staging systems), with *supra* Part II (describing Maryland's rejection of the loss of chance doctrine and its reliance on the 50% threshold).

<sup>79</sup> *AJCC Cancer Staging Manual*, *supra* note 66, at 5.

<sup>80</sup> See *id.* at 4 (providing a resource for medical professionals on methods of cancer staging that rank different survival levels, for example, Stage I indicates a higher chance of survival than State IV).

<sup>81</sup> *Id.* at 12.

<sup>82</sup> *Id.* at 10.

cancer progression and treatment response.<sup>83</sup> Consequently, the staging system does not reflect improvements in survival that may occur due to innovative treatments or early intervention.<sup>84</sup>

As described by the American College of Surgeons, the staging system provides critical insights into cancer management by standardizing the language used to describe cancer progression.<sup>85</sup> The purpose of this system is to ensure consistent communication among medical professionals globally.<sup>86</sup> However, this system does not account for other critical factors, such as the impact of delayed diagnosis, which can significantly alter patient survivability outcomes by allowing cancers to progress to more advanced stages prior to treatment.<sup>87</sup> The system also does not account for changes in survival rates based on newer treatments available.<sup>88</sup> These delays, often due to medical negligence, and lack of consistent updates based on new technologies and treatments, are not reflected in survivability calculations, despite their profound impact on prognosis.<sup>89</sup>

### *C. Beyond AJCC: The Variable Nature of Survivability Assessments.*

Although the AJCC Staging Manual system remains a cornerstone in cancer prognosis, it is not the sole authority used by medical professionals.<sup>90</sup> Providers often rely on a combination of resources such as the American Cancer Society (“ACS”), the National Cancer Institute

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<sup>83</sup> See *id.* at 9 (describing that stages are assigned at diagnosis and rarely changed).

<sup>84</sup> See *id.* at 10 (describing that stages are assigned at diagnosis and rarely changed even as prognosis improves).

<sup>85</sup> *AJCC Cancer Staging Manual*, *supra* note 66, at 10.

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

<sup>87</sup> See *id.* at 8-12 (explaining that cancer staging is based primarily on the anatomic extent of disease: tumor size, lymph node involvement, and presence of metastases, and incorporates only limited nonanatomic prognostic factors, such as tumor grade, biomarkers, and patient age); *Cancer Staging Systems*, *supra* note 68 (describing the TNM system’s reliance on anatomical characteristics to classify disease severity).

<sup>88</sup> See *AJCC Cancer Staging Manual*, *supra* note 66, at 8-12 (describing the factors accounted for in cancer staging); *Cancer Staging Systems*, *supra* note 68 (describing the factors accounted for in cancer staging).

<sup>89</sup> See *AJCC Cancer Staging Manual*, *supra* note 66, at 8-12 (describing the factors accounted for in cancer staging with a notable absence for delayed diagnosis).

<sup>90</sup> See *Cancer Staging*, AM. CANCER SOC’Y, <https://www.cancer.org/cancer/diagnosis-staging/staging.html> (on file with the University of Baltimore Law Forum) (last revised Sept. 10, 2024) [hereinafter *Cancer Staging I*] (describing the AJCC system of cancer staging, derived from the AJCC Staging Manual); *Cancer Staging*, NAT’L CANCER INST., <https://www.cancer.gov/about-cancer/diagnosis-staging/staging> (on file with the University of Baltimore Law Forum) (last reviewed Oct. 14, 2022) [hereinafter *Cancer Staging II*] (describing the AJCC cancer staging system).

(“NCI”), and peer-reviewed clinical literature to determine survivability estimates.<sup>91</sup> These sources offer broader insights including, cancer-specific survival data, treatment responses by population group, and survival metrics based on tumor biology and genetics.<sup>92</sup> Oncologists, radiologists, and other specialists use these tools in conjunction with their clinical judgement when advising patients and forming treatment plans.<sup>93</sup>

This multidimensional approach underscores the fact that survivability calculations are not universally standardized.<sup>94</sup> They are often based on a combination of evidence-based estimates, evolving medical data, and individual patient circumstances.<sup>95</sup> Additionally, online medical platforms like “UpToDate” are frequently used by healthcare professionals as reliable, real-time decision making aids, further supporting the notion that survivability assessments are inherently interpretative and variable.<sup>96</sup>

#### *D. The Impact of Medical Advancements on Survivability.*

Medical Advancements have significantly altered traditional survivability metrics.<sup>97</sup> Treatments such as immunotherapy, precision medicine, and advanced imaging technologies have enhanced early detection and treatment outcomes.<sup>98</sup> For example, Chimeric antigen receptor-T cell therapy (“CAR-T cell therapy”) is used in the treatment of lymphoma, leukemia, and myelomas with remission rates of up to eighty percent.<sup>99</sup> Advances in imaging technologies such as, PET scans and magnetic resonance imaging (“MRI”) have increased the accuracy of early cancer detection.<sup>100</sup> These innovations challenge the fairness of primarily

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<sup>91</sup> See sources cited *supra* note 90.

<sup>92</sup> See sources cited *supra* note 90.

<sup>93</sup> See generally sources cited *supra* note 90 (describing the staging systems relied upon by medical practitioners); *AJCC Cancer Staging Manual*, *supra* note 66 (describing the AJCC Staging Manual used by practitioners).

<sup>94</sup> See *supra* text accompanying notes 90-93 (explaining that multiple cancer staging systems exist for physicians to evaluate disease progression and treatment planning).

<sup>95</sup> See generally sources cited *supra* notes 87, 90 (describing the staging systems relied upon by medical practitioners); *AJCC Cancer Staging Manual*, *supra* note 66 (describing the AJCC Staging Manual used by practitioners).

<sup>96</sup> Wolters Kluwer, *UpToDate: Trusted, Evidence-based Solutions for Modern Healthcare*, UP2DATE, <https://www.wolterskluwer.com/en/solutions/uptodate> (on file with the University of Baltimore Law Forum) (last visited Mar. 28, 2025).

<sup>97</sup> Weiss, *supra* note 74.

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

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

<sup>100</sup> See Akhil Pulumati et al., *Technological Advancements in Cancer Diagnostics: Improvements and Limitations*, 6 *CANCER REP.* 1, 2 (2021), <https://onlinelibrary.wiley.com/doi/pdfdirect/10.1002/cnr2.1764> (on file with the

basing negligence claims strictly on outdated survival metrics tied to staging.<sup>101</sup>

While the AJCC Staging Manual remains a cornerstone of cancer prognosis, its application in calculating survivability must adapt to reflect modern medical advancements.<sup>102</sup> Courts and policymakers should consider these changes and deviate from their current reliance on survivability assessments in medical malpractice cases to ensure fairness and accuracy in negligence claims involving cancer patients.<sup>103</sup>

#### IV. ISSUE: MARYLAND’S “ALL-OR-NOTHING” APPROACH.

Maryland law fails to adequately protect individuals who experience medical negligence that reduces their chances of survival, particularly when such chances are below fifty percent.<sup>104</sup> By rigidly adhering to an “all-or-nothing” standard of proximate causation, Maryland law denies recovery to plaintiffs based on arbitrary statistical thresholds rather than the actual harm suffered by patients.<sup>105</sup> This approach ignores medical advancements and the effect of delayed diagnoses, while also shielding negligent providers from accountability.<sup>106</sup>

##### *A. Delayed Diagnosis and Negligence.*

Delayed cancer diagnoses can significantly worsen patient outcomes by allowing diseases to progress to more advanced stages.<sup>107</sup> Under Maryland’s current loss of chance framework, patients whose cancer progresses due to diagnostic delays may face limited legal recourse, as survivability is closely tied to the stage at which the cancer is ultimately diagnosed, not when it should have been detected by medical

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University of Baltimore Law Forum) (describing advances in cancer diagnostic technologies).

<sup>101</sup> See generally sources cited *supra* notes 74, 100 (describing advances in cancer diagnostic technologies).

<sup>102</sup> See *AJCC Cancer Staging Manual*, *supra* note 66, at 8-12 (describing the factors accounted for in cancer staging).

<sup>103</sup> See *infra* Part VI.

<sup>104</sup> See *supra* Part II.

<sup>105</sup> See *infra* Section IV.B.

<sup>106</sup> See *infra* Part IV.

<sup>107</sup> See 3 LEE S. GOLDSMITH, *MEDICAL MALPRACTICE GUIDE: MEDICAL ISSUES* § 42.01 (Matthew Bender, rev. ed., 2024) (describing the significant twenty percent reduction in survival rates for breast cancer as a result of delayed diagnosis); *Loudin v. Radiology & Imaging Servs.*, 924 N.E.2d 433, 445-46 (Ohio Ct. App. 2009) (explaining the adverse effect of a delayed diagnosis of breast cancer).

professionals.<sup>108</sup> This disconnect means that even if earlier detection could have led to a higher survival rate, the stage assigned reflects the delayed diagnosis, resulting in lower survival odds and reducing the patient's ability to bring a claim.<sup>109</sup> This is especially important because currently, Maryland law bars wrongful death actions where a patient had less than a fifty percent chance of survival at the time of the alleged negligence.<sup>110</sup>

In defending delayed diagnosis cases, doctors often use tumor growth rate modeling to argue that the patient's survival odds were already below fifty percent at the time the diagnosis *should* have been made by the doctor.<sup>111</sup> This approach involves estimating how fast the tumor grew, then working backward from the size at diagnosis to suggest that earlier detection would not have improved the prognosis.<sup>112</sup>

This type of modeling is speculative, relying on generalized data that fails to account for individual differences in tumor biology and growth patterns.<sup>113</sup> This highlights a core problem with Maryland's rigid fifty percent threshold that it ignores real harm caused by delayed diagnosis by focusing on speculative numbers.<sup>114</sup>

As a result, patients with delayed diagnoses may lose the opportunity to seek justice, even if negligence played a role in worsening their prognosis.<sup>115</sup> In the case of *Loudin v. Radiology & Imaging Services*,

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<sup>108</sup> See *supra* Parts II–III.

<sup>109</sup> See *AJCC Cancer Staging Manual*, *supra* note 66, at 12 (describing that cancer staging is assigned at diagnosis and does not change and that lower staged cancers have better prognoses than higher staged cancers).

<sup>110</sup> See *supra* Part II.

