

# UNIVERSITY OF BALTIMORE LAW FORUM

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**VOLUME 53**

**FALL 2022**

**NUMBER 1**

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## LETTER FROM THE EDITOR-IN-CHIEF

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To the Maryland Legal Community:

Since its founding in 1970, the *University of Baltimore Law Forum* has devoted itself to providing the Maryland Legal Community with a resource for evolving legal issues in Maryland. This issue represents *Law Forum's* commitment to preserving this fifty-year legacy of providing readers with thought-provoking and informative pieces.

Volume 53.1 opens with an article written by Justice John G. Browning. In this article, he discusses the decades-long battle to integrate the Maryland bar—highlighting the historic achievements of prominent Black lawyers from Maryland and those who were denied admission to the bar based solely on racial grounds. The article further calls for the posthumous admission to the Maryland Bar of Edward Garrison Draper to duly recognize him as Maryland's first Black lawyer. The second article is written by R. Stark Merrifield IV, and explores the constitutionality of Baltimore City's local hiring ordinance. In analyzing seminal case law and local hiring laws throughout the United States, this article considers whether the ordinance would withstand a challenge under either the Privileges and Immunities Clause or Commerce Clause.

Also included are two student comments selected for publication by the *Law Forum* Volume 52 Executive Board. The first student comment, written by Olga Petrovskikh, analyzes how Maryland child abuse and neglect laws can address the parental denial of and interference with treatment for a child's gender dysphoria. The second comment, written by Chelsea Roberts, discusses the Maryland Use of Force Statute enacted in 2022. This comment examines case law surrounding police excessive force and the statute's legislative history to determine the intended meaning behind vague terms contained in the statute. Finally, included are six recent development pieces which interpret recent decisions made by Maryland's highest appellate court.

This publication reflects the hard work and commitment of our Editorial Board, Associate Editors, and Staff Editors. I want to thank the entire *Law Forum* Staff for their diligence, versatility, and creativity throughout the production process. I also want to recognize our Faculty Advisor, Professor Sheldon Lyke, and the Assistant Dean of Academic and Writing Support, Dean Claudia Diamond, for their guidance and support. On behalf of *Law Forum*, we thank you, our readers, for your continued interest in our publication.

Sincerely,  
Chelsea Roberts  
Editor-in-Chief  
University of Baltimore Law Forum - Vol. 53, No. 1

Member, National Conference of Law Reviews

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**ARTICLES**

TO FIGHT THE BATTLE, FIRST YOU NEED  
WARRIORS: EDWARD GARRISON DRAPER,  
EVERETT WARING, AND THE QUEST FOR  
MARYLAND'S FIRST BLACK LAWYER

*John G. Browning* 1

CONSTITUTIONALITY OF BALTIMORE  
CITY'S LOCAL HIRING ORDINANCE

*R. Stark Merrifield IV* 43

**COMMENTS**

ADDRESSING PARENTAL DENIAL OF  
GENDER DYSPHORIA TREATMENT UNDER  
MARYLAND'S CHILD ABUSE AND  
NEGLECT LAWS

*Olga Petrovskikh* 66

TIME TO DEFINE THE OBJECTIVELY  
REASONABLE OFFICER: HOW  
MARYLAND'S USE OF FORCE STATUTE  
SUPPLIES MEASURABLE STANDARDS TO  
PROTECT FOURTH AMENDMENT RIGHTS

*Chelsea Roberts* 96

**RECENT DEVELOPMENTS**

Att'y Grievance Comm'n of Md. v. Jackson

*Victoria Garner* 121

Harris v. State

*Kaitlyn Lyons* 125

In re D.D.

*Donald Waldron* 129

Murphy v. Liberty Mut. Ins. Co.

*Alexandra Mitchell* 133

Pabst Brewing Co. v. Frederick P. Winner, Ltd.

*Shiloh Shassian* 136

Park Plus, Inc. v. Palisades of Towson

*Brandon Ewing* 139



## ARTICLE

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### TO FIGHT THE BATTLE, FIRST YOU NEED WARRIORS: EDWARD GARRISON DRAPER, EVERETT WARING, AND THE QUEST FOR MARYLAND'S FIRST BLACK LAWYER

*By: John G. Browning\**

#### I. INTRODUCTION

As she reflected upon her historic confirmation as the first Black woman on the nation's highest court, Justice Ketanji Brown Jackson acknowledged that she stood “on the shoulders” of many “true pathbreakers.”<sup>1</sup> Undoubtedly, Justice Jackson had in mind earlier Black U.S. Supreme Court advocates turned members of the federal judiciary such as Constance Baker Motley (the first Black female federal judge) and Thurgood Marshall (the first Black U.S. Supreme Court justice).<sup>2</sup> Yet, she could easily have been referring as well to the earlier generations of Black lawyers whose trailblazing efforts paved the way for lawyers like Motley, Marshall, and Charles Hamilton Houston.<sup>3</sup> While the history of the first Black lawyers in America is a chronicle of broken barriers and adversities overcome, the history of Black lawyers in Maryland—the state that produced Thurgood

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\* John G. Browning is a former Justice on Texas' Fifth Court of Appeals, and he now serves as the Distinguished Jurist in Residence and Professor of Law at Faulkner University's Thomas Goode Jones School of Law. He is a graduate of Rutgers University and the University of Texas School of Law, is an elected member of the American Law Institute, and has received Texas' highest awards for legal writing, contributions to legal ethics, and continuing legal education. A Trustee of the Texas Supreme Court Historical Society, he serves as editor-in-chief of the Society's award-winning journal. Justice Browning gratefully acknowledges the assistance of the Dartmouth College Library, as well as the research assistance of Jacob Linn, Brice Litus, and Erin Carrington Smith of the University of Baltimore School of Law. He dedicates this article to the memories of Edward Garrison Draper, Everett J. Waring, and all those wrongfully denied the chance to become lawyers because of the color of their skin.

<sup>1</sup> *Ketanji Brown Jackson's Remarks at the White House After her Supreme Court Confirmation*, CNN, <https://www.cnn.com/2022/04/08/politics/ketanji-brown-jackson-confirmation-speech/index.html> (last updated Apr. 8, 2022, 5:00 PM).

<sup>2</sup> See *infra* Parts II-V.

<sup>3</sup> See *infra* Parts II-IV. See generally *The Case That Changed America: Brown v. Board of Education: Meet the Legal Team*, NAACP LEGAL DEF. FUND, <https://www.naacpldf.org/brown-vs-board/meet-legal-minds-behind-brown-v-board-education/> (last visited Sept. 28, 2022, 10:14 AM) (describing the legal accomplishments of Motley, Marshall, and Houston).

Marshall and Charles Hamilton Houston—is particularly poignant.<sup>4</sup> As this article will discuss, the effort to integrate Maryland’s bar took place decades after the Civil War—well past the point that other Southern states had admitted Black lawyers into the legal profession.<sup>5</sup> Maryland’s restrictions led to historic injustices, including the denial of a well-qualified Ivy League graduate, Edward Garrison Draper.<sup>6</sup> But the same discriminatory laws galvanized a civil rights movement in Baltimore, one that predated the National Association for the Advancement of Colored People (“NAACP”) and launched the career of the first Black person admitted to the Maryland State Bar Association, Everett J. Waring.<sup>7</sup>

In sharing the story of the campaign to break the race barrier of the Maryland bar, this article aims to correct the egregious historical neglect of this subject. The history of lawyers generally has been too long regarded as “a white man’s history,”<sup>8</sup> while Black lawyers’ “names and contributions remained unknown.”<sup>9</sup> The Reconstruction Era itself was long neglected by generations of historians who regarded it as an illegitimate period “presided over by unscrupulous ‘carpetbaggers’ from the North, unprincipled Southern white ‘scalawags,’ and ignorant freedmen.”<sup>10</sup> Despite being a largely unknown and overlooked chapter in American legal history, the quest to open the doors of the Maryland bar to Black Americans is a chapter with significant consequences for the civil rights movement and one that yields lessons that resonate with today’s racial justice movement. At a time when the struggle for diversity, equity, and inclusiveness in the legal profession continues—the percentage of Black attorneys actually regressed between 2011 and 2021—it remains more important than ever to appreciate the significance of Black voices in the profession and what it took for those voices to be heard.<sup>11</sup> Thurgood Marshall, himself denied entry to the University of Maryland School of Law, recognized that later civil rights victories would not be achieved without first dismantling racial barriers to legal education and the

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<sup>4</sup> See *infra* Parts II-V.

<sup>5</sup> See *infra* Part III.

<sup>6</sup> See *infra* Part II.

<sup>7</sup> See *infra* Part IV; Catherine E. Pugh, *Milestones in Black Education*, BALT. SUN (Feb. 4, 1992), <https://www.baltimoresun.com/news/bs-xpm-1992-02-04-1992035057-story.html>.

<sup>8</sup> Maxwell Bloomfield, *John Mercer Langston and the Training of Black Lawyers*, in W.J. LEONARD, *BLACK LAWYERS* 79 (1977).

<sup>9</sup> J. CLAY SMITH, *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1994* 19 (U. Pa. Press 1993).

<sup>10</sup> ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877*, at xix (1988).

<sup>11</sup> Hassan Kanu, ‘Exclusionary and Classist’: *Why the Legal Profession is Getting Whiter*, REUTERS, <https://www.reuters.com/legal/legalindustry/exclusionary-classist-why-legal-profession-is-getting-whiter-2021-08-10/> (Aug. 10, 2021, 5:49 PM).

profession.<sup>12</sup> Cases like *University of Maryland v. Murray* (1935), along with U.S. Supreme Court cases like *Missouri ex rel. Gaines v. Canada* (1938), *Sipuel v. Board of Regents of the University of Oklahoma* (1948), and *Sweatt v. Painter* (1950) made later civil rights milestones like *Brown v. Board of Education* (1954) possible.<sup>13</sup> The lessons learned from the decades-long effort to integrate the Maryland bar were clear: to fight the battle for racial justice, you first need warriors.

## II. EDWARD GARRISON DRAPER SEEKS TO DEFY THE ODDS

Maryland did not admit a Black lawyer to practice until Everett J. Waring in 1885 and did not repeal its discriminatory statute banning Blacks from bar admission until 1888—some 20 years after the ratification of the Fourteenth Amendment.<sup>14</sup> The state’s law restricting anyone but white males from becoming lawyers dated back to 1832.<sup>15</sup> It provided that applicants must “have been a student of law in any part of the United States for at least two years previous to said application.”<sup>16</sup> The few historians to comment on this restriction dismissed its race-based exclusion as “merely codified practice,” since the notion of a Black lawyer must have been far-fetched in 1832.<sup>17</sup> Indeed, a Black man would not be admitted to the bar of any state until 1844, when the Maine Bar admitted Macon Bolling Allen.<sup>18</sup> Allen moved to Massachusetts the following year becoming the first Black lawyer in that state in 1845.<sup>19</sup> Only a handful of Black lawyers would follow in his footsteps by the outbreak of the Civil War: Robert Morris, admitted in Massachusetts in 1847; George Vashon, admitted in New York in 1848; John Mercer Langston, admitted in Ohio in 1854; Aaron Alpeoria Bradley, admitted in Massachusetts in 1856; Edward Garrison Walker, admitted in Massachusetts in May 1861; and John Swett Rock, admitted in Massachusetts in September 1861.<sup>20</sup>

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

<sup>13</sup> *Timeline of Events Leading to the Brown v. Board of Education Decision of 1954*, NAT’L ARCHIVES, <https://www.archives.gov/education/lessons/brown-v-board/timeline.html> (June 7, 2021).

<sup>14</sup> Act of Apr. 7, 1876, ch. 264 § 3, 1786 Md. Laws (repealed 1888); see *1831-1884: Abolition and Emancipation*, BALT. HERITAGE, <https://baltimoreheritage.github.io/civil-rights-heritage/1831-1884/> (last visited Sept. 28, 2022, 11:47 AM).

<sup>15</sup> Act of Mar. 10, 1832, ch. 268 § 2, 1831 Md. Laws.

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

<sup>17</sup> See generally SMITH, *supra* note 9, at 33-34.

<sup>18</sup> See *id.* at 2.

<sup>19</sup> *Id.* at 94.

<sup>20</sup> *Id.* at 34, 96, 100, 129.

However, such a dismissive approach, overlooks what was going on in the South, and in Maryland particularly, at the time that statute was passed. Nat Turner's unsuccessful slave rebellion of August 1831 in Southampton, Virginia had sent shockwaves throughout the South, motivating Southern legislatures to pass even more restrictive laws against the education, movement, and assembly of slaves.<sup>21</sup> Beyond laws that further subordinated the enslaved population, states like Virginia and Maryland began to ponder what to do about something they perceived to be an even bigger threat in the event of future uprisings—the free Black population.<sup>22</sup> Calls for the removal of free people of color and forced colonization of Liberia gained momentum.<sup>23</sup> As one historian noted, in Virginia:

[t]he question as to what should be done with the blacks turned out to be the most important matter brought before the legislature. Three-fourths of the session was devoted to the discussion of such questions as the removal of free Negroes, and the colonization of such slaves as masters could be induced to give up.<sup>24</sup>

A bill for the removal of Virginia's free Black population to Liberia was considered, tabled, and indefinitely postponed in the Senate by a vote of 18 to 14.<sup>25</sup>

Maryland, on the other hand, went further.<sup>26</sup> At its 1831-32 legislative session, Maryland passed a law allowing a board of managers to use state funds appropriated for the purpose of removing free Black Maryland residents to Liberia in conjunction with the state-created Maryland Colonization Society.<sup>27</sup> And like other Southern states, Maryland passed a wide range of other laws impacting free Black people within its borders in an effort to make emigration seem like a more palatable alternative to living and working in the state.<sup>28</sup> For example, few Black persons could succeed as retail

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<sup>21</sup> John W. Cromwell, *The Aftermath of Nat Turner's Insurrection*, 5 J. AFR. AM. HIST. 208, 219-220 (1920).

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

<sup>23</sup> *Id.* at 231.

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

<sup>25</sup> *Id.* at 229-30.

<sup>26</sup> *Id.* at 219-20.

<sup>27</sup> Act of Mar. 12, 1832, ch. 281, 1831 Md. Laws.

<sup>28</sup> For example, the 1831–1832 Maryland legislature required free Blacks to carry certificates attesting to their non-enslaved status, restricted meetings of free Black people; required special licenses for free Black people to own weapons; and required free Black persons desiring to leave the state for more than 30 days to first obtain a court-issued permit. See Act of Mar. 14, 1832, ch. 323, §§ 1, 2, 6, 7, 1831 Md. Laws. Free Black people,



shopkeepers due to one such law, which prohibited the sale “by any free Negro or mulatto” of:

any bacon, pork, beef, mutton, corn, wheat, tobacco, rye, or oats unless such free negro or mulatto shall, at the time of such sale, produce a certificate from a justice of the peace, or three respected persons residing in the neighborhood of said negro, of the county of which such negro resides, that he or they have reason to believe and does believe, that such free negro or mulatto came honestly and bona fide into possession of any such article so offered for sale . . . .<sup>29</sup>

Ostensibly, the law was to address the concern that freedmen trafficked in stolen goods, yet it had a chilling effect on the free enterprise and wealth-building of free Black people.<sup>30</sup> One who was not deterred, however, was a successful Baltimore tobacconist and cigar-maker named Garrison Draper. Garrison and his wife, Charlotte Gilburg Draper, lived in Antebellum Baltimore, and like roughly half of Maryland’s Black population, they were free.<sup>31</sup> They had one child, Edward Garrison Draper, born in Baltimore on January 1, 1834.

The elder Draper had some education.<sup>32</sup> According to the census of 1860, of the 84,000 free Black people in Maryland, 21,699 could not read or write.<sup>33</sup> He had an inquiring mind and co-founded an organization—the Society of Enquiry—to learn more about the proposed colonization of Liberia.<sup>34</sup> Because of his interest, Draper was invited to be a correspondent for the *Maryland Colonization Journal*, the publication of the state-funded Maryland Colonization Society.<sup>35</sup> Most free Black people opposed the notion

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in theory, had the right to own property and to sue or be sued—rights which in reality were limited by the absence of Black lawyers and by a state law prohibiting Black people from testifying against whites. See Act of June 8, 1717, ch. 13, § 2, 1717 Md. Laws.

<sup>29</sup> Act of Mar. 14, 1832, ch. 323, 28 at § 9, 1831 Md. Laws.

<sup>30</sup> See David S. Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland’s First Black Lawyers*, 44 MD. L. REV. 939, 979 (1985) (citing James M. Wright, *The Free Negro in Maryland, 1634-1860*, 261-75 (1917)) (In the Baltimore City Directory for 1840, for example, there are only 10 Black retailers listed. By 1850’s directory, that number had only increased to 18).

<sup>31</sup> See Bogen, *supra* note 30, at 977.

<sup>32</sup> *Id.* at 979.

<sup>33</sup> JEFFREY R. BRACKETT, *THE NEGRO IN MARYLAND: A STUDY OF THE INSTITUTION OF SLAVERY* 198 n.2 (1889).

<sup>34</sup> Bogen, *supra* note 30, at 979.

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

of Liberia colonization, evincing a healthy skepticism of white motivation for supporting it.<sup>36</sup>

Prior to 1832, Maryland had supported the work of the American Colonization Society, founded as a private organization that helped establish the “colony” of Liberia.<sup>37</sup> But with the passage of its 1832 law enshrining Liberian colonization as an official state policy, Maryland ceased its financial support of the national organization.<sup>38</sup> Instead, it focused on its own group, the Maryland Colonization Society, and the establishment of a specific area dubbed “Maryland in Liberia.”<sup>39</sup> While not officially a state agency, the Maryland Colonization Society was heavily funded by the state.<sup>40</sup> Ultimately, more than a thousand free or formerly enslaved Black residents of Maryland went on to establish what was once known as “the independent Republic of Maryland” in Liberia, known today as Liberia’s Maryland County.<sup>41</sup>

Garrison Draper remained interested in the concept of Black Americans finding the freedoms they had been denied in the United States through emigration to Liberia, but he did not buy into the enticement of a tropical paradise that was often used to generate interest in the colonization effort.<sup>42</sup> In his letters on the subject, Draper was realistic about the real reason Liberia represented an attractive option: it created an opportunity to secure the rights and liberties that Black Americans were denied in their own country.<sup>43</sup> Unlike the European immigrants who came voluntarily to America “not only for the pecuniary advantage of agriculture or commerce, but also to transmit the blessings of civil and religious liberty to their posterity,” Draper wrote: Black people were brought to this country “without consulting their

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

<sup>37</sup> *Id.* at 977 n.100.

<sup>38</sup> See Act of Mar. 12, 1832, ch. 281, § 1, 1831 Md. Laws (codified at MD. CODE art. 66, §§ 44-46 (1860) (repealed 1865)); see also Act of Mar. 14, 1832, ch. 314, § 1, 1831 Md. Laws (codified at MD. CODE art. 66, §§44-46 (1860) (repealed 1865)).

<sup>39</sup> Bogen, *supra* note 30, at 977 n.100.

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

<sup>41</sup> See generally John H. B. Latrobe, President of the Md. Hist. Soc’y., Maryland in Liberia—A History of the Colony Planted by the Maryland State Colonization Society Under the Auspices of the State of Maryland, U.S., at Cape Palmas on the South-West Coast of Africa, 1833–1853 (a paper read before the Maryland Historical Society) (Mar. 9, 1885) (transcript available in the Columbia University Library); accord, Christina Tkacik, ‘The Real Story of Liberia Is a Story of Survival’: Remembering the Role of Black and White Marylanders in the Creation of Africa’s First Republic, BALTIMORE SUN (July 1, 2021, 5:00 AM), <https://www.baltimoresun.com/features/retro-baltimore/bs-fe-retro-maryland-countyliberia-colonization-20210701-qm56afogzjhxbjx32lvx6fx4bq-story.html>.