<sup>111</sup> See P. Sasieni et al., *Impact of MCEd Screening Interval on Reduction in Late-Stage Cancer Diagnosis and Mortality*, 32 ANNALS OF ONCOLOGY S925, S925 (2021) (using tumor growth rate scenarios to model cancer screening outcomes, including effects of varying detection intervals on diagnosis stage and mortality risk, thereby supporting backward modeling of tumor progression). See generally John Ng et al., *Development of a Model to Estimate the Association Between Delay in Cancer Treatment and Local Tumor Control and Risk of Metastases*, 4 JAMA NETWORK OPEN 1 (2021) (proposing a simplified mathematical model that uses tumor doubling times to estimate the impact of treatment delays on tumor control and metastasis formation, supporting retrospective inferences about tumor size and progression).

<sup>112</sup> See sources cited *supra* note 111.

<sup>113</sup> See generally Ng, *supra* note 111 (developing a simplified mathematical model of tumor growth and metastasis using generalized literature-based data and acknowledging that the model's assumptions do not capture individual variability in tumor biology and growth patterns); Sasieni, *supra* note 111 (describing that studies used generalized statistics to be able to calculate tumor growth rate patterns).

<sup>114</sup> Compare Sasieni, *supra* note 111 (describing tumor growth rate models), with *supra* Part IV (describing the problem with Maryland's rejection of the loss of chance doctrine), and *supra* Part II (describing how Maryland currently applies the loss of chance doctrine).

<sup>115</sup> See generally *Wadsworth v. Sharma*, 278 A.3d 1269, 1272-74 (Md. 2022) (showing a loss of chance claim where a delayed diagnosis adversely affected the patient, resulting in

*Inc.*, the plaintiff's breast cancer progressed from Stage I to Stage IIA due to a delayed diagnosis, which decreased her chance of survival.<sup>116</sup> Although this case did not explicitly confirm the plaintiff had a greater than fifty percent chance of survival at diagnosis, it highlights that regardless of the survivability calculation, evidence can be shown to prove a physician's negligence.<sup>117</sup> Such evidence may include a comparison of the tumor size at the time the cancer should have been diagnosed versus when the physician actually diagnosed the tumor.<sup>118</sup> Moreover, while *Loudin* concerns Ohio law, this case highlights how proximate causation can be established through evidence of a delayed diagnosis caused by the physician, regardless of the calculated chance of survival at the time of diagnosis.<sup>119</sup>

*B. Limitations of the Fifty Percent Threshold.*

Maryland's strict adherence to a fifty percent threshold for survival odds presents significant limitations.<sup>120</sup> Under this approach, slight differences, such as a forty percent versus a fifty-one percent chance of survival, can determine whether plaintiffs are eligible for recovery.<sup>121</sup> It is not fair that a patient with a fifty-one percent chance of survival at the time of the alleged negligence has a valid claim, but a patient with a forty-nine percent chance of survival is barred from recovery.<sup>122</sup> This "all-or-nothing" rule is rooted in the state's rejection of the loss of chance doctrine, as reaffirmed in *Wadsworth*.<sup>123</sup> In *Wadsworth*, the court held that Maryland law does not recognize claims where medical negligence merely diminishes the likelihood of a better outcome.<sup>124</sup> Instead, plaintiffs must demonstrate by a preponderance of the evidence that the negligence proximately caused

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her untimely death, and barred the family from raising a claim in court because the patient did not possess a greater than fifty percent chance of survival at diagnosis).

<sup>116</sup> *Loudin v. Radiology & Imaging Servs.*, 924 N.E.2d 433, 447 (Ohio Ct. App. 2009).

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

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

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

<sup>120</sup> *See supra* Section II.C.

<sup>121</sup> *See generally supra* Part II (explaining Maryland's rejection of the loss of chance doctrine and patients bar to recovery based on the fifty percent threshold); *Weimer v. Hetrick*, 525 A.2d 643 (Md. 1987) (rejecting the loss of chance doctrine and showing that proximate causation for negligence cannot be established where the decedent had a less than fifty percent chance of survival); *Fennel v. S. Md. Hosp. Ctr.*, 580 A.2d 206 (Md. 1990) (rejecting the loss of chance doctrine and showing that proximate causation for negligence cannot be established where the decedent had a less than fifty percent chance of survival).

<sup>122</sup> *See supra* Section II.C.

<sup>123</sup> *Wadsworth v. Sharma*, 278 A.3d 1269, 1285 (Md. 2022).

<sup>124</sup> *Id.* at 1273.

the harm, a burden that is insurmountable when survival chances are inherently low.<sup>125</sup>

This rigid interpretation becomes even more troubling when marginal differences, such as between a fifty-one percent and a forty-nine percent chance of survival, determine the validity of a claim.<sup>126</sup> A patient who deteriorates from a sixty percent chance of survival to forty-five percent due to a delayed diagnosis has still suffered a medically significant loss, yet is barred from recovery under Maryland's current doctrine.<sup>127</sup>

### C. *Ethical and Legal Concerns with Maryland's Current Approach.*

Denying recovery based on arbitrary survival percentages raises ethical issues.<sup>128</sup> This approach invalidates patients' grievances and leaves them without recourse, exacerbating their suffering.<sup>129</sup> By barring claims for those below this arbitrary threshold, the law fails to hold negligent practitioners accountable, which erodes the public's trust in both the healthcare and legal systems.<sup>130</sup>

This disproportionately impacts vulnerable populations, such as low-income patients and racial minorities, who face systemic barriers to early detection and care.<sup>131</sup> For instance, Black women are more likely to be

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<sup>125</sup> See *Weimer*, 525 A.2d 643 (denying recovery where a premature infant's low survival odds made it more likely that her death resulted from her fragile condition rather than the doctor's negligence, thus failing to satisfy proximate cause under Maryland's fifty percent rule); *Fennell*, 580 A.2d 206 (reaffirming that recovery is barred when a patient's initial chance of survival was less than fifty percent, as any causal link between negligence and death is deemed speculative).

<sup>126</sup> See generally *Weimer*, 525 A.2d 643 (rejecting the loss of chance doctrine and showing that proximate causation for negligence cannot be established where the decedent had a less than fifty percent chance of survival).

<sup>127</sup> See generally *id.* (describing how a delayed diagnosis of a patient will result in a less than fifty percent survivability and bars a patient's family from recovery); *Fennell*, 580 A.2d 206 (describing how a delayed diagnosis of a patient will result in a less than fifty percent survivability and bars a patient's family from recovery); *Wadsworth*, 278 A.3d 1269 (describing how a delayed diagnosis as a result of Dr. Sharma's negligence ignored because fifty percent survivability threshold not met, patient's family barred from recovery).

<sup>128</sup> See *infra* Section IV.C.

<sup>129</sup> See generally *Weimer*, 525 A.2d 643 (plaintiffs denied recovery for failure to establish proximate causation); *Fennell*, 580 A.2d 206 (plaintiff denied recovery); *Wadsworth*, 278 A.3d 1269 (plaintiffs denied recovery).

<sup>130</sup> See generally *Weimer*, 525 A.2d 643 (plaintiffs denied recovery for failure to establish proximate causation); *Fennell*, 580 A.2d 206 (Plaintiff denied recovery); *Wadsworth*, 479 Md. 606 (plaintiffs denied recovery).

<sup>131</sup> MATTHEW BENDER & COMPANY, INC., 3 MEDICAL MALPRACTICE GUIDE: MEDICAL ISSUES § 42.01 (2024).

diagnosed with advanced breast cancer, yet Maryland's framework may deny them recovery, thus perpetuating inequities.<sup>132</sup>

Further, this rigid system ignores advancements in medical treatments such as CAR-T cell therapy and mRNA vaccines, which can improve survival odds over time.<sup>133</sup> By clinging to outdated survivability metrics, Maryland law contradicts modern medical ethics, which prioritize individualized care and equitable treatment.<sup>134</sup> Ultimately, this “all-or-nothing” approach undermines the principle of corrective justice by failing to provide a remedy for harm caused by negligence.<sup>135</sup>

Regardless of a patient's survival odds, a doctor's negligence can and should be proven through methods that establish proximate causation beyond the rigid fifty percent threshold.<sup>136</sup> Proximate causation can be demonstrated by showing how a doctor's failure to meet the standard of care directly impacted the patient's condition or accelerated the progression of their illness.<sup>137</sup> For example, expert testimony can identify deviations from the standard of care, such as failing to diagnose a condition or provide timely treatment, and how those actions or inactions contributed to measurable harm.<sup>138</sup>

Maryland's current approach, which attributes the patient's poor outcome solely to their illness when survival odds are below fifty percent at the time of the alleged negligence, ignores these critical considerations.<sup>139</sup> By focusing solely on statistical survival odds, the law disregards other evidence that could illustrate how a physician's negligence exacerbated the patient's conditions or reduced their quality of life.<sup>140</sup> A more holistic approach would ensure that negligence is addressed and remedied,

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<sup>132</sup> *Id.*

<sup>133</sup> See generally Weiss, *supra* note 74 (describing advances in cancer treatments).

<sup>134</sup> Basil Varkey, *Principles of Clinical Ethics and Their Application to Practice*, 30 MED. PRINC. AND PRAC. 17, 17-20 (2020) (explaining medical ethics).

<sup>135</sup> See U.S. CONST. amend. I (guaranteeing individuals the right to seek redress for grievances through the government, a principle that underscores the need for access to remedies when negligence causes harm).

<sup>136</sup> See *Fennell v. S. Md. Hosp. Ctr.*, 580 A.2d 206, 213-15 (Md. 1990) (noting that physicians failed to promptly diagnose and treat the patient's bacterial meningitis, which expert testimony indicated could have increased her forty-percent chance of survival, but holding that recovery was barred because Maryland's fifty-percent rule rendered the causal link between negligence and death legally insufficient).

<sup>137</sup> *Loudin v. Radiology & Imaging Servs.*, 924 N.E.2d 433, 447 (Ohio Ct. App. 2009).

<sup>138</sup> See *id.* at 447; MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-04 (West 2019) (explaining the requirement of experts needed for medical malpractice claims in Maryland).

<sup>139</sup> See *Fennell*, 580 A.2d at 213-14.