<sup>42</sup> Bogen, *supra* note 30, at 979.

<sup>43</sup> *Id.* at 980.

own wishes.”<sup>44</sup> As such, Garrison Draper prepared young Edward for a possible life in Liberia.<sup>45</sup>

Yet, the majority of the free Black population in Baltimore did not share Garrison Draper’s cautious hope for colonization in Liberia.<sup>46</sup> Pointing to the language in one of the Maryland Colonization Society’s own resolutions from their 1841 convention, the group bluntly acknowledged that “the idea that the colored people will ever obtain social and political equality in this state is wild and mischievous; and by creating among them hopes that can never be realized, is at war with their happiness and improvement.”<sup>47</sup> In 1838, the Society’s traveling agent, John H. Kennard, summarized for his board of managers the opposition to colonization that he heard from members of the Black community:

They are taught to believe, and do believe, that this is their country, their home. A Country and home now wickedly withholden from them but which they will presently possess, own and control. Those who Emigrate to Liberia, are held up to the world, as the vilest and veriest traitors to their race, and especially so, toward their brethren in bonds.<sup>48</sup>

But perhaps no one captured the sentiments of the Black community quite as succinctly as Black minister and educator, William S. Watkins, who in 1831 wrote in William Lloyd Garrison’s abolitionist newspaper, *The Liberator*, that Black Baltimoreans would “rather die in Maryland, under the pressure of unrighteous and cruel laws” than to be “drive[n], like cattle” to Liberia.<sup>49</sup>

In preparation for a (hopefully) promising future in Liberia, Draper sought out the best possible education for his son.<sup>50</sup> Public education for Black children in Baltimore was limited at best.<sup>51</sup> So young Edward was sent

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<sup>44</sup> Draper, Colonization and Missions, in 2 MD. COLONIZATION J. 288 (1844).

<sup>45</sup> Bogen, *supra* note 30, at 980.

<sup>46</sup> *Id.* at 979.

<sup>47</sup> Maryland Colonization Society Resolutions (June 4, 1841), in 1 MD. COLONIZATION J. 15 (1841).

<sup>48</sup> Md. State Colonization Soc’y, *Maryland State Colonization Society Overview*, MD. STATE ARCHIVES, [http://slavery.msa.maryland.gov/html/casestudies/mscs\\_overview.pdf](http://slavery.msa.maryland.gov/html/casestudies/mscs_overview.pdf) (last visited Nov. 1, 2022) <http://slavery.msa.maryland.gov/html/casestudies/mscscountycs.html> (quoting John H. Kennard, Reports to the Board Manager (Dec. 9th, 1838), in MD. COLONIZATION SOC’Y PAPERS 54-55 (1787-1902)).

<sup>49</sup> 2 THE BLACK ABOLITIONIST PAPERS: CANADA, 1830–1865, at 234 (C. Peter Ripley, et al. eds., 1986) (quoting A Colored Baltimorean, Letter to the Editor, THE LIBERATOR (Boston), June 4, 1831).

<sup>50</sup> Bogen, *supra* note 30, at 980.

<sup>51</sup> See generally Bettye J. Gardner, *Antebellum Black Education in Baltimore*, 71 MD. HIST. MAG. 360, 360–63 (Fall 1976).

off to the public school for Black children in Philadelphia.<sup>52</sup> Edward evidently received a fine preparatory education because he was able to pass Dartmouth College's entrance examination in 1851, which then encompassed Greek, Latin, English grammar, mathematics, and geography.<sup>53</sup> Draper was not Dartmouth's first Black student; that distinction belongs to Edward Mitchell, who enrolled in 1824 and graduated in 1828.<sup>54</sup> However, at least one historian has claimed Draper may very well have been the first Black man from Maryland to graduate from college.<sup>55</sup> In any event, by the time he graduated from Dartmouth in 1855, Draper had maintained "a very respectable standing, socially, and in his class."<sup>56</sup>

Draper next set his sights on becoming a lawyer, with his ultimate goal of being Liberia's first college-educated, trained attorney.<sup>57</sup> Before the Civil War, there were only a handful of law schools and none were in Maryland.<sup>58</sup> Most lawyers received their training by "reading the law" under the tutelage of an older practitioner or judge.<sup>59</sup> College degrees were not common; as late as 1883, less than half of the students at the fledgling University of Maryland School of Law had bachelor's degrees.<sup>60</sup> Until the State passed its bar admission statute in 1832, no formal standards existed for becoming a lawyer in Maryland.<sup>61</sup> With that statute, Maryland, for the first time, spelled out that an applicant must be a free, white male citizen of Maryland over twenty-one years of age who had been "a student of the law in any part of the United States, for at least two years previous to said application."<sup>62</sup> Applicants could make their petition in open court, at any of

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<sup>52</sup> James Hall, *A Lawyer for Liberia*, in 9 MD. COLONIZATION J. 88 (1857). Philadelphia had established separate public schools for Black children as early as 1822. John C. Van Horne, *The Education of African Americans in Benjamin Franklin's Philadelphia*, in "THE GOOD EDUCATION OF YOUTH": WORLDS OF LEARNING IN THE AGE OF FRANKLIN 94 (John H. Pollack ed., 2009).

<sup>53</sup> Bogen, *supra* note 30, at 980 (citing *Dartmouth College Catalog, 1851-1852*, at xxii).

<sup>54</sup> See Forrester Lee, *Finding Community: The Life of Edward Mitchell 1828*, DARTMOUTH LIBR., <https://www.dartmouth.edu/library/rauner/exhibits/finding-community.html> (last updated May 17, 2022) (acknowledging the assistance of Jay Satterfield, Head of Dartmouth's Rauner Special Collections Library, for assistance with documenting Edward Garrison Draper's career at the school).

<sup>55</sup> A. BRISCOE KOGER, *THE MARYLAND NEGRO* 17 (1955).

<sup>56</sup> Hall, *supra* note 52.

<sup>57</sup> Bogen, *supra* note 30, at 981.

<sup>58</sup> *Id.* at 981-82.

<sup>59</sup> Jennifer Uhlarik, *Becoming a Lawyer in the Old West*, HEROES, HEROINES & HIST. (Feb. 25, 2015, 1:00 AM), <https://www.history.com/2015/02/becoming-lawyer-in-old-west.html>.

<sup>60</sup> ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 177-87 (1953); see also *The Law School of the University of Maryland Catalog, 1884*, at 5-6 (1884).

<sup>61</sup> David S. Bogen, *The First Integration of the University of Maryland School of Law*, 84 MD. HIST. MAG. 39 (1989).

<sup>62</sup> Act of Mar. 10, 1832, ch. 268, 1831 Md. Laws.

the county courts, “courts of equity or courts of appeals. . . .”<sup>63</sup> The statute called for the courts “to examine the applicant upon the same day during the regular session [of the court], touching his qualifications for admission . . . and they shall also require and receive evidence of his probity and general character . . . .”<sup>64</sup> Upon a satisfactory examination, the newly admitted attorney was entitled to practice in all courts of the state.<sup>65</sup> Judicial examination of aspiring attorneys was the norm in Maryland until 1876, when a statute was enacted authorizing each court to appoint a board of at least three attorneys to examine the applicant in the presence of the court.<sup>66</sup>

Deciding to embark upon a course of legal education must have been daunting for Draper, and he apparently made this decision only “[a]fter much consultation with friends.”<sup>67</sup> As a well-read free Black man, Draper surely knew of the few Black lawyers then practicing in the United States at the time: men like: Macon Allen, Robert Morris, George Vachon, and John Mercer Langston.<sup>68</sup> Besides the uncertainty of the career path itself and its prospects, Draper was aware that Maryland’s race restriction would discourage lawyers from offering him the apprenticeship that he sought—not to mention the judicial approval he would need to be an admitted attorney.<sup>69</sup> Support for Draper’s risky endeavor would come from the Maryland Colonization Society.<sup>70</sup> As the Society’s journal would later indicate, hopes were high that a promising young Black lawyer like Draper could fulfill an important role in Liberia:

On the sailing of almost every expedition we have had occasion to chronicle the departure of missionaries, teachers, or a physician, but not until the present time that of a lawyer. The souls and bodies of the emigrants have been well cared for; now, it is no doubt supposed, they require assistance in guarding their money, civil rights, [etc]. Most professional emissaries have been educated at public expense, either by

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<sup>63</sup> *Id.* at § 1.

<sup>64</sup> *Id.* at § 2.

<sup>65</sup> *Id.* at § 3.

<sup>66</sup> Act of Apr. 7, 1876, ch. 264, 1876 Md. Laws; *see also* William Adkins II, *What Doth the Board Require of Thee?*, 28 MD. L. REV. 103 (1968) (providing a historical overview of Maryland bar admission requirements).

<sup>67</sup> Hall, *supra* note 52.

<sup>68</sup> *See* EDWARD BYRON REUTER, THE MULATTO IN THE UNITED STATES: INCLUDING A STUDY OF THE ROLE OF MIXED-BLOOD RACES THROUGHOUT THE WORLD 232-34 (1918).

<sup>69</sup> *See* Hall, *supra* note 52.