<sup>140</sup> *But see Loudin*, 924 N.E.2d at 447.

regardless of survival probability, aligning with the principles of justice and accountability.<sup>141</sup>

The current legal framework inadvertently incentivizes inaction.<sup>142</sup> If medical providers can escape liability simply by showing a patient had a low statistical chance of survival, even egregious negligence, such as ignoring abnormal scans or failing to communicate key findings, like in *Wadsworth*, can go unpunished.<sup>143</sup> This is not in the best interests of Maryland citizens or its healthcare community and undermines public trust in the medical and legal systems.<sup>144</sup>

#### *D. Advancements in Cancer Treatments.*

Recent advancements in cancer treatments have significantly improved patient outcomes, challenging the traditional survivability metrics Maryland relies upon for medical malpractice claims.<sup>145</sup> Innovations such as immunotherapy, precision medicine, and targeted therapies have extended survival rates even for patients with late diagnoses, demonstrating that survival odds at the time of the alleged negligence should not be the sole determinant of a plaintiff's ability to recover damages.<sup>146</sup>

For example, CAR-T cell therapy has revolutionized treatment for certain cancers, including leukemia and lymphoma, by training the patient's immune system to attack cancer cells.<sup>147</sup> With this therapy about eighty percent of patients have experienced remission.<sup>148</sup> Similarly, mRNA cancer vaccines, custom made to fit the genetics of an individual's tumor, are now

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<sup>141</sup> See generally Varkey, *supra* note 134 (explaining medical ethics).

<sup>142</sup> See *infra* text accompanying note 143 (describing that practitioners can escape liability because fifty percent threshold not met); *infra* Section IV.E (describing how the current system in Maryland fails to hold negligent practitioners accountable due to its reliance on the fifty percent threshold). See generally *Weimer v. Hetrick*, 525 A.2d 643 (Md. 1987) (rejecting the loss of chance doctrine and showing that proximate causation for negligence cannot be established where the decedent had a less than fifty percent chance of survival); *Fennell*, 580 A.2d 206 (rejecting the loss of chance doctrine and showing that proximate causation for negligence cannot be established where the decedent had a less than fifty percent chance of survival).

<sup>143</sup> See generally *Wadsworth v. Sharma*, 278 A.3d 1269 (Md. 2022) (holding that failure to disclose abnormal scans did not support recovery where patient could not show greater than fifty percent chance of survival).

<sup>144</sup> See *infra* Section IV.E (describing how the current system in Maryland fails to hold negligent practitioners accountable resulting in a lack of trust in the medical and legal systems).

<sup>145</sup> See *infra* notes 146-51.

<sup>146</sup> See Pulumati et al., *supra* note 100 (describing advances in cancer diagnostic technologies).

<sup>147</sup> Weiss, *supra* note 74 (describing Chimeric Antigen Receptor CAR-T Cell Therapy).

<sup>148</sup> *Id.*

being developed to treat various types of cancer.<sup>149</sup> Moreover, developments in early cancer detection methods, including artificial intelligence-enhanced imaging and liquid biopsy technology, allow for early intervention and improved survival rates.<sup>150</sup> Techniques such as PET and MRI scans now provide more accurate diagnoses at earlier stages.<sup>151</sup> These advancements mean patients diagnosed with late-stage cancer can have better prognoses compared to traditional survivability calculations.<sup>152</sup>

Maryland's rigid reliance on the fifty percent survival threshold ignores the evolving nature of cancer treatment and the increasing availability of life-extending treatments.<sup>153</sup> The legal system must adapt to reflect these advancements rather than continue to rely on outdated models.<sup>154</sup> By disregarding the potential for treatments and breakthroughs, Maryland law does not provide justice for all victims of medical negligence.<sup>155</sup>

#### *E. Holding Negligent Practitioners Accountable.*

Maryland's failure to recognize the loss of chance doctrine in medical malpractice cases shields negligent healthcare providers from accountability and effectively denies access to justice for many patients harmed by negligent healthcare providers.<sup>156</sup> By imposing an arbitrary survival threshold, the law excuses medical professionals whose errors deprive patients of effective treatments and bars many valid claims from even reaching court.<sup>157</sup> This lack of accountability not only harms patients, but also weakens trust in the healthcare and legal systems designed to protect them.<sup>158</sup>

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

<sup>150</sup> Pulumati et al., *supra* note 100, at 1, 7, 10, 12 (describing advances in cancer diagnostic technologies).

<sup>151</sup> *Id.*

<sup>152</sup> *See supra* Section III.D.

<sup>153</sup> *See supra* Part IV.

<sup>154</sup> *See infra* Part V (explaining the approaches adopted by other jurisdictions that do not rely on survivability metrics).

<sup>155</sup> *See generally* Fennell v. S. Md. Hosp. Ctr., 580 A.2d 206 (Md. 1990) (denying recovery to plaintiff); Wadsworth v Sharma, 278 A.3d 1269 (Md. 2022) (denying recovery to plaintiffs); Weimer v. Hetrick, 525 A.2d 643 (Md. 1987) (denying recovery to plaintiffs for failure to establish proximate causation).

<sup>156</sup> *See generally* Wadsworth, 278 A.3d at 1273 (describing how a delayed diagnosis as a result of Dr. Sharma's negligence ignored because 50% survivability threshold not met).

<sup>157</sup> *See generally id.* (holding that delayed-diagnosis negligence claim failed absent proof of greater than fifty percent chance of survival).

<sup>158</sup> *See supra* notes 127, 155 (patients without recourse, negligent physicians not held accountable).

Under the current framework, physicians who fail to diagnose or properly treat cancer in a timely manner can escape liability simply because their patients have a statistically lower chance of survival.<sup>159</sup> This approach ignores the fact that medical negligence, such as a failure to diagnose or a delay in treatment, can still cause measurable harm, even if a patient's initial prognosis was poor.<sup>160</sup> In *Wadsworth v. Sharma*, despite knowing that Dr. Sharma reviewed an abnormal PET/CT scan showing the presence of cancer in 2013, the court declined to offer relief to the family because Ms. Wadsworth's chance of survival at the time of diagnosis in 2016, was below fifty percent.<sup>161</sup> Maryland's rejection of the loss of chance doctrine makes it difficult for patients in similar situations to hold providers accountable.<sup>162</sup>

Maryland's strict adherence to survivability calculations fails to consider the real impact of medical negligence.<sup>163</sup> Even when a patient has a low chance of survival, the opportunity for an increased lifespan or alternative treatment options still holds value.<sup>164</sup> Other jurisdictions recognize this by allowing plaintiffs to recover damages for the reduction in their chance of survival, even if their survival odds were below fifty percent.<sup>165</sup>

To ensure accountability and fairness, Maryland should reform its legal approach by incorporating a proportional damages system or adopting an "increased risk of harm" standard.<sup>166</sup> Such reforms would align Maryland's medical malpractice laws with modern medical advancements and ethical considerations while ensuring that negligent providers are held

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<sup>159</sup> See generally *Wadsworth*, 278 A.3d 1269 (holding that negligence claim for delayed diagnosis failed absent proof of more-than-fifty percent chance of survival).

<sup>160</sup> See generally *id.* (holding that a negligence claim for delayed diagnosis failed absent proof of more-than-fifty percent chance of survival); *Loudin v. Radiology & Imaging Servs.*, 924 N.E.2d 433, 436-38 (Ohio Ct. App. 2009) (identifying other potential evidence to establish medical negligence).

<sup>161</sup> *Wadsworth*, 278 A.3d at 1285.

<sup>162</sup> See generally *Weimer v. Hetrick*, 525 A.2d 643 (Md. 1987) (denying recovery for failure to establish proximate causation); *Fennell v. S. Md. Hosp. Ctr.*, 580 A.2d 206 (Md. 1990) (denying recovery to plaintiff); *Wadsworth*, 278 A.3d 1269 (denying recovery to plaintiffs).

<sup>163</sup> See generally *Wadsworth*, 278 A.3d. at 1273-74, 1285-86 (affirming summary judgment for the defendant despite evidence that Dr. Sharma failed to follow up on an abnormal PET/CT scan showing cancer recurrence, which delayed diagnosis until metastasis and ultimately resulted in the patient's death, reasoning that recovery was barred because her likelihood of survival at the time of the negligence did not exceed fifty percent under Maryland's proximate cause standard).

<sup>164</sup> See *Weiss*, *supra* note 74 (describing advances in cancer treatments and increased survivability).

<sup>165</sup> See *infra* Part V.

<sup>166</sup> See *infra* Part V.

responsible for their actions.<sup>167</sup> Without these changes, Maryland’s current “all-or-nothing” adherence continues to deny justice to patients and families harmed by negligence.<sup>168</sup>

## V. SOLUTION.

Maryland’s Wrongful Death statute must be amended to recognize the loss of chance doctrine, allowing recovery even when a patient’s initial odds of survival are below fifty percent.<sup>169</sup> The current rigid threshold unjustly bars claims, ignoring the harm caused by delayed diagnoses and substandard care.<sup>170</sup> Maryland should adopt either an increased risk of harm standard, a proportional damages model, or both, ensuring accountability while balancing fairness.<sup>171</sup> Drawing from other states, these standards would ensure negligent practitioners are held accountable and patients are not left without recourse.<sup>172</sup>

### A. Revised Doctrine Proposal.

Maryland’s Wrongful Death statute allows for actions against a party “whose wrongful act causes the death of another.”<sup>173</sup> However, the statute does not explicitly address situations where negligence reduces a patient who already had less than a fifty percent chance of survival at the time of the alleged negligence.<sup>174</sup> This gap has left families of patients like Stephanie Wadsworth without recourse when medical negligence diminishes the chance of prolonged life but does not meet Maryland’s proximate causation standard.<sup>175</sup>

It is possible to amend the Maryland Wrongful Death statute by adopting a modified version of the loss of chance doctrine, without

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<sup>167</sup> See *supra* Section IV.C.

<sup>168</sup> See *supra* Part II.

<sup>169</sup> See *infra* Section V.A.

<sup>170</sup> Compare *supra* Part III (describing the method in which survivability is calculated and how it ignores delayed diagnoses and unjustly bars claims), with *supra* Part IV (describing that the reliance on an arbitrary survivability calculation, many are left with legal recourse and are barred from filing suit in court).

<sup>171</sup> See *infra* Sections V.B-C.

<sup>172</sup> See *infra* Section V.B.

<sup>173</sup> MD. CODE ANN., CTS. & JUD. PROC. § 3-902(a) (West 2024).

<sup>174</sup> See *id.* § 3-902 (showing the language of the statute and exclusion of survival rates).

<sup>175</sup> See *Wadsworth v. Sharma*, 278 A.3d 1269 (Md. 2022) (holding that Maryland rejects the loss-of-chance doctrine and denying recovery absent evidence that survival probability exceeded fifty percent).

changing traditional causation principles.<sup>176</sup> Specifically, the statute should allow recovery for cases where negligence significantly diminishes the likelihood of a better outcome.<sup>177</sup> If the odds of survival are below fifty percent, additional evidence, such as expert testimony or a delayed diagnosis, can help establish proximate causation.<sup>178</sup> The amendment would address a critical shortfall in Maryland law, where proximate causation requires proof that negligence was a factor in causing a patient's death, often leaving victims of negligence uncompensated.<sup>179</sup>

*B. Support from Other Jurisdictions.*

*i. Pennsylvania.*

Pennsylvania has been a leader in recognizing the loss of chance doctrine, particularly in medical malpractice cases.<sup>180</sup> Maryland should consider Pennsylvania's "increased risk of harm" standard to protect patients whose chances of recovery or survival are substantially reduced by a physician's negligence.<sup>181</sup> Under this approach, a plaintiff is not required to prove that the defendant's negligence more likely than not caused the injury or death.<sup>182</sup> Instead, they must show that the negligence increased the risk of harm, and it is then left to the jury to decide whether that increased risk was a substantial factor in the outcome.<sup>183</sup> This standard shifts the focus away from arbitrary survival percentages and toward whether the provider's actions made the patient's situation worse, which is ultimately the heart of any malpractice claim.<sup>184</sup>

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<sup>176</sup> See *supra* Parts II, V (describing the loss of chance doctrine in Maryland and describing the problems its current state causes).

<sup>177</sup> See generally *Loudin v. Radiology & Imaging Servs.*, 924 N.E.2d 433, 447 (Ohio Ct. App. 2009) (addressing medical malpractice and recognizing expert testimony that a radiologist's year-long delay in diagnosing the plaintiff's breast cancer allowed the disease to progress from Stage I to Stage IIA, thereby substantially reducing her likelihood of survival, and suggesting that such evidence may be sufficient to establish proximate cause).

<sup>178</sup> See generally *id.* (showing that expert testimony can establish causation and proposing that the factfinder should determine whether the alleged negligence caused the injury).

<sup>179</sup> See *supra* Part V (describing the problems with the current application of the loss of chance doctrine in Maryland).

<sup>180</sup> See *infra* Section V.B.i.

<sup>181</sup> See *infra* Section V.B.i.

<sup>182</sup> See *infra* Section V.B.i.

<sup>183</sup> See *infra* notes 184-87.

<sup>184</sup> Compare *infra* Section V.B.i (describing Pennsylvania's increased risk of harm standard), with *supra* Part II (describing Maryland's rejection of the loss of chance doctrine), and *supra* Part IV (describing the problems caused by Maryland's reliance on the arbitrary 50% threshold).

*Hamil v. Bashline* sets the foundation by allowing recovery under an “increased risk of harm” standard.<sup>185</sup> The court held that plaintiffs need only prove the negligence increased the risk of harm, leaving the jury to determine whether it caused the ultimate injury.<sup>186</sup> Additionally, in *Sutherland v. Magilner*, the court allowed recovery in cases involving delayed cancer diagnosis, even when the patient’s cancer was at an advanced stage, recognizing the role of negligence in diminishing survival chances.<sup>187</sup> As these two cases exemplify, Pennsylvania’s framework reflects a broader commitment to fairness by ensuring that patients are not denied recovery simply because their odds of survival were initially low.<sup>188</sup>

Pennsylvania’s model, reflected in its civil jury instructions, makes clear that plaintiffs need only demonstrate that a physician’s actions increased the risk of harm, not that it was the sole or direct cause.<sup>189</sup> The instruction states,

“Where the plaintiff presents expert testimony that the negligent act or failure to act or delay on the part of the defendant has increased the risk of harm to the plaintiff, this testimony, if found credible, provides a sufficient basis from which you may find that the negligence was a factual cause of the injuries sustained.”<sup>190</sup>

This instruction recognizes the reality of medical uncertainty, particularly in cancer cases where proving exact causation is often difficult.<sup>191</sup> It allows a jury to decide whether a provider’s negligence played a substantial role in worsening a patient’s outcome, thus providing a far more just approach than Maryland’s current fifty percent threshold.<sup>192</sup>

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<sup>185</sup> *Hamil v. Bashline*, 392 A.2d 1280, 1286-87 (Pa. 1978).

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

<sup>187</sup> See *Sutherland v. Magilner*, 2008 Phila. Ct. Com. Pl. LEXIS 260 (Nov. 21, 2008) (allowing medical negligence claim to proceed despite advanced stage of cancer).

<sup>188</sup> Compare *id.* (allowing medical negligence claim to proceed despite advanced stage of cancer), with *supra* Part II (describing Maryland’s rejection of cases where survivability below fifty percent), and *supra* Part V (describing the ethical issues raised by Maryland’s rejection of the loss of chance doctrine).

<sup>189</sup> See HON. THOMAS C. BRANCA ET AL., PENNSYLVANIA SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS (Pa. Bar Inst. ed., 6th ed. 2024) (guiding the Pennsylvania’s judicial system to instruct jurors properly depending on the matter of the case).

<sup>190</sup> *Id.* (explaining the jury instruction for medical malpractice in proving factual cause).

<sup>191</sup> See *id.* (stating that Plaintiff’s need to prove that the defendant’s negligence only increased the risk of harm).

<sup>192</sup> Compare *id.* (defending the importance of a jury weighing the provider’s involvement on the causation of the patient’s health decline), with *supra* Part II (describing Maryland’s

*ii. Virginia.*

Virginia courts also support recovery for lost chances, emphasizing the importance of accountability in *Hicks v. United States*.<sup>193</sup> In this case, the court held that even a small chance of survival destroyed by negligence warrants recovery, recognizing that such losses represent tangible harm.<sup>194</sup> Similarly, *Wagoner v. Commonwealth* expanded this principle by confirming plaintiffs could recover damages even if the patient's survival odds were below fifty percent, provided the negligence destroyed a substantial possibility of survival.<sup>195</sup> Virginia's approach underscores the ethical importance of holding medical professionals accountable for their actions, fostering trust in the healthcare system, while providing justice to victims of negligence.<sup>196</sup>

*iii. New Jersey.*

New Jersey employs a nuanced approach to loss of chance claims, emphasizing proportional accountability.<sup>197</sup> In *Scafidi v. Seiler*, the court established a proportional model, limiting recovery to the value of the loss chance directly attributable to negligence.<sup>198</sup> For example, if a defendant is responsible for a fifty percent loss of chance of survival, and the total damages amount to one million dollars, the defendant would owe five hundred thousand dollars.<sup>199</sup> This model balances the interests of plaintiffs and defendants by ensuring fair compensation without overburdening medical professionals.<sup>200</sup> Additionally, in *Evers v. Dollinger*, the court allowed recovery for patients with less than a fifty percent chance of survival, particularly in cases involving a delayed cancer diagnosis.<sup>201</sup>

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rejection of cases where survivability below fifty percent), and *supra* Part V (describing the ethical issues raised by Maryland's rejection of the loss of chance doctrine).

<sup>193</sup> *Hicks v. United States*, 368 F.2d 626, 632-33 (4th Cir. 1966).

<sup>194</sup> *Id.* at 632.

<sup>195</sup> *Wagoner v. Commonwealth*, 756 S.E.2d 165, 177 (Va. Ct. App. 2014).

<sup>196</sup> *Compare Wagoner*, 756 S.E.2d at 177 (holding medical professionals accountable for their actions), with *supra* Part V (describing the distrust in the healthcare and legal system when patients are unable to redress grievances due to arbitrary survival statistics).

<sup>197</sup> See *infra* Section V.B.iii.

<sup>198</sup> *Scafidi v. Seiler*, 574 A.2d 398, 407-08 (N.J. 1990).

<sup>199</sup> See *generally id.* (describing the proportional damages model).

<sup>200</sup> See *generally id.* (implying fairness as the purpose of the proportional model of damages).

<sup>201</sup> *Evers v. Dollinger*, 471 A.2d 405, 409 (N.J. 1984).

Moreover, *Verdicchio v. Ricca* emphasized the substantial factor test, recognizing that even a diminished chance of survival has intrinsic value.<sup>202</sup>

iv. New York.

New York has recognized the significance of the loss of chance in medical malpractice cases under specific circumstances.<sup>203</sup> In *Clune v. Moore*, the court allowed recovery where negligence deprived the patient of a substantial possibility for a better outcome, emphasizing the importance of recognizing incremental harms.<sup>204</sup> Likewise, in *Buffolino v. Lieberman*, the court affirmed that patients could recover for the deprivation of a substantial chance for a cure, even when facing advanced-stage cancer.<sup>205</sup> These cases highlight New York's willingness to hold medical practitioners accountable for negligence that diminishes opportunities for recovery, providing an example of how a more inclusive loss of chance doctrine can operate effectively.<sup>206</sup>

v. Take-Away from Other Jurisdictions.

Collectively, these jurisdictions demonstrate that adopting a modified loss of chance doctrine can balance fairness and accountability.<sup>207</sup> By adopting the approaches used in other jurisdictions and reducing reliance on arbitrary thresholds, like a fifty percent survival rate, Maryland may provide justice for victims of medical negligence while encouraging higher standards of care in the medical profession.<sup>208</sup>

C. Proposed Statutory Changes.

To address these shortcomings, Section 3-902 of the Maryland Wrongful Death Statute should be amended to include the following provisions:

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<sup>202</sup> See generally *Verdicchio v. Ricca*, 843 A.2d 1042 (N.J. 2004) (describing the use of the substantial factor test where the defendant's negligence occurs when a patient has a preexisting condition).

<sup>203</sup> See *infra* Section V.B.iv.

<sup>204</sup> *Clune v. Moore*, 38 N.Y.S.3d 852, 854 (N.Y. App. Div. 2016).

<sup>205</sup> *Buffolino v. Lieberman*, 924 N.Y.S.2d 307, 10-11 (N.Y. App. Div. 2011).