<sup>70</sup> *See id.*

Missionary or the Colonization Societies, but the first lawyer goes out independent of any associated aid.<sup>71</sup>

The first source of tangible support came in the form of the attorney under whom Draper would “read the law”—retired Baltimore attorney Charles Gilman.<sup>72</sup> Gilman, a member of the Maryland Colonization Society’s Board of Managers, agreed to instruct Draper in the law and provide him with access to his office.<sup>73</sup> Gilman, born in New Hampshire on December 14, 1793, was admitted to the New Hampshire bar in 1826.<sup>74</sup> He moved to Baltimore in 1833 and had a successful career there until the spring of 1849, when he apparently went off to California—swept up like so many others with “gold rush fever.”<sup>75</sup> Gilman’s stay in California lasted about five years, after which he returned to spend his remaining years in Baltimore before his death on September 9, 1861.<sup>76</sup> Gilman’s return to Maryland in 1854 may have been prompted by health concerns, as at least one source maintains that “before his return to Maryland he suffered a stroke.”<sup>77</sup>

Gilman’s mentoring of Edward Garrison Draper was not the only support the aspiring lawyer received, directly or indirectly, from the Maryland Colonization Society.<sup>78</sup> When Draper was not tucked away in Gilman’s office, Draper spent much of his time reading in the office of Dr. James Hall, general agent of the Society and editor of the *Maryland Colonization Journal*.<sup>79</sup> Hall would later describe Draper as a man “of an amiable disposition, very modest and retiring, [and] a good student. . . .”<sup>80</sup>

But reading law books and tutelage by retired lawyers would only take Draper so far. The color of his skin made it impossible for Draper to acquire firsthand practical knowledge of the day-to-day realities of Baltimore law practice and the rules and quirks of the bench and bar.<sup>81</sup> Fortunately, Draper was able to spend the final months studying in the Boston office of prominent attorney, Charles W. Storey.<sup>82</sup> The Harvard-educated Storey was

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

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

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

<sup>74</sup> *A Lesser-Known New Hampshire Masonic Leader: Charles Gilman*, 3 Q. NEWSL. ANNIVERSARY LODGE RSCH. NO. 175, (Anniversary Lodge of Research No. 175, Milford N.H.), 2002, at 7-8 [hereinafter Gilman].

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

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

<sup>77</sup> *Charles Gilman*, THE GRAND LODGE OF A.F. & A.M. OF MD., <https://mdmasons.org/past-gm/charles-gilman-2/> (last visited Oct. 20, 2022).

<sup>78</sup> Gilman, *supra* note 74, at 7-8.

<sup>79</sup> *See, e.g.*, Bogen, *supra* note 30, at 982.

<sup>80</sup> James Hall, *Death of J. W. Lugenbeel, M. D.*, 9 MD. COLONIZATION J., at 79.

<sup>81</sup> Gilman, *supra* note 74, at 8.

<sup>82</sup> *Id.*

well-positioned to provide opportunities for Draper to see lawyers in action, since he served as clerk of the Superior Criminal Court and the register of insolvency for Suffolk County.<sup>83</sup> Storey himself had studied law in the offices of George T. Curtis, who had been part of the legal team representing Dred Scott, and Benjamin R. Curtis, a dissenting U.S. Supreme Court Justice in the *Dred Scott* decision.<sup>84</sup> Given Storey's connection with both Curtises, the *Dred Scott* decision was likely a subject of conversation between Storey and young Draper.<sup>85</sup> Storey was sympathetic to the abolitionist cause; his wife Elizabeth Moorfield was a prominent abolitionist.<sup>86</sup> Their son, Moorfield Storey, served as private secretary to noted abolitionist Senator, Charles Sumner.<sup>87</sup> The younger Storey would go on to have a distinguished career, serving not only as president of the American Bar Association but also as a co-founder and president of the NAACP.<sup>88</sup>

On October 29, 1857, armed with legal education, months of practical observation in Boston courts and Charles Gilman's sponsorship, Draper presented himself for examination before Baltimore Superior Court Judge Zacheus Collins Lee.<sup>89</sup> Judge Lee, a first cousin to Robert E. Lee, had served as the U.S. District Attorney for Baltimore from 1848 to 1855, after which he was appointed to the bench—a position he would hold until his death in 1859.<sup>90</sup> Judge Lee was a slave owner, and while the number of slaves he owned is unknown, he posted newspaper advertisements offering rewards for the capture and return of at least two of his slaves, Martha and Samuel, who had run away.<sup>91</sup>

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<sup>83</sup> WILLIAM T. DAVIS, PROFESSIONAL AND INDUSTRIAL HISTORY OF SUFFOLK COUNTY, MASSACHUSETTS 413 (Boston Hist. Co., Vol. 1, 1894).

<sup>84</sup> *Biographies of the Robes*, SUP. CT. HIST. THE FIRST HUNDRED YEARS (Dec. 2006), [https://www.thirteen.org/wnet/supremecourt/antebellum/robes\\_curtis.html](https://www.thirteen.org/wnet/supremecourt/antebellum/robes_curtis.html).

<sup>85</sup> *Id.*

<sup>86</sup> Geoffrey D. Austrian, *Moorfield Story*, HARV. MAG. (July-Aug. 2018), <https://www.harvardmagazine.com/2018/07/moorfield-storey>.

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

<sup>88</sup> Austrian, *supra* note 86.

<sup>89</sup> Bogen, *supra* note 30, at 984; Smith, *supra* note 9, at 142.

<sup>90</sup> *Stratford Hall and the Lees Connected with Its History*, LEE FAMILY DIGIT. ARCHIVES, <https://leefamilyarchive.org/reference/books/alexander/06.html> (last visited May 17, 2022).

<sup>91</sup> See DAILY NAT'L INTELLIGENCER (Aug. 8, 1842) [https://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/runaway\\_advertisements/pdf/18420812dni1.pdf](https://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/runaway_advertisements/pdf/18420812dni1.pdf); BALT. SUN (Aug. 1842), [https://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/runaway\\_advertisements/pdf/18420810bs1.pdf](https://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/runaway_advertisements/pdf/18420810bs1.pdf); DAILY NAT'L INTELLIGENCER (July 27, 1836), [https://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/runaway\\_advertisements/pdf/18360727dni1.pdf](https://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/runaway_advertisements/pdf/18360727dni1.pdf).

Judge Lee knew that however impressive Draper might be as a candidate, he was not a “free white citizen” and so would not be admitted.<sup>92</sup> However, Draper persuaded the judge of his intent to emigrate to Liberia and his desire to practice law there.<sup>93</sup> So, Judge Lee issued Draper a certificate that stated as follows:

STATE OF MARYLAND  
City of Baltimore  
October 29, 1857

Upon the application of Charles Gilman, Esq. of the Baltimore Bar, I have examined Edward G. Draper, a young man of color, who has been reading law under the direction of Mr. Gilman, with the view of pursuing its practice in Liberia, Africa. And I have found him most intelligent and well informed in his answers to the questions propounded by me, and qualified in all respects to be admitted to the Bar in Maryland, *if he was a free white citizen of this State*. Mr. Gilman, in whom I have the highest confidence, has also testified to his good moral character.

This Certificate is therefore furnished to him by me, and with a view to promote his establishment and success in Liberia at the Bar there.

Z. Collins Lee

Judge of the Superior Court, Baltimore, Maryland<sup>94</sup>

Armed with this certificate, the newly married Draper and his wife, Jane Rebecca Jordan, set sail from Baltimore to Liberia six days later aboard the *M.C. Stevens*.<sup>95</sup> Also on the voyage was G.W. Hall (son of Dr. Hall), who wrote of his prospects to the corresponding secretary, describing the young Dartmouth graduate as:

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<sup>92</sup> See generally LANGSTON, *John Mercer*, HIST., ART & ARCHIVES, <https://history.house.gov/People/Detail/16682>, (last visited Oct. 20, 2022) (noting that in some states that restricted admission to the legal profession to white male citizens, a sympathetic judge or examining committee could sometimes find justification for a Black candidate of mixed ancestry. In the case of John Mercer Langston in Ohio—who had defiantly refused to “pass” in order to attend a law school—he was found to be not only qualified but “close enough to white.”).

<sup>93</sup> See Z. Collins Lee, Certificate Attesting that Edward G. Draper is Fit to Practice Law (Oct. 29, 1857), in 9 MD. COLONIZATION J. 89 (1857).

<sup>94</sup> *Id.* (emphasis added).

<sup>95</sup> James Hall, *Voyages of the Ship M. C. Stevens*, in 9 MD. COLONIZATION J. 81 (1857).



fully qualified, color excepted, to practice at the Baltimore bar. His success is almost certain, as there is not another lawyer in Liberia who was bred to the profession; a second one might be equally successful, and thus, this business would gradually pass out of the hands of quacks, who now hold it without depending upon their practice for support.<sup>96</sup>

This optimism was echoed by the Maryland Colonization Society. His arrival was heralded in its article *A Lawyer for Liberia*, noting:

We consider the settlement of Mr. Draper in the Republic as an event of no little importance. It seemed necessary that there should be one regularly educated lawyer in a community of several thousand people, in a Republic of freedmen. True, there are many very intelligent, well-informed men now in the practice of law in Liberia, but they have not been educated to the profession, and we believe no one makes that his exclusive business. We doubt not but they will welcome Mr. Draper as one of their fraternity.<sup>97</sup>

But the promise was unfulfilled.<sup>98</sup> Within a year after his arrival in Monrovia, Liberia, Edward Garrison Draper died on December 18, 1858, in Cape Palmas—only two weeks before his 25<sup>th</sup> birthday.<sup>99</sup> The cause was pulmonary consumption, better known as tuberculosis.<sup>100</sup>

Nothing is known of Draper's all too brief legal career in Liberia.<sup>101</sup> What we do know is that, but for the color of his skin, this Ivy League graduate met all the requirements for admission to the Maryland bar—a fact acknowledged by the Baltimore judge who examined him.<sup>102</sup> Edward Garrison Draper deserves to be added to the small but growing number of members of diverse communities who have been granted posthumous bar admission by state supreme courts in the 21<sup>st</sup> century, as a way of righting the wrong of being rejected by the bar on racial grounds during the 19<sup>th</sup> and early

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<sup>96</sup> Letter from G.H. Hall to R.R. Gurley (Dec. 16, 1857), in 34 THE AFR. REPOSITORY 94 (1858).

<sup>97</sup> *Id.* at 27.