<sup>206</sup> See *supra* Section V.B.iv.

<sup>207</sup> Compare *supra* Section V.B.i. (explaining the different approaches to the application of the loss of chance doctrine in other jurisdictions), with *supra* Part V (describing the distrust in the healthcare and legal system when patients are unable to redress grievances due to arbitrary survival statistics).

<sup>208</sup> See *supra* Section V.B.

(1) Explicit Recognition of Loss of Chance: The Statute should explicitly allow recovery when negligence diminishes a meaningful chance of survival, even if initial odds were below fifty percent at the time of the alleged negligence.<sup>209</sup> This change would ensure accountability for cases where substantial opportunities for recovery are lost due to negligence.<sup>210</sup>

(2) “Increased Risk of Harm” Standard: Maryland should adopt Pennsylvania’s “increased risk of harm” standard, which could contribute to establishing proximate causation by allowing plaintiffs to demonstrate that negligence increased the risk of harm, leaving causation determinations to the jury.<sup>211</sup>

The amendments should explicitly extend the loss of chance doctrine to wrongful death claims under Section 3-902, ensuring families can recover damages when negligence significantly diminishes survival chances.<sup>212</sup>

## VI. CONCLUSION.

Maryland’s rigid “all-or-nothing” approach to medical malpractice claims fails to reflect the realities of modern cancer care and the ethical standards of justice.<sup>213</sup> By requiring survival odds above fifty percent at the time of the alleged negligence, the current framework unfairly denies justice and compensation to patients whose chances of prolonged life are significantly diminished by medical negligence.<sup>214</sup> This arbitrary threshold fails to account for the reality that even a slight chance of survival or prolonged life holds immense value for patients and their families.<sup>215</sup>

Moreover, this approach disproportionately harms vulnerable populations, such as low-income individuals and racial minorities, who face systemic barriers to early detection and quality care.<sup>216</sup> The law, as it stands, perpetuates inequities and leaves patients without recourse in situations where negligence demonstrably worsened their prognosis.<sup>217</sup>

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<sup>209</sup> See *supra* Sections V.B.i; MD. CODE ANN., CTS. & JUD. PROC. § 3-902(a) (West 2024).

<sup>210</sup> See *supra* Sections V.B.i.

<sup>211</sup> See *supra* Section V.B.i.

<sup>212</sup> See MD. CODE ANN., CTS. & JUD. PROC. § 3-902(a) (West 2024).

<sup>213</sup> See *supra* Part IV.

<sup>214</sup> See *supra* Parts II-IV.

<sup>215</sup> See *supra* Part IV.

<sup>216</sup> See *supra* Section IV.C.

<sup>217</sup> See *supra* Part IV.

Advancements in cancer treatment, such as immunotherapy, targeted therapy, and precision medicine, have dramatically improved survivability, even in advanced cases.<sup>218</sup> These innovations highlight the inadequacy of Maryland's outdated framework, which relies on static survival metrics tied to the stage of diagnosis rather than the availability of other forms of evidence to prove a physician's negligence and establish proximate causation.<sup>219</sup> By rejecting the loss of chance doctrine, Maryland law disregards critical evidence that could demonstrate how a physician's failure to meet the standard of care directly impacted a patient's condition.<sup>220</sup> This rigid approach not only denies justice to victims of medical negligence, it also erodes the public's trust in the healthcare and legal systems.<sup>221</sup> Aligning legal practice with contemporary medical progress and ethical considerations is essential to address these shortcomings and ensure fair treatment for all patients, regardless of their statistical odds of survival.<sup>222</sup>

Reforming Maryland's approach to medical malpractice law by adopting the loss of chance would restore fairness and accountability in cases where negligence diminishes a patient's chances of survival.<sup>223</sup> Amending the Wrongful Death Statute to permit recovery for patients with survival odds below fifty percent at the time of the alleged negligence would provide a legal framework that recognizes the intrinsic value of every opportunity for survival and holds negligent practitioners accountable.<sup>224</sup> Such a change would ensure that Maryland law reflects modern medical advancements, corrects inequities in patient outcomes, and upholds legal and constitutional principles such as redressing grievances.<sup>225</sup> By enacting

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<sup>218</sup> See *supra* Section IV.D.

<sup>219</sup> Compare *Loudin v. Radiology & Imaging Servs.*, 924 N.E.2d 433, 436-38 (Ohio Ct. App. 2009) (showing other possible evidence to prove a doctor's negligence), with *supra* Part II (describing Maryland's rejection of cases where survivability below fifty percent), and *supra* Part V (describing the ethical issues raised by Maryland's rejection of the loss of chance doctrine).

<sup>220</sup> *Wadsworth v. Sharma*, 278 A.3d 1269, 1278 (Md. 2022) (denying recovery where survivability was not shown to exceed fifty percent). See *generally id.* (finding evidence of negligence where the practitioner failed to identify a suspicious abnormality on the plaintiff's mammogram, and expert testimony established that the year-long delay in diagnosis allowed her breast cancer to progress from Stage I to Stage IIA, significantly reducing her likelihood of survival).

<sup>221</sup> See *supra* Part IV.

<sup>222</sup> See *supra* Part V.

<sup>223</sup> Compare *supra* Part IV (describing the issues with Maryland's current approach), with *supra* Part V (outlining the approaches adopted by other jurisdictions that Maryland should implement).

<sup>224</sup> See *supra* Part V.

<sup>225</sup> See *supra* Part V.

these reforms, Maryland can protect its citizens, strengthen its legal system, and set a precedent for balancing justice with medical innovation.<sup>226</sup> Maryland's time to act is not only necessary, but overdue.<sup>227</sup>

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<sup>226</sup> See *supra* Part V.

<sup>227</sup> Compare *supra* Part II (describing Maryland's treatment of the loss of chance doctrine, denying many patients from recovery), with *supra* Part IV (describing the issues with Maryland's current approach), and *supra* Part V (outlining the approaches adopted by other jurisdictions that Maryland should implement).

## RECENT DEVELOPMENT

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### ***HOMER WALTON ET AL. V. PREMIER SOCCER CLUB, INC., ET AL.: MARYLAND STATUTORY VIOLATIONS CAN EVIDENCE NEGLIGENCE, BUT LIABILITY DEMANDS ACTUAL, NOT SPECULATIVE, CAUSATION.***

**By: Katelin Carter**

In *Walton v. Premier Soccer Club, Inc.*, the Supreme Court of Maryland held that while statutory violations may serve as evidence of negligence, liability still requires proof of causation-in-fact, without which proximate cause cannot be established. *Walton v. Premier Soccer Club, Inc.*, 490 Md. 204, 213-14, 334 A.3d 784, 789-90 (2025). The court explained that proximate cause cannot be established without evidence directly connecting the alleged statutory violation to the harm. *Id.* at 222-23, 334 A.3d at 795-96.

In 2017, Sydney Walton (“Sydney”) sustained a concussion and permanent injuries at a Baltimore County recreational center when she collided with another player during soccer practice and struck her head on a wooden boundary wall. In December 2019, Sydney’s Parents, Homer and Kathleen Walton, filed a negligence complaint on their daughter’s behalf that named Premier Soccer Club (“Premier”) and coach Lucio Gonzaga (“Coach”), Michael and Dolores DeCarlo (“DeCarlo”), and four Baltimore County employees as defendants (“County”).

The Waltons alleged that the DeCarlos, and the County Defendants violated the “Concussion Awareness Statute,” Md. Code Ann., Health–Gen. § 14-501, which requires youth sports programs to provide concussion education to coaches, athletes, and parents, and to remove and medically clear any athlete suspected of sustaining a concussion before allowing return to play by failing to provide concussion information required by law. They further alleged that the County failed to notify Premier of its statutory obligations, Premier failed to provide concussion materials to players and parents or ensure coach review, and the DeCarlos enabled these violations by arranging Premier’s unauthorized use of the facility.

The circuit court granted summary judgment for the DeCarlos and the Premier Defendants, finding no evidence that statutory violations proximately caused Sydney’s injuries, and barred related evidence at trial. The Waltons appealed, but the Appellate Court of Maryland affirmed, holding that even assuming statutory violations occurred, they were only evidence of breach and insufficient to establish cause-in-fact. The Waltons

appealed to the Supreme Court of Maryland, which reviewed the record independently to determine whether the circuit court correctly granted summary judgment.

On review, the Supreme Court of Maryland framed the central issue as: whether a plaintiff bringing a negligence claim under a statute or ordinance can survive summary judgment on proximate cause merely by demonstrating that the injured party falls within the class the statute was intended to protect and suffered the type of harm the statute was designed to prevent. *Walton*, 490 Md. at 222–23, 334 A.3d at 794–95. Or, more specifically, whether the plaintiff must also present evidence establishing a cause-and-effect relationship between the statutory violation and the injury. *Id.* at 222–23, 334 A.3d at 794–95. The court further considered whether the Waltons had adduced sufficient evidence that the defendants’ alleged violations of the Concussion Awareness Statute, Md. Code Ann., Health-Gen. § 14-501, were the cause-in-fact of Sydney’s head injury so as to defeat summary judgment. *Id.* at 227, 334 A.3d at 797.

The court reaffirmed that a plaintiff must satisfy two prongs to make a *prima facie* case of negligence. First, the plaintiff must show they are within the special class of people the statute was meant to protect. *Id.* at 223-25, 334 A.3d at 795-97. Second, the plaintiff must prove that the “violation proximately caused the injury complained of,” and the Waltons failed to make such a showing. *Id.* at 226-29, 334 A.3d at 797-98.

The court relied on Maryland’s line of lead-paint cases to clarify that a statutory violation alone does not establish causation-in-fact. *Id.* at 223, 334 A.3d at 795. The holdings that emerge from these cases establish that plaintiffs must show a reasonable probability of three causal links: that the defendant’s property was a source of lead exposure, that the exposure caused elevated blood-lead levels, and that those levels caused injury. *Walton*, 490 Md. at 224-26, 334 A.3d at 795-97 (citing *Rogers v. Home Equity USA, Inc.*, 453 Md. 251, 264–65, 160 A.3d 1207 (2017)). Collectively, these cases demonstrate that a statutory violation, such as a failure to follow the Concussion Awareness Statute, does not relieve plaintiffs of proving actual causation. *Id.* at 222–26, 334 A.3d at 795–97.

Applying this framework, the court in *Walton* held that the Concussion Awareness Statute cannot relieve plaintiffs of their burden to show that the alleged statutory violation was a cause-in-fact of their injury. *Id.* at 223, 334 A.3d at 794-95. The court explained that the Waltons failed to provide evidence in the record showing that the statutory violations directly and proximately caused Sydney’s injury. *Id.* at 227, 334 A.3d at 797. The plaintiffs did not introduce the concussion policies into evidence, nor did they ask the circuit court to take judicial notice of them. *Id.* at 229, 334 A.3d at 798. Any jury finding that compliance would have prevented

Sydney's traumatic injury would rest on speculation, which is an insufficient basis to survive summary judgment under Rule 2-501. *Walton*, 490 Md. at 204, 228, 334 A.3d at 784, 798. Therefore, the court concluded that summary judgment was appropriate because the Waltons failed to establish a causal connection between the alleged statutory violation and Sydney's injury. *Id.* at 204, 228, 334 A.3d at 784, 798.

Justice Watts dissented, emphasizing that the issue of proximate cause should have been decided by the jury, not resolved as a matter of law. *Id.* at 243, 334 A.3d at 807. In Watt's view, the Waltons produced sufficient facts for a jury to reasonably infer that the failure to distribute mandatory concussion information contributed to Sydney's injury, particularly given the statute's use of the word "shall." *Id.* at 240-41, 334 A.3d at 805. Watts further argued that summary judgment should not have been granted where inferences could be drawn in the plaintiffs' favor and criticized the majority for narrowing the Statute or Ordinance Rule beyond precedent. *Walton*, 490 Md. at 204, 243, 334 A.3d at 784, 807.

*Walton v. Premier Soccer Club Inc.* establishes that while statutory safety provisions may bolster negligence claims, they do not excuse plaintiffs from their burden to prove causation-in-fact through admissible evidence. This decision strengthens tort law causation requirements, raising the bar for plaintiffs trying to prove liability in a negligence claim involving a statute or ordinance. For defense counsel, the objective is to identify and challenge weak or speculative causal links in the plaintiff's chain of causation. For plaintiffs' counsel, this requires ensuring both the statutory violations and concrete evidence establishing proximate cause are documented in the record. In short, statutory violations can help support a negligence claim, but cannot substitute for proof of how the defendant's conduct actually caused the injury.

## RECENT DEVELOPMENT

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### ***CRAWFORD V. STATE: COURTS MAY ADMIT EVIDENCE OF OTHER CRIMES WHEN PROBATIVE AND DENY MISTRIAL ABSENT SUBSTANTIAL EVIDENCE.***

**By: Allison Comess**

The Appellate Court of Maryland held that trial courts do not abuse their discretion in admitting evidence of other acts when it helps establish key elements such as identity or motive, provided its probative value outweighs any unfair prejudice. *Crawford v. State*, 265 Md. App. 374, 399, 335 A.3d 176, 191 (2025). The Appellate Court further held that testimony regarding a defendant's refusal to consent to a phone search does not automatically warrant a mistrial, provided it does not unfairly prejudice the defendant. *Crawford*, 265 Md. App. at 403, 335 A.3d at 193.

Defendant, David Michael Crawford ("Crawford"), a retired police chief, was convicted in the Circuit Court for Howard County of several offenses, including eight counts of attempted first-degree murder, three counts of first-degree arson, and one count of malicious burning related to four fires. The fires occurred at the homes of individuals who had prior personal or professional disputes with Crawford. During the investigation, police discovered a note on Crawford's phone, called "the List," containing names of individuals who knew Crawford and recalled minor prior grievances with him. The victims of the fires were among the individuals identified on the list.

Before trial, the State moved to admit evidence of eight other fires under Maryland Rule 5-404(b), from counties other than Howard County, arguing they were probative by identifying Crawford's motive, common scheme, and identity. The Circuit Court for Howard County granted the motion, finding clear and convincing evidence of Crawford's involvement and concluding that the value of the evidence outweighed the danger of prejudice. During trial, a detective testified that Crawford did not permit him to search his phone. His Defense Counsel objected, and he moved for a mistrial. The Circuit Court for Howard County found that the detective's answer was a "blurt." The jury found Crawford guilty and he was sentenced to two consecutive life terms plus an additional consecutive seventy-five years.

On appeal, the Appellate Court of Maryland considered two questions: (1) whether the trial court abused its discretion in admitting the evidence of the eight other fires and (2) whether the trial court abused its

discretion by refusing to grant Crawford's motion for mistrial after testimony that Crawford refused to consent to a search of his cellphone. *Crawford*, 265 Md. at 380, 335 A.3d at 179.

In answering the first question presented, the Appellate Court of Maryland examined the circuit court's application of the three-part test established in *State v. Faulkner*. *Crawford*, 265 Md. at 391, 335 A.3d at 185 (citing *State v. Faulkner*, 314 Md. 630, 552 A.2d 896 (1989)). Under the *Faulkner* test, evidence is admissible under Maryland Rule 5-404(b) if: (1) it is specially relevant, (2) the defendant's involvement is proved by clear and convincing evidence, and (3) the probative value is not substantially outweighed by the risk of unfair prejudice. *Id.* at 393, 335 A.3d at 187. The court emphasized that Rule 5-404(b) reflects Maryland's exclusionary approach, designed to prevent convictions based on a defendant's character rather than the charged conduct. *Id.*

Applying the test, the Appellate Court of Maryland agreed with the Circuit Court that the other fires were admissible to establish Crawford's identity and motive. *Id.* at 399, 335 A.3d at 191. The List was admitted because the court deemed it relevant, as it contained names associated with the other eight fires. *See id.* at 396, 335 A.3d at 188. All of the fires shared distinctive similarities: they occurred late at night, were ignited with gasoline, and began in garages or driveways. *Id.* at 391, 335 A.3d at 186. The court noted that arson is "likely to be a clandestine offense" typically established through circumstantial evidence, and that limiting the State's ability to link entries from the List to actual fires would diminish its probative value in identifying Crawford as the perpetrator. *Id.* at 395-96, 335 A.3d at 188 (citing *Nasim v. State*, 34 Md. App. 65, 76, 366 A.2d 70 (1976)). Thus, the Appellate Court found that the circuit court did not abuse its discretion in admitting the evidence of the eight fires. *Id.* at 399-400, 335 A.3d at 191.

Next, the court addressed the Circuit Court's denial of Crawford's motion for mistrial. *See Crawford*, 265 Md. at 400-05, 335 A.3d at 191-94. Crawford argued that the circuit court erred in admitting the detective's "blurt" testimony that he did not consent to a cellphone search and, as a result, abused its discretion in denying his subsequent motion for a mistrial. *Id.* at 400-01, 335 A.3d at 191. The Appellate Court of Maryland reconsidered the five *Guesfeird* factors identified by the circuit court in order to evaluate whether the "blurt" testimony warranted a mistrial. *Id.* at 401-02, 335 A.3d at 192 (citing *Guesfeird v. State*, 300 Md. 653, 480 A.2d 800 (1984)). The *Guesfeird* factors the court considered were (1) whether the statement was repeated or isolated, (2) whether the evidence was solicited by the State, (3) whether the witness testifying is the principal

witness; (4) whether the witness's credibility was central, and (5) whether other overwhelming evidence exists. *Id.*

The Appellate Court of Maryland reviewed the Circuit Court's decision for abuse of discretion, emphasizing that "a mistrial is an 'extraordinary remedy' that is necessary only when 'the prejudice to the defendant is so substantial that [the defendant is] deprived of a fair trial.'" *Crawford*, 265 Md. at 402, 335 A.3d at 192. The Appellate Court found that none of the *Guesfeird* factors weighed in favor of granting a mistrial. *Id.* at 403, 335 A.3d at 193. The court reasoned that because the detective was only one of twenty-nine witnesses called by the State, he was not a principal witness, and the credibility of any individual witness was not pivotal to the prosecution's case against Crawford. *Id.* Thus, the Appellate Court found that the "extraordinary remedy" of a mistrial was therefore not warranted. *Id.* at 403, 335 A.3d at 193. The Appellate Court of Maryland affirmed Crawford's convictions. *Id.* at 405, 335 A.3d at 194.

The decision in *Crawford v. State* provides Maryland practitioners with a concrete application of the *Faulkner* test and illustrates how trial courts should evaluate the probative value and prejudicial effect of other crimes that are introduced in cases built largely on circumstantial proof. By affirming the admission of eight other fires, the Appellate Court of Maryland emphasized that the number of prior acts is not dispositive so long as the acts are clearly connected to the charged conduct and serve a non-propensity purpose such as identity or motive. In addition, the court's analysis of the "blurt" testimony confirms that mistrials remain an extraordinary remedy. Taken together, the opinion clarifies both the scope of Rule 5-404(b) and the demanding standard for mistrial, reinforcing the significant discretion Maryland trial courts have in managing evidentiary rulings.

## RECENT DEVELOPMENT

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### ***MOONEY V. STATE: CIRCUMSTANTIAL EVIDENCE ALONE, OR A COMBINATION OF CIRCUMSTANTIAL EVIDENCE AND TRADITIONAL METHODS, MAY BE USED TO AUTHENTICATE VIDEOS IF THE “REASONABLE JUROR” TEST IS SATISFIED.***

**By: Whitney Dudley**

The Supreme Court of Maryland held that videos can be authenticated if there is sufficient evidence to convince a reasonable juror that the video is what it is purported to be. *Mooney v. State*, 487 Md. 701, 708, 321 A.3d 91, 95 (2024). Additionally, the court held that videos can be authenticated, under Maryland Rule 5-901(b)(4), by circumstantial evidence. *Id.* at 708, 321 A.3d at 95. Lastly, the court held that traditional methods of authentication can be combined with circumstantial evidence to authenticate videos. *Id.* at 708, 321 A.3d at 95.

In September 2021, Christopher Mooney (“Mooney”) engaged in a verbal altercation with Joshua Zimmerman (“Zimmerman”). Zimmerman was sitting in his car and opened his door believing that Mooney was walking towards the driver’s side. Zimmerman got out of the vehicle, looked around, but did not see Mooney. As Zimmerman got back into his vehicle, he was shot in the back. A video was retrieved from a resident’s doorbell camera.