<sup>98</sup> See *Edward Garrison Draper*, DARTMOUTH LIBR., [https://www.dartmouth.edu/library/rauner/blackgreens/e\\_draper.html](https://www.dartmouth.edu/library/rauner/blackgreens/e_draper.html) (last visited Oct. 6, 2022).

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

<sup>100</sup> See *id.*

<sup>101</sup> See generally Bogen, *supra* note 30, at 985 (revealing that Draper fell fatally ill after arriving in Liberia and died within a year).

<sup>102</sup> Letter from G.H. Hall to R.R. Gurley, *supra* note 96, at 94.

20th centuries.<sup>103</sup> These include the Washington Supreme Court's admission of Japanese American Takuji Yamashita in 2001; the Pennsylvania Supreme Court's admission of Black American George Vachon in 2010; the California Supreme Court's admission of Chinese American Hong Yen Chang in 2015 and Japanese American Sei Fujii in 2017; the New York Supreme Court's admission of Black American William Herbert Johnson in 2019, and the Supreme Court of Texas' admission of Black American J.H. Williams in 2020.<sup>104</sup> Draper was denied the distinction of becoming Maryland's first Black lawyer months after the U.S. Supreme Court, in one of its most infamous decisions, denied Black Americans much more: their basic rights of citizenship.<sup>105</sup> But it is never too late to address the injustices of the past.

### III. THE FIGHT GOES ON: *IN RE TAYLOR* AND CHARLES WILSON

In the aftermath of the Civil War, the educational and economic opportunities that had long been denied to the Black population suddenly brought the legal profession within reach.<sup>106</sup> Across the former Confederate states, the legal profession's racial barrier was breached, spurred on in part by the creation of a law department at fledgling Howard University.<sup>107</sup> Howard's earliest graduates would forge new paths as the first Black lawyers in multiple states.<sup>108</sup> Arkansas admitted its first Black lawyer in 1866; Tennessee and South Carolina followed suit in 1868; Mississippi added its first in 1869, while Alabama, Louisiana, and Virginia welcomed their first Black lawyers in 1871.<sup>109</sup> Texas did not have a Black lawyer admitted until 1873, while Georgia did not see a Black lawyer admitted until 1878.<sup>110</sup> Yet,

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<sup>103</sup> See generally John G. Browning, *Righting Past Wrongs: Posthumous Bar Admissions and the Quest for Racial Justice*, 21 BERKELEY J. AFR. AM. L. & POL'Y 1 (2021) (examining the posthumous bar admission of various lawyers who were denied admission on the basis of race).

<sup>104</sup> See *id.*

<sup>105</sup> See *Scott v. Sanford*, 60 U.S. 393 (1857).

<sup>106</sup> *Emancipation and Reconstruction*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/immigration/african/emancipation-and-reconstruction/> (last visited Oct. 17, 2022).

<sup>107</sup> *Our History*, HOWARD UNIV. SCH. OF L., <http://law.howard.edu/content/our-history#:~:text=Howard%20University%20School%20of%20Law%20started%20as%20Howard%20University%20Law,of%20Professor%20John%20Mercer%20Langston> (last visited Oct. 6, 2022).

<sup>108</sup> See John G. Browning, "Pioneers of an Interesting and Exciting Destiny": *The Lives and Legacies of Howard's First Law Graduates*, 66 HOWARD L.J. (forthcoming 2023).

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

<sup>110</sup> John G. Browning, *A Texas Law Graduate's Quest to Uncover the Story of the State's First Black Attorney*, THE ALCALDE (Mar. 1, 2021, 1:13 PM)

in the face of these breakthroughs elsewhere, Maryland's bar remained lily-white.<sup>111</sup>

Despite the ratification of the Fourteenth Amendment, debate continued to swirl over the meaning and extent of its provisions, including both the Equal Protection Clause and the Privileges and Immunities Clause.<sup>112</sup> Even before the U.S. Supreme Court would weigh in during *The Slaughterhouse Cases*, discussions surrounding other civil rights legislation featured heated consideration of the Privileges and Immunities Clause that occasionally veered into the subject of Black membership in the legal profession.<sup>113</sup> For example, prominent constitutional lawyer and Wisconsin senator, Matthew Carpenter, during a debate over Senator Charles Sumner's civil rights bill in 1872 on just what rights were protected as "privileges and immunities" of citizenship, addressed the issue of Blacks in the legal profession.<sup>114</sup> Arguing that the Privileges and Immunities Clause struck down racial barriers like Maryland's discriminatory statute, he proclaimed, "[t]hat great amendment opened the bar to colored men."<sup>115</sup> Later, relying on the Privileges and Immunities Clause in *Bradwell v. Illinois*, Carpenter maintained that the protections afforded by the Fourteenth Amendment were equally applicable to both gender and racial discrimination: "Why may a colored citizen be admitted to the Bar? Because he is a citizen, and that is one of the avocations open to every citizen, and no State can abridge his right to pursue it. Certainly, no other reason can be given."<sup>116</sup> Later, he expanded upon this notion:

The 14<sup>th</sup> Amendment opens to every citizen of the United States, male or female, black or white, married or single, the honorable professions as well as the servile employment of life; and that no citizen can be excluded from any one of them. Intelligence, integrity, and honor are the only qualifications

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<https://alcalde.texasexes.org/2021/03/a-texas-law-graduates-quest-to-uncover-the-story-of-the-states-first-black-attorney/>.

<sup>111</sup> Stephanie Cornish, *Maryland's First Black Lawyers*, AFRO NEWS (Mar. 26, 2015), <https://afro.com/marylands-first-black-lawyers/>.

<sup>112</sup> See *infra* text accompanying notes 114-17.

<sup>113</sup> See *infra* text accompanying notes 114-17.

<sup>114</sup> CONG. GLOBE, 42nd Cong., 2d Sess. 524, at 762 (1872).

<sup>115</sup> *Id.* In 1872, Carpenter would argue before the Supreme Court on behalf of the Crescent City Livestock Corporation in *The Slaughterhouse Cases* and on behalf of Myra Bradwell's bid to become a lawyer in *Bradwell v. Illinois*. See *Slaughter-House Cases*, 83 U.S. 36, (1872); see *Bradwell v. State*, 83 U.S. 130, (1873).

<sup>116</sup> John A. Lupton, *Myra Bradwell and the Profession of Law: Case Documents*, 36 J. SUP. CT. HIST. 236 (2011) (reproducing in full Argument for Plaintiff in Error, *Bradwell v. State*, 83 U.S. 130 (1873)).

that can be prescribed as conditions precedent to an entry upon any honorable pursuit or profitable avocation . . . .<sup>117</sup>

Unfortunately, the Supreme Court's restrictive view of the Fourteenth Amendment's protections in *The Slaughterhouse Cases* influenced state courts around the country, and Maryland was no exception.<sup>118</sup> For example, in *Cully v. Baltimore & Ohio Railroad Co.*, Baltimore federal judge, William Fell Giles, ruled against Black plaintiffs suing a Maryland railroad for forcing them into separate and lesser accommodations, holding that the privilege of local travel on the railroad was one of state citizenship rather than a privilege of U.S. citizens.<sup>119</sup> In 1877, this narrow view—centered on the Privileges and Immunities Clause rather than the Equal Protection Clause—would doom another legal attempt to integrate the Maryland bar.<sup>120</sup>

Interestingly enough, even before the Maryland bar formally admitted Black lawyers, at least one practiced within the confines of federal courts in Maryland.<sup>121</sup> James Harris Wolff attended Harvard Law School after reading the law under the tutelage of former Massachusetts Congressman Daniel Wheelright Gooch. On June 26, 1875, he was admitted to the Suffolk County bar and to practice before the Supreme Judicial Council of Massachusetts.<sup>122</sup> That same year, Wolff moved to Maryland and was the first Black lawyer admitted to practice before the United States Circuit Court of Maryland.<sup>123</sup> Federal Court practice, however, provided more limited opportunities than state court practice.<sup>124</sup> In 1876, Wolff and Charles S. Taylor, another Black lawyer originally from Massachusetts, decided to challenge Maryland's racially discriminatory statute.<sup>125</sup> Wolff soon dropped out of the case and returned to Massachusetts, where he was eventually appointed to the state Adjutant General's office as a clerk by Governor John Davis Long.<sup>126</sup>

Taylor, however, pressed forward with the suit. His qualifications were impeccable: he was already licensed in Massachusetts, and, in June

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<sup>117</sup> *Bradwell*, 83 U.S. at 137.

<sup>118</sup> See *Cully v. Balt. & Ohio R.R. Co.*, 6 F. Cas. 946, 947 (D. Md. 1876) (No. 3,466).

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

<sup>120</sup> DENNIS PATRICK HALPIN, *A BROTHERHOOD OF LIBERTY: BLACK RECONSTRUCTION AND ITS LEGACIES IN BALTIMORE, 1865–1920* 54-55 (Univ. Pa. Press, 2019) (clarifying that although the Maryland Court of Appeals decided *In re Taylor* in 1877, the actions leading to it began in 1876).

<sup>121</sup> *Id.* at 55.

<sup>122</sup> SMITH, *supra* note 9, at 103.

<sup>123</sup> WALTER J. LEONARD, *BLACK LAWYERS* 293 (1977).

<sup>124</sup> See generally SMITH, *supra* note 9, at 103-04 (discussing how Massachusetts admitted Wolff to the bar, as did the U.S. Circuit Court of Maryland, but Maryland's State Bar did not allow Wolff to practice in the state, so he moved back to Massachusetts).

<sup>125</sup> HALPIN, *supra* note 120, at 54.

<sup>126</sup> SMITH, *supra* note 9, at 104.