The Circuit Court for Baltimore City, by jury, found Mooney guilty of second-degree assault, reckless endangerment, and gun offenses. The Appellate Court of Maryland affirmed. Mooney appealed to the Supreme Court of Maryland, which granted *certiorari*. The Supreme Court of Maryland addressed the following issues: (1) whether the “reasonable juror” test applies to the authentication of video evidence; (2) whether videos can be authenticated through circumstantial evidence; and (3) whether video evidence can be authenticated through a combination of methods versus one single method. *Mooney*, 487 Md. at 701, 321 A.3d at 91. The first and third issues were of first impression. *Id.* at 701, 321 A.3d at 91.

The court held that videos can be authenticated by the “reasonable juror” test if there is sufficient evidence to convince a reasonable juror, by a preponderance of evidence, that the video is what it is purported to be. *Id.* at 708, 321 A.3d at 95. In adopting the “reasonable juror” test, the court relied on three points: (1) alignment with federal law; (2) its’ opinions in *Sublet v. State* and *Sample v. State*; and (3) the plain language of Maryland Rule 5-901. *Id.* at 718-19, 321 A.3d at 100-01 (first citing *Sublet v. State*,

442 Md. 632, 113 A.3d 695 (2015); and then citing *Sample v. State*, 468 Md. 560, 228 A.3d 171 (2020)).

Beginning with issue one, the court adopted the “reasonable juror” test for social media evidence in 2015 relying on the Second Circuit’s holding that Federal Rule of Evidence 901 is satisfied by the “reasonable juror” test. *Mooney*, 487 Md. at 718-19, 321 A.3d at 101 (citing *United States v. Vayner*, 769 F.3d 125 (2d Cir. 2014)). The court then explained how it utilized the “reasonable juror” test in *Sublet* to authenticate social media evidence. *Mooney*, 487 Md. at 719, 321 A.3d at 101. Five years later, the court clarified in *Sample* that the preponderance of evidence standard applies to the “reasonable juror” test. *Id.* at 719, 321 A.3d at 100. Finally, the court stated that Maryland Rule 5-901(b)(4) does not contain language allowing for the disposal of evidence based on the absence of certain information. *Id.* at 719, 321 A.3d at 100. This opening in the rule has allowed for the adoption of the “reasonable juror” test. *Id.*

Moving to the second issue, the court held that video footage can be authenticated, under Maryland Rule 5-901(b)(4), by circumstantial evidence. *Mooney*, 487 Md. at 708, 321 A.3d at 95. Traditionally, courts have authenticated video evidence by using the “pictorial testimony” and “silent witness” methods. *Id.* at 720-21, 321 A.3d at 102. “Pictorial testimony” is when a witness with personal knowledge testifies to what a video depicts; the “silent witness” theory is when a witness testifies to how a video was retrieved. *Id.* at 721, 321 A.3d at 102. The court emphasized that while the “pictorial testimony” and “silent witness” theories are often used, those are not the only two methods available. *Id.* at 729, 321 A.3d at 107. Additionally, the plain language of Maryland Rule 5-901(b)(4), allows for evidence to be authenticated through circumstantial evidence. *Id.* at 729, 321 A.3d at 107. Lastly, to determine whether circumstantial evidence should extend to video authentication, the court analyzed other jurisdictions’ holdings on video authentication issues. *Id.* at 726-29, 321 A.3d at 105-07. In conclusion, the court held that circumstantial evidence can authenticate video footage. *Mooney*, 487 Md. at 708, 321 A.3d at 95.

For the final issue, the court held that traditional theories of authentication can be combined with circumstantial evidence to authenticate video footage. *Mooney*, 487 Md. at 708, 321 A.3d at 95. Using similar analysis as issue two, the court explains that the traditional methods of authentication are not exhaustive. *Id.* at 729, 321 A.3d at 107. Further, these methods may be combined with circumstantial evidence. *Id.* at 730, 321 A.3d at 108. In analyzing this issue, the court turned to the firsthand testimony that Zimmerman did have and the temporal proximity of the relevant events that Zimmerman testified to. *Id.* at 732, 321 A.3d at 109.

Although Zimmerman was unable to testify with personal knowledge of who shot him, he was able to personally testify to the moments in the video leading up to the shooting and those immediately after. *Mooney*, 487 Md. at 731, 321 A.3d at 109. This testimony satisfied Rule 5-901(b)(1) - a traditional method of authentication. *Id.* at 730-31, 321 A.3d at 108-09. Since Zimmerman did not have knowledge of who shot him but could personally testify to the events immediately before and after, the court found that the shooting could be authenticated through temporal proximity. *Id.* at 731, 321 A.3d at 109-10. The court considered the temporal proximity to be circumstantial evidence. *Id.* at 731, 321 A.3d at 109. Additional circumstantial evidence that was considered is the detective's testimony that supported that the video was retrieved from an independent party immediately following the shooting. *Id.* at 733, 321 A.3d at 110. The court held that the personal knowledge of Zimmerman could be combined with the circumstantial evidence to authenticate the video footage. *Id.* at 734, 321 A.3d at 110.

Chief Justice Fader concurred stating that although Mooney did not allege that the video was altered, artificial intelligence ("AI") is creating evidentiary concerns that may require the court to adjust their rules in the future. *Mooney*, 487 Md. at 735, 321 A.3d at 111 (Fader, C.J., concurring).

In his dissent, Justice Gould expresses a similar concern regarding AI, further stating that allowing circumstantial evidence to authenticate video footage has lowered the bar of authentication. *Id.* at 736, 321 A.3d at 111 (Gould, J., dissenting). While Justice Gould agrees with the majority that circumstantial evidence may be sufficient to authenticate video evidence, as well as the traditional authentication methods, he does not agree that the circumstantial evidence here was sufficient to satisfy the "reasonable juror test." *Id.* at 739-44, 321 A.3d at 113-16.

The *Mooney* decision supports that videos from personal devices will likely continue to be successfully admitted into evidence. *Mooney* has the potential to be harmful and helpful. On one end, there is the potential that convictions based on video evidence could alleviate traffic in courts due to plea deals. However, on the other end, *Mooney* increases the risk of manipulated evidence being admitted. AI poses a true risk to the integrity of courts' admissibility decisions. Courts must be vigilant of video evidence objections and challenges to avoid miscarriages of justice. AI videos mislead people daily. Eventually, the court will likely have to determine a test that considers the negative effects of AI in order to protect the liberty of potentially innocent people.

## RECENT DEVELOPMENT

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### ***DAVIS V. STATE: COUNSEL’S FAILURE TO CONSULT WITH DEFENDANT AND FILE A MOTION FOR SENTENCE MODIFICATION IS SUFFICIENT TO ESTABLISH A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.***

**By: Morgan Love**

The Supreme Court of Maryland held that defendant’s counsel was deficient in failing to consult with the defendant about a motion to modify his sentence and subsequently failing to file said motion. *Davis v. State*, 490 Md. 359, 399, 335 A.3d 950, 973 (2025). The court further held that these failures prejudiced the defendant by denying him the chance to have the court consider a motion to modify his sentence. *Id.* at 399, 335 A.3d at 973. Finally, the court held that a defendant does not have to request a motion for sentence modification to prove ineffective assistance of counsel. *Id.* at 393, 335 A.3d at 969-70.

In July 2013, Harry Davis Jr. (“Davis”) was sentenced to seventy-two years of incarceration. This sentence represented the maximum penalty provided by Maryland’s sentencing guidelines. During his sentencing hearing, the circuit court informed Davis that he had thirty days to file an appeal and ninety days to move for the court to modify his sentence.

In October 2021, Davis moved for postconviction relief, arguing that his trial attorney was ineffective for failing to file a motion to modify his sentence. At a hearing on the motion in January 2023, Davis’s trial attorney testified that he did not recall having further communications or meetings with Davis after his 2013 sentencing hearing. Davis confirmed this lack of communication in his own testimony. The record did not state whether Davis requested that his attorney file a motion for modification. The circuit court denied postconviction relief, prompting Davis to appeal.

In November 2024, after hearing oral arguments on appeal, the Appellate Court of Maryland sent a certification to the Supreme Court of Maryland to answer two questions of law. The first question was whether the defendant must demonstrate that he asked trial counsel to file a motion for sentence modification in order to prove ineffective assistance of counsel. If the defendant is not required to demonstrate this request, the second question before the court was whether the framework in *Roe v. Flores-Ortega* should be used to address claims of ineffective assistance of counsel based on an attorney’s failure to file a sentence modification motion.

The court began its analysis by overruling *State v. Adams* and *Rich v. State*, two conflicting cases from the Appellate Court of Maryland. *Davis*, 490 Md. at 390-91, 335 A.3d at 968. The *Adams* ruling was found to contradict the holding in *Flores-Ortega*, in which the Supreme Court of the United States rejected Adams' "per se deficiency rule" and held that failures to consult are not automatically unreasonable. *Id.* at 391, 335 A.3d at 968. *Rich* was also overruled because it wrongly presumed that claims for ineffective assistance of counsel were precluded if the record did not show that the defendant requested a motion for modification. *Id.* at 391, 335 A.3d at 968.

In addressing the instant case, the court articulated the standard applied to claims of ineffective assistance of counsel, using the two-part test outlined in *Strickland v. Washington*. *Davis*, 490 Md. at 378, 335 A.3d at 961. The first part, known as "the performance prong," requires a showing that the attorney's performance was deficient, meaning his or her representation was not objectively reasonable according to the norms of the profession. *Id.* at 379, 335 A.3d at 961. The petitioner has the burden of overcoming the strong presumption that counsel's conduct was reasonable. *Id.* at 379, 335 A.3d at 961. The second part of the test, known as "the prejudice prong," requires the defendant to show he or she was prejudiced by the attorney's deficient performance. *Davis*, 490 Md. at 379, 335 A.3d at 961. In demonstrating prejudice, there must be a reasonable likelihood that the outcome of the proceeding would have been different but for the attorney's unprofessional mistakes. *Id.* at 379, 335 A.3d at 961. Prejudice may be established by showing that counsel's unprofessional conduct deprived the defendant of the chance to have a proceeding that would have occurred otherwise. *Id.* at 395, 335 A.3d at 971.

In applying the *Strickland* test, the court relied on the framework used in *Flores-Ortega* to determine whether the attorney's failure to consult with the defendant regarding a motion for modification constituted deficient performance. *Davis*, 490 Md. at 391-92, 335 A.3d at 969. Although there is no rule requiring counsel to consult with the defendant about a motion for modification in every case, there are some instances where counsel may have a duty to consult. *Id.* at 392-93, 335 A.3d at 969. This duty may arise when the defendant has expressed to counsel a desire to file a motion for modification of sentence, or "when there is reason to think that a rational defendant would want to file" said motion. *Id.* at 393, 335 A.3d at 969.

Here, the court found that the lack of contact between Davis and his attorney after his 2013 sentencing hearing demonstrated an unreasonable failure to consult. *Davis*, 490 Md. at 393-94, 335 A.3d at 970. The court determined that Davis's trial attorney had a duty to consult with Davis about filing a motion for modification because any reasonable defendant in

his circumstances would likely want to move for a modification. *Id.* at 394-95, 335 A.3d at 970. Specifically, the fact that Davis received the greatest possible sentence permitted by the guideline range led the court to believe he would have wanted to move for a modification. *Id.* at 394-95, 335 A.3d at 970. Thus, the court concluded that the attorney's failure to consult was conduct that fell below an objective standard of reasonableness and constituted deficient performance. *Id.* at 395, 335 A.3d at 970.

Regarding the second prong, the court held that prejudice is not presumed and must be proved by the defendant. *Davis*, 490 Md. at 397, 335 A.3d at 972. Here, the court ruled that prejudice was established because there was a "reasonable probability" that Davis would have liked to file a motion for modification and that motion would have been filed but for counsel's failure to consult with him. *Id.* at 397, 335 A.3d at 972. It was likely that Davis would have wanted to move for a modification because there was no detriment to him in doing so and he already expressed a desire to reexamine his convictions when he filed his appeal. *Id.* at 397, 335 A.3d at 972. As a result of this prejudice, Davis lost the opportunity to move for modification. *Id.* at 397-98, 335 A.3d at 972. Since both parts of the *Strickland* test were met, the court reversed the circuit court's ruling and remanded the case to allow Davis to belatedly file a motion for a sentence modification. *Davis*, 490 Md. at 399, 335 A.3d at 973.

The *Davis* decision clarified the standard used to address claims of ineffective assistance of counsel when an attorney fails to consult with the defendant about filing a motion for sentence modification and fails to file said motion. The court's ruling broadens defendants' opportunities for postconviction relief by permitting a claim of ineffective assistance of counsel even when the defendant did not request that counsel file the motion. Additionally, the ruling makes clear that defense attorneys should consult with their clients about filing a motion for modification, even if the client does not raise the issue themselves. Finally, *Davis* eliminates the contradictions of prior decisions and provides a clear framework for Maryland courts to use in future ineffective assistance of counsel proceedings.

## RECENT DEVELOPMENT

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### ***IN RE ESTATE OF SCHAPPELL: THE SUPREME COURT OF MARYLAND ESTABLISHED A TWO-STEP, INTENT-CENTERED TEST FOR EQUITABLE ADOPTION IN INTESTATE SUCCESSION.***

**By: Jamison Young**

The Supreme Court of Maryland held that when a decedent dies intestate without a surviving spouse, domestic partner, children, parents, siblings, or grandparents, a claimant may establish equitable adoption by presenting clear and convincing evidence of the decedent's intent to adopt and supporting conduct demonstrating that intent. *In re Estate of Schappell*, 489 Md. 654, 662, 331 A.3d 471, 475-76 (2025). First, a claimant must provide clear and convincing evidence of the decedent's intent to adopt, through an unperformed promise, an invalid adoption attempt, or direct statements of intent. *Id.* at 693, 331 A.3d at 494. Second, the claimant must demonstrate the decedent acted consistently with this intent by publicly holding out the claimant as their child and treating them as their natural or legally adopted child. *Id.*

Michael Gerard Schappell ("Decedent") died intestate in May 2021 without a spouse, domestic partner, biological children, siblings, or parents. The Decedent married the mother of Karen Ellis ("Ms. Ellis") when she was four years old and maintained a close parental relationship with her until his death. Ms. Ellis alleged that the Decedent raised her, attended her milestones, referred to her as his daughter, and treated her children as his grandchildren. The Decedent also made statements such as "all of this will be yours one day" and acted as though she were part of his immediate family.

Ms. Ellis petitioned the Orphans' Court for Montgomery County for recognition as his sole heir under the doctrine of equitable adoption. After filing her petition, the Decedent's intestate heirs, consisting of cousins, aunts, and uncles (collectively, the "Intestate Heirs"), contested her claim.

The Orphans' Court for Montgomery County denied the Intestate Heirs' motion for summary judgment and granted Ms. Ellis's petition to transmit issues to the Circuit Court for Montgomery County. The Orphans' Court rejected the Intestate Heirs' argument that equitable adoption required an express contract to adopt, finding that material factual disputes warranted jury determination.

On appeal, the Appellate Court of Maryland vacated and remanded, holding that equitable adoption could be established where the decedent and claimant “intended to and did live as child and parent,” a fairness-driven standard focused on the functional relationship. The court determined that the equitable adoption question could properly be transmitted to the circuit court.

The Supreme Court of Maryland granted *certiorari* to resolve the test for equitable adoption. *Schappell*, 489 Md. at 669, 331 A.3d at 479. The principal issue was whether, and under what circumstances, a stepchild may inherit from an intestate decedent under the doctrine of equitable adoption. *Id.* at 658, 331 A.3d at 473. Both the Intestate Heirs and Ms. Ellis proposed tests for the court to adopt, which were ultimately rejected. *Id.* at 666–68, 331 A.3d at 478–79. Given the lack of clarity in applying the Equitable Adoption doctrine and three competing theories across jurisdictions, the Supreme Court of Maryland articulated a narrowed, uniform standard. *Id.* at 670, 331 A.3d at 480.

The court first established recognition and application of the doctrine in Maryland by analyzing Maryland precedent. *Schappell*, 489 Md. at 672–78, 331 A.3d at 481–85. In *Besche v. Murphy*, the court declined to apply equitable adoption where the decedent had left a will. *Id.* at 673–74, 331 A.3d at 482 (citing *Besche v. Murphy*, 190 Md. 539, 548, 59 A.2d 499, 504 (1948)). In *McGarvey v. State*, the court recognized equitable adoption for intestate succession for “certain limited purposes.” *Id.* at 674–75, 331 A.3d at 482–83 (quoting *McGarvey v. State*, 311 Md. 233, 238–39, 533 A.2d 690, 692–93 (1987)). Later, in *Board of Education v. Browning*, the court allowed an equitably adopted child to inherit from the adoptive parent but not from collateral relatives. *Id.* at 675–78, 331 A.3d at 483–84 (citing *Bd. of Educ. of Montgomery Cnty. v. Browning*, 333 Md. 281, 289, 635 A.2d 373, 378 (1994)). These cases confirmed that Maryland recognized equitable adoption but did not define the required showing. *Id.* at 673–78, 331 A.3d at 482–84.

After tracing Maryland’s inconsistent application, the court identified three competing approaches across other jurisdictions: contract-based, estoppel-based, and intent-based. *Schappell*, 489 Md. at 678, 331 A.3d at 485. Contract-based approaches treat equitable adoption as specific performance of an agreement to adopt. *Id.* Estoppel-based approaches prevent heirs from denying adoption where a decedent and child relied upon such a relationship. *Id.*

The court rejected a purely contractual theory, explaining that contracts with minors present capacity problems and unconsummated agreements may reflect changed intent. *Schappell*, 489 Md. at 694–95, 331 A.3d at 495. Similarly, the court also declined to rely solely on estoppel

principles, noting that children's reliance is often indistinguishable from ordinary familial relationships and does not necessarily reflect testamentary intent. *Id.*

Although the Appellate Court had adopted the intent-based approach, the test was articulated too broadly by allowing inheritance where the parties simply lived as parent and child. *Schappell*, 489 Md. at 699, 331 A.3d at 497. Instead, the Supreme Court of Maryland narrowed the intent-based approach, requiring a two-step showing for equitable adoption. *Id.* at 696, 331 A.3d at 495-96. First, a claimant must provide clear and convincing proof of the decedent's intent to adopt. *Id.* at 693, 331 A.3d at 494. This can be established through an unperformed promise, an invalid adoption attempt, or direct statements of intent. *Id.* The court emphasized that equitable adoption serves a limited equitable function: approximating the decedent's likely intent, without displacing statutory adoption. *Id.* at 697-99, 331 A.3d at 498-99. As a result, the court concluded to satisfy step one on remand, Ms. Ellis must show that the Decedent's repeated statements and efforts to include her as a beneficiary demonstrated a clear intent to adopt. *Id.* at 701-02, 331 A.3d at 498-99.

Second, the claimant must demonstrate that the decedent acted in accordance with this intent by both publicly presenting the claimant as their child and treating them as a natural or legally adopted child. *Schappell*, 489 Md. at 693, 331 A.3d at 494. Treatment alone, absent expressed intent, is insufficient. *Id.* at 697, 331 A.3d at 496. This two-step approach requires Ms. Ellis, on remand, to corroborate the Decedent's expressed intent to adopt with evidence that he consistently acted as her parent and publicly acknowledged her as his child, rather than relying on their close familial relationship. *Id.* at 701-2, 331 A.3d at 498-99.

By requiring both intent and conduct, the two-step test aims to balance fairness to claimants with fidelity to statutory schemes and decedents' probable wishes. *Schappell*, 489 Md. at 697, 331 A.3d at 498. Subsequently, the court's decision in *Schappell* established a uniform framework, promoting more predictable outcomes. *Id.* at 700-01, 331 A.3d at 499.

The decision carries practical estate planning implications. Attorneys advising blended families must emphasize that without formal adoption or a will, equitable adoption claims face a high evidentiary bar, making proactive planning essential to ensure stepchildren and dependents inherit as intended.

By clarifying the doctrine of equitable adoption, the court balanced equitable fairness with statutory fidelity, ensuring that only those claims most clearly aligned with decedents' probable wishes succeed. The risks of neglecting these formalities are substantial: children embraced as one's own

may be excluded from inheritance, sparking conflict, litigation, and outcomes contrary to the decedent's probable intent.