1877, Taylor was sworn into practice before the U.S. Circuit and District courts in Maryland.<sup>127</sup> Sponsoring Taylor's admission was district attorney Archibald Stirling.<sup>128</sup> Taylor's test case for state court admission was grounded in the Fourteenth Amendment's Privileges and Immunities Clause: admission to the bar, he argued, was a privilege of state citizenship under Article IV of the Fourteenth Amendment, belonging to "that class of privileges that a State legislature [could not] abridge on account of race or color."<sup>129</sup> Unfortunately, his argument did not rely on the Equal Protection Clause, and the Supreme Court (in decisions like *Bradwell*, and *The Slaughterhouse Cases*) had already rejected any Privileges and Immunities basis.<sup>130</sup>

The Maryland Court of Appeals denied Taylor's petition.<sup>131</sup> It dismissed the applicability of Article IV of the Fourteenth Amendment because Taylor was now a resident of Maryland.<sup>132</sup> Citing *The Slaughterhouse Cases*, the court held that privileges of state citizenship "are not embraced" by the Privileges and Immunities Clause.<sup>133</sup> Citing *Bradwell*, the court observed that bar admission was a privilege of state, not national, citizenship.<sup>134</sup> To the Maryland Court of Appeals, therefore, such Supreme Court precedent made it abundantly clear that "the 14th Amendment has no application."<sup>135</sup> The court did not even discuss the application of the Equal Protection Clause, comfortable in its assumption that *The Slaughterhouse Cases* had effectively done away with any basis for challenging discrimination in laws that did not involve property, the right to travel, or personal security.<sup>136</sup> Having been barred from practicing in Maryland state courts because the court upheld the statute's racial exclusion, Taylor soon left Maryland and returned to Massachusetts.<sup>137</sup>

Any further challenge to Maryland's racially discriminatory bar admission statute would lay dormant until 1884.<sup>138</sup> That year, another Black attorney from Massachusetts, Richard E. King, came to Maryland and tried a

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<sup>127</sup> HALPIN, *supra* note 120, at 55.

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

<sup>129</sup> *In re Taylor*, 48 Md. 28, 29 (1877).

<sup>130</sup> *Id.* at 31-32; *Bradwell*, 83 U.S. at 139; *Slaughter-House Cases*, 83 U.S. at 80.

<sup>131</sup> *Taylor*, 48 Md. at 34.

<sup>132</sup> *Id.* at 31; *see Bradwell*, 83 U.S. at 138.

<sup>133</sup> *Taylor*, 48 Md. at 32 (quoting *Slaughter-House Cases*, 83 U.S. at 75).

<sup>134</sup> *Taylor*, 48 Md. at 32-33 (citing *Bradwell*, 83 U.S. at 130).

<sup>135</sup> *Taylor*, 48 Md. at 33.

<sup>136</sup> *Id.* at 32 (citing *Slaughter-House Cases*, 83 U.S. at 115). It certainly did not help dissuade the court that the Maryland legislature had reaffirmed its racial restriction on bar admission in 1872 and again in 1876. HALPIN, *supra* note 120, at 54.

<sup>137</sup> HALPIN, *supra* note 120, at 55.

<sup>138</sup> *Id.*

different approach, taking the fight to the legislature instead of the courts.<sup>139</sup> King lobbied the Maryland House of Delegates to overturn the exclusionary law but was unsuccessful.<sup>140</sup> Writing in the *New York Globe*, future Black Maryland lawyer, William Ashbie Hawkins, seethed at the legislative inaction: “The bill allowing colored lawyers to practice in the courts of the State was left, as was expected, on the files. So far as the law is concerned, the Colored people of this State are practically little better off than they were in antebellum days.”<sup>141</sup>

King also petitioned the U.S. Senate to intervene, to no avail.<sup>142</sup> However, while his campaign was unsuccessful, he garnered considerable media attention and support, raising public awareness of the racially exclusionary law.<sup>143</sup> Mainstream newspapers like the *Baltimore Sun* called for the law to be changed, saying, “[t]he law has no right to keep a colored man from earning his bread in any honest way he may see fit, provided that he shows himself able to meet the requirements imposed on all other classes of citizens.”<sup>144</sup>

Even more significant than the media coverage, the attention shined on this issue helped galvanize the nascent Mutual United Brotherhood of Liberty, a group of Black pastors and community activists led by Reverend Harvey Johnson, pastor of the Union Baptist Church.<sup>145</sup> With legislative efforts stalling (a bill to permit Black lawyers in state courts passed the Maryland Senate but failed in the General Assembly), Johnson and the Brotherhood of Liberty decided to bring a test case on bar admission.<sup>146</sup> They were buoyed by two recent developments.<sup>147</sup> First, in 1882, Black support had been critical in changing judicial selection in Baltimore; instead of appointed judges, the Baltimore Supreme Bench featured judges elected with the key support of Black voters.<sup>148</sup> Second, in 1885, Johnson and the Brotherhood—represented by white attorneys Alexander Hobbs and Archibald Stirling, Jr.—won a crucial civil rights victory in a public accommodations discrimination case, the *Steamer Sue* lawsuit.<sup>149</sup> Black female church members, who had been forced to move to second-class seating, sued the steamship owners, and U.S. District Judge Morris ruled that

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

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* (quoting William Ashbie Hawkins, *Baltimore Topics*, N.Y. GLOBE, Apr. 5, 1884).

<sup>142</sup> HALPIN, *supra* note 120, at 55.

<sup>143</sup> *Id.*

<sup>144</sup> Editorial, *Colored Men as Lawyers*, BALT. SUN, Feb. 7, 1884, at 2.

<sup>145</sup> See, e.g., HALPIN, *supra* note 120, at 42 fig. 3.

<sup>146</sup> HALPIN, *supra* note 120, at 54-55.

<sup>147</sup> See *infra* text accompanying notes 148-49.

<sup>148</sup> *Id.*

<sup>149</sup> *The Sue*, 22 F. 843 (D. Md. 1885).

although the steamship owners could provide separate accommodations, they had to be equal.<sup>150</sup> In addition, he awarded damages of \$100 to each plaintiff for the conduct of the ship's officers.<sup>151</sup>

Finding a suitable plaintiff for the test case on bar admission, however, would prove challenging.<sup>152</sup> The *Taylor* decision, combined with the restrictive statute itself, had already discouraged Black candidates from pursuing this career path, while simultaneously dissuading Black lawyers in other states from coming to Maryland.<sup>153</sup> Reverend Johnson and attorney Hobbs finally found their plaintiff: Charles S. Wilson, a Massachusetts-trained attorney who was teaching high school in Baltimore County.<sup>154</sup> With some persuasion, Wilson applied for admission to the Supreme Bench of Baltimore City.<sup>155</sup> At the same time, more and more white community leaders were coming out against racial restrictions on bar admission, including Baltimore Mayor Ferdinand Latrobe and Baltimore Supreme Bench Judge Charles Phelps, who called the statute "a relic of barbarism."<sup>156</sup>

At the initial hearing on Wilson's case, while Judges Brown and Fisher seemed sympathetic to the unfairness of the statute's racial exclusion, they nevertheless felt compelled to uphold the statute due to the *Taylor* precedent.<sup>157</sup> Arguing that subsequent Supreme Court cases had effectively overruled *Taylor*, Hobbs was able to appeal the ruling to Baltimore's Supreme Bench.<sup>158</sup> On appeal, Hobbs emphasized how Maryland's statute violated the Fourteenth Amendment's Equal Protection Clause, abandoning the earlier Privileges and Immunities-focused arguments.<sup>159</sup> He pointed to post-*Taylor* U.S. Supreme Court precedents that emphasized equal protection grounds, including *Strauder v. West Virginia*<sup>160</sup> and *The Civil Rights Cases*.<sup>161</sup>

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<sup>150</sup> *Id.* at 843-44.

<sup>151</sup> *Id.* at 848.

<sup>152</sup> *See supra* pp. 1-2.

<sup>153</sup> *See* Act of Mar. 10, 1833, ch. 268, § 2, 1831 Md. Laws; *In re Taylor*, 48 Md. at 28.

<sup>154</sup> HALPIN, *supra* note 120, at 54.

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

<sup>156</sup> *Colored Lawyers: Views of Members of the Bar as to the Admission of Colored Men*, BAL. SUN, Feb. 10, 1885, at 1, col. 2.

<sup>157</sup> *Admitted to the Bar*, BAL. SUN, Mar. 20, 1885, at 1, col. 4.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Strauder v. West Virginia*, 100 U.S. 303 (1880).

<sup>161</sup> *See The Civil Rights Cases*, 109 U.S. 3, 23-24 (1888); *see also Can Colored Men Be Lawyers? Argument on the Application of Charles S. Wilson for Admission to the Bar*, BAL. SUN, Feb. 16, 1885, at 2, col. 2. (mentioning a newspaper article contemporaneous to the aforementioned cases summarizing the petitioner's argument).

On March 19, 1885, the Supreme Bench of Baltimore—in a unanimous decision—held that Maryland’s statutory racial exclusion for the legal profession constituted a denial of the Fourteenth Amendment’s equal protection guarantee.<sup>162</sup> The court reasoned that, if Black people could not be discriminated against in jury selection (the central holding in *Strauder*), they certainly could not be discriminated against in the opportunity to become lawyers and judges.<sup>163</sup> The court noted that securing “all chances of participation in other branches of the administration of the law” was “quite as essential to their security.”<sup>164</sup> As the court pointed out,

[t]o debar any class of citizens from its membership is not only to prevent their engaging in a lawful calling, but, in the language of the Supreme Court, tends to degrade and stigmatize the whole class by depriving them of a privilege [sic] which all other citizens possess and of the equal protection of the law.<sup>165</sup>

While it was an important victory, Wilson’s case was not a complete one.<sup>166</sup> For one thing, its application was limited to Baltimore, rather than the State.<sup>167</sup> For another, Charles Wilson did not go on to become admitted.<sup>168</sup> A victory had been achieved in favor of the abstract right to practice law, albeit not in a statewide sense. The struggle to show that Black people were not only as worthy of the right to practice law as any white candidate but also were equally capable of succeeding as practitioners was ongoing.<sup>169</sup> To fight this ongoing battle for civil rights in Maryland and beyond, Reverend Johnson and the Brotherhood of Liberty needed warriors. They found one in a newly minted graduate of Howard University School of Law named Everett J. Waring.<sup>170</sup>

#### IV. RISING TO THE CHALLENGE: EVERETT WARING AND THE INTEGRATION OF THE MARYLAND BAR

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<sup>162</sup> *Admitted to the Bar*, *supra* note 157, at 1, col. 4.

<sup>163</sup> *Id.*; *see also* *Strauder*, 100 U.S. at 310.

<sup>164</sup> *Admitted to the Bar*, *supra* note 157, at 1.

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

<sup>166</sup> *See infra* text accompanying notes 168-71.

<sup>167</sup> *See supra* note 162 and accompanying text.

<sup>168</sup> HALPIN, *supra* note 57, at 57. (Sources disagree on how this happened. One leading scholar maintains that Wilson simply did not apply to the bar.); AZZIE BRISCOE KOGER, *THE NEGRO LAWYER IN MARYLAND* 7 (1948) (Others have said that the court ultimately found Wilson not qualified to practice law.).

<sup>169</sup> *See infra* Part IV.

<sup>170</sup> *See id.*



Everett J. Waring was born in Springfield, Ohio on May 22, 1859, to James and Melinda Waring.<sup>171</sup> James, an educator, worked as the principal of the Black schools of both Springfield and Columbus.<sup>172</sup> James was biracial and Melinda was white, and contemporary accounts described their son Everett as “very light-colored.”<sup>173</sup> Everett was one of five children and attended Columbus High School, where he graduated in 1877.<sup>174</sup> After graduation, Everett began work as a teacher as well.<sup>175</sup> James Waring died on May 15, 1878, and that year, Everett assumed his father’s position as principal.<sup>176</sup> Changes to the school system in 1882 left young Waring without a job.<sup>177</sup> He briefly edited a newspaper in Columbus, but then received an appointment from U.S. Senator John Sherman to serve in the Department of the Interior as an examiner of pensions.<sup>178</sup> The patronage job provided him with a steady income while he attended Howard University School of Law, and Waring graduated in 1885.<sup>179</sup>

Like many early Howard graduates, Waring became a trailblazer.<sup>180</sup> How the young lawyer and the crusading Reverend Harvey Johnson first crossed paths remains a mystery, but Johnson clearly had an eye out for a lawyer who could pick up where the successful Wilson case left off.<sup>181</sup> As one account has it, “Johnson rushed to Howard University to convince Waring to come to Baltimore and make history.”<sup>182</sup> Several months after graduating from Howard University School of Law, Waring moved to Baltimore.<sup>183</sup> On October 10, 1885, Waring “presented himself to the Supreme Bench of Baltimore City and was admitted to the bar, becoming the first Negro lawyer admitted to practice in the courts in Maryland” on the

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<sup>171</sup> *Everett J. Waring: 1859–1914*, MD. STATE ARCHIVES, <https://msa.maryland.gov/msa/stagser/s1259/121/6050/html/17455000.html> (last visited Oct. 20, 2022).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*; *Franklin County at the Beginning of the Twentieth Century*, HIST. PUBL’G CO., (1901).

<https://books.google.com/books?id=OAM2AQAAAJ&pg=PA366#v=onepage&q=Clarence&f=false>.

<sup>174</sup> *Everett J. Waring: Education, Law and Business Careers*, MD. STATE ARCHIVES, <https://msa.maryland.gov/msa/stagser/s1259/121/6050/html/17452000.html> (last visited Oct. 20, 2022).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

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

<sup>178</sup> *Id.*; HISTORICAL PUBLISHING PARTY, *FRANKLIN COUNTY AT THE BEGINNING OF THE TWENTIETH CENTURY* 366 (Hist. Pub. Co. 1901).

<sup>179</sup> *Id.*; see Browning *supra* note 108 (describing the early days of Howard University School of Law).

<sup>180</sup> Waring, *supra* note 174.

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

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

<sup>183</sup> *Id.*

motion of Assistant State's Attorney Edgar H. Gans, a progressive white lawyer sympathetic to racial equality issues.<sup>184</sup> Not surprisingly, the Black press nationwide hailed the moment.<sup>185</sup> In one New York paper, a Black lawyer from the District of Columbia named William E. Matthews was quoted as saying "I'm glad to see the subject [of bar admission] treated on its merits and not as a social or political question."<sup>186</sup>

Waring soon had a colleague: Joseph Seldon Davis, an 1885 Howard Law graduate.<sup>187</sup> A native Virginian, Davis had graduated from the Hampton Institute in the late 1870s.<sup>188</sup> Like Waring, he had initially worked as a teacher before moving to Washington, D.C. and finding a government job.<sup>189</sup> Davis worked at the General Land Office while attending law school at Howard, and like Waring, he brought a sense of military-like obligation to his work in advancing civil rights, stating "[m]any a brave soldier gave his life for universal liberty, and we will be derelict of duty if we fail to labor unitedly in carrying out the principles of justice and liberty for which so many noble lives have been sacrificed."<sup>190</sup> On March 1, 1886, Davis was admitted to practice law before the Supreme Bench of Baltimore.<sup>191</sup> Together, Waring and Davis became co-counsel for the Brotherhood of Liberty.<sup>192</sup>

The Brotherhood wasted no time in putting Waring and Davis to work advancing a civil rights agenda by mounting legal challenges to Maryland's discriminatory laws.<sup>193</sup> The first of these was the state's Bastardy Act, a law which established the rights of white women, but not black women, to seek financial support in cases of abandonment by the fathers of their children.<sup>194</sup> As originally written in 1781, the law had applied to all women; later, in 1785, legislators narrowed its scope to apply to free women, regardless of race.<sup>195</sup>

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<sup>184</sup> SMITH, *supra* note 9, at 144 (quoting Ashbie Hawkins Orator, *Bar Association Holds Its Banquet*, BALT. AFRO-AM., Sep. 29, 1922, at 12); Bogen, *supra* note 30, at 1041.

<sup>185</sup> See generally *The Colored Lawyer*, N.Y. FREEMAN, Mar. 14, 1885, at 2, col. 4 (discussing the reactions of the colored legal community to the admission of colored men to practice in Maryland).

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

<sup>187</sup> Plebian, *Progress of the Emancipated Race*, 84 PHRENOLOGICAL J. AND SCI. HEALTH 83, 85 (1887); *1884-85: Catalogue of the Officers and Students of Howard University*, at 8 (1884).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 85-86.

<sup>191</sup> David S. Bogen, *Forgotten Era: Black Lawyers' Struggles for Recognition in the Maryland Legal Profession Began Nearly 130 Years Ago*, 19 MD. B. J. 10, 10 (1986).

<sup>192</sup> *Id.*

<sup>193</sup> Thomas B. Corey, *Maryland's Legal Pioneers*, 28 MD. B. J. 22, 26 (1995).

<sup>194</sup> *Id.*

<sup>195</sup> Henry J. McGuinn, *Equal Protection of the Law and Fair Trial in Maryland*, 24 J. NEGRO HIST. 143, 146 (1939).

But in 1860, lawmakers added a racial restriction, inserting the word “white.”<sup>196</sup>

Waring sought to challenge the Bastardy Act on behalf of a young Black woman named Lucinda Moxley, who sought the prosecution of her child’s father, James Smith.<sup>197</sup> It is quite possible that this case was not as adversarial as it seemed on paper; the state was represented by the same Edgard Gans who had sponsored Waring’s admission, and the father, Smith, was represented by Edwin R. Davis, a lawyer who had tried to change the law in Maryland’s House of Delegates.<sup>198</sup> The case also had popular support, with the *Baltimore Sun* reporting that many citizens both Black and white “think that the bastardy law, which discriminates against colored women, is a barbarism, and ought to be done away with.”<sup>199</sup>

Davis entered a responsive pleading on Smith’s behalf, arguing that, because the law did not apply to Black women, Moxley lacked standing to bring the suit.<sup>200</sup> The lower court accepted this demurrer, setting the stage for Baltimore’s Supreme Bench to determine the Act’s constitutionality.<sup>201</sup> In presenting his argument, Waring became the first Black lawyer to appear before the Supreme Bench.<sup>202</sup> On the day of the hearing, the courtroom was crowded with lawyers and laypeople alike, all eager to witness the historic first argument by a Black lawyer in a Maryland courtroom.<sup>203</sup> According to one account, the “youthful advocate did not disappoint those who had pinned their faith in him.”<sup>204</sup> Waring argued that the Act stigmatized Black women by denying them the same protections that white women enjoyed.<sup>205</sup> “[T]he Bill of Rights guarantees colored women the common law,” he said, before continuing, “[t]hey are on the same footing with white women at common law. Why not under statute?”<sup>206</sup>

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<sup>196</sup> *Id.* at 146–47.

<sup>197</sup> HALPIN, *supra* note 120, at 72.

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

<sup>199</sup> *Id.* (quoting *The Color-Line Test: A United Effort to be Made to Abolish an Objectionable Law*, BALT. SUN, Apr. 30, 1886, at 6).

<sup>200</sup> HALPIN, *supra* note 120, at 72.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> SMITH, *supra* note 9, at 144.

<sup>204</sup> Elaine K. Freeman, Harvey Johnson, and Everett Waring: A Study of Leadership in the Baltimore Negro Community, 1880-1900 29 (Sept. 1968) (M.A. thesis, George Washington University) (on file with the George Washington University library system) (quoting Warner McGuinn, A Brotherhood of Liberty 18-20 (1907) (unpublished manuscript)).

<sup>205</sup> HALPIN, *supra* note 120, at 73.

<sup>206</sup> *Id.*; *Maryland’s Unjust Law: Lawyers Waring’s Plea in a Bastardy Case*, N.Y. FREEMAN, June 12, 1886, at 2.

However, Waring and his client did not prevail.<sup>207</sup> The Baltimore Supreme Bench upheld the lower court's decision, ruling that the Bastardy Act did not violate the Fourteenth Amendment because it did not protect an individual.<sup>208</sup> Viewed technically, the statute protected the state from having to support the out-of-wedlock child by levying a fine against the father—thus safeguarding state revenue rather than benefiting a mother or her child.<sup>209</sup> The outcome was disappointing, especially since its racial restriction not only excluded Black women entirely, but also had the effect of protecting white men from the legal consequences of fathering children as the result of interracial relationships.<sup>210</sup> Interestingly, just a few months later, in a case involving a white couple, one of the justices who decided against Ms. Moxley accepted the white father's argument that the law violated the Fourteenth Amendment's equal protection guarantee.<sup>211</sup> Judge Edward Duffy apparently had a change of heart, writing that the law "denied the colored woman the right to have the father of her illegitimate child compelled by process of law to support the child, a right accorded by law to the white woman, and was therefore in that respect also unconstitutional."<sup>212</sup> The following year, the Maryland Court of Appeals heard *Plunkard v. State*, yet another challenge to the Bastardy Act involving a white couple, in which counsel for the defendant father adopted Waring's Fourteenth Amendment equal protection argument.<sup>213</sup>

In a 5–1 decision, the Court of Appeals of Maryland held that the Bastardy Act did not violate the Fourteenth Amendment, stating that "[t]he procreation of illegitimate children cannot be said to be a privilege or immunity of citizens of the United States, nor does the statute give any privilege or confer any benefit upon the mothers of such children."<sup>214</sup> The lone dissenting justice, Frederick Stone, made it clear that he felt the racially divisive wording of the Act should not pass constitutional muster, saying "[i]f the [F]ourteenth [A]mendment to the [C]onstitution of the United States means anything it means that there shall not be in any State one law applying to the white race and another and different one applying to the black."<sup>215</sup>

The defeat had a silver lining for Waring and the Brotherhood of Liberty.<sup>216</sup> As one scholar has noted, his historic appearance had tremendous

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<sup>207</sup> See HALPIN, *supra* note 120, at 73.

<sup>208</sup> *Id.*; see *A Bastardy Law Sustained*, BALT. SUN, July 3, 1886, at 4.

<sup>209</sup> HALPIN, *supra* note 120, at 72.

<sup>210</sup> *Id.* at 73.

<sup>211</sup> *Id.* at 73-74.

<sup>212</sup> *Id.* at 74.

<sup>213</sup> *Id.*; *Plunkard v. State*, 67 Md. 364, 366, 10 A. 225, 225 (1887).

<sup>214</sup> HALPIN, *supra* note 120, at 74 (quoting *Plunkard*, 67 Md. at 370, 10 A. at 227).

<sup>215</sup> See *Plunkard*, 67 Md. at 372, 10 A. at 228 (Stone, J., dissenting).

<sup>216</sup> Freeman, *supra* note 204, at 30.

significance, since “to Baltimore’s Negroes the mere presence of Waring as counsel made the event seem a major victory.”<sup>217</sup> For the Brotherhood, the *Plunkard* decision helped galvanize statewide public support for, first, lobbying the legislature to amend the Act (two bills were introduced and rejected in spring 1888), and later funding an appeal to the Supreme Court.<sup>218</sup> A Black newspaper helped with a fundraising drive, and the Brotherhood issued a call for subscriptions to fund these legal costs.<sup>219</sup> Facing mounting public pressure, and staring at a potential showdown at the Supreme Court, Maryland’s legislature gave in.<sup>220</sup> In May 1888, when Dean John Prentiss Poe submitted his codification of Maryland’s laws (the same one in which he eliminated the racial restriction of the bar admission statute), he omitted the word “white” in the Bastardy Act.<sup>221</sup> The legislature adopted the revised code without comment.<sup>222</sup> That same year, Waring was admitted to practice before the Court of Appeals of Maryland on April 17, reflecting his, and other Black lawyers’, right to practice statewide.<sup>223</sup>

Notwithstanding the unsuccessful court challenge by Waring, the Brotherhood of Liberty’s efforts helped ultimately defeat the Bastardy Act.<sup>224</sup> However, Waring would be kept busy with other civil rights battles such as education reform.<sup>225</sup> Indeed, Baltimore was plagued by longstanding racial inequalities in education including lack of funding, inadequate facilities, and the city’s refusal to hire Black educators.<sup>226</sup> In 1886, the Brotherhood’s education committee succeeded in getting the city council to pass an ordinance to build two new primary schools and a new high school.<sup>227</sup> After the mayor vetoed the measure the following year, Waring wrote a newspaper editorial in February 1887 that “called upon the mechanics, professional men, businessmen, laborers, women, children, in fact, everyone, to join the army

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<sup>217</sup> *Id.*

<sup>218</sup> HALPIN, *supra* note 120, at 74-75.

<sup>219</sup> *Id.* at 75; see *Our Baltimore Budget*, N.Y. AGE, Apr. 7, 1888.

<sup>220</sup> HALPIN, *supra* note 120, at 75.

<sup>221</sup> David S. Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland’s First Black Lawyers*, 44 MD. L. REV. 939, 1043 (1985). As a number of scholars have pointed out, Poe’s actions were likely the product of pragmatism rather than race sympathy. *Id.* at 1043 n.363. A segregationist, he later authored legislation to disenfranchise Black voters. *Id.* And as dean of the University of Maryland School of Law, he supervised the 1891 expulsion of Black students. *Id.* at 1043.

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

<sup>223</sup> *Id.*; see 2 CONWAY W. SAMS & ELIHU S. RILEY, *THE BENCH AND BAR OF MARYLAND*, 1634 – 1901, at 431 (1901).

<sup>224</sup> HALPIN, *supra* note 120, at 75.

<sup>225</sup> *Id.* at 78.

<sup>226</sup> See Freeman, *supra* note 204, at 36.

<sup>227</sup> *Baltimore City Schools: The Question of Colored Teachers for Colored Children and Other*, BALT. SUN, Feb. 24, 1886, at 6.

and storm the fortress that denied us [equal employment and opportunities in the schools].”<sup>228</sup> The Brotherhood’s education committee and its offshoot, the Maryland Educational Union, continued to press the issue with public gatherings and protests that called for Black voters to make their wishes known.<sup>229</sup> Finally, in May 1888, Baltimore’s new mayor, Ferdinand Latrobe, signed an ordinance that made sweeping changes, including giving Black teachers the right to teach in Baltimore with equal pay to their white counterparts.<sup>230</sup>

In other cases, Waring fought the good fight but did not emerge victorious.<sup>231</sup> He defended a Black man named Ernest Forbes, who was accused of raping a white woman.<sup>232</sup> Despite the deathbed confession of a different Black man, Forbes was convicted and executed.<sup>233</sup> Waring also lost a suit against an insurance company that discriminated against Black customers by charging them higher premium rates; the insurance carrier maintained that the prices were justified by Black customers’ higher mortality rates.<sup>234</sup>

Waring also represented Reverend Robert McGuinn, a Black pastor who had purchased a ticket in 1887 for travel to Virginia on the steamship *Mason Weems*.<sup>235</sup> McGuinn sat down at a table on board for dinner; upon seeing him there, white passengers refused to dine, prompting the captain to intervene.<sup>236</sup> The captain asked McGuinn to move; when he refused, the captain tried to move him.<sup>237</sup> A white passenger began to assault the clergyman, and fearing for his own safety, Rev. McGuinn left the vessel before it arrived at his destination.<sup>238</sup> Waring sued the captain and the ship’s owners in federal court for racial discrimination, but Judge Morris dismissed the complaint.<sup>239</sup> While conceding that a common carrier must make a “bona fide effort” to provide equal accommodation to first-class passengers regardless of race, Morris nevertheless foreshadowed *Plessy v. Ferguson*.<sup>240</sup> He wrote:

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<sup>228</sup> *Baltimore Issue: The Struggle for Colored Teachers and a High School – Ministers and Newspapers*, N.Y. FREEMAN, Mar. 12, 1887, at 4.

<sup>229</sup> HALPIN, *supra* note 120, at 78.

<sup>230</sup> *Judge Brown’s Apt Quotation: Local Briefs*, BALT. SUN, May 4, 1888, at 4.

<sup>231</sup> Freeman, *supra* note 204, at 77.

<sup>232</sup> *Id.* at 76.

<sup>233</sup> *Id.* at 77.

<sup>234</sup> *Id.*

<sup>235</sup> *McGuinn v. Forbes*, 37 F. 639, 639 (D. Md. 1889).

<sup>236</sup> *Id.* at 639-40.

<sup>237</sup> *Id.* at 640.

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

<sup>239</sup> *Id.* at 641.

<sup>240</sup> *Id.*

When public sentiment demands a separation of the passengers, it must be gratified to some extent. While this sentiment prevails among the traveling public, although unreasonable and foolish, it cannot be said that the carrier must be compelled to sacrifice his business to combat it. Within reasonable limits the carrier must be allowed to manage his own affairs.<sup>241</sup>

In fighting these “race battles,” Everett Waring had achieved milestones for himself and for the Black community.<sup>242</sup> He and the Brotherhood of Liberty succeeded in breaking Maryland’s racial barrier to entering the legal profession, ending the racial and gender discrimination of the Bastardy Act, and achieving meaningful educational reforms.<sup>243</sup> Yet Waring and his clients also repeatedly experienced the racial inequalities of the criminal and civil justice systems.<sup>244</sup> Before too long, however, the young lawyer would be tested on the biggest stage of all: the Supreme Court of the United States.<sup>245</sup>

## V. THE ROAD TO *JONES V. UNITED STATES*

Even as Waring absorbed the loss in Reverend McGuinn’s suit over disparate treatment in public accommodations, events were occurring on a tropical island thousands of miles from Baltimore that would result in Waring becoming the first Black lawyer to argue before the U.S. Supreme Court.<sup>246</sup>

The story began decades earlier, and involved neither gold nor oil, but a far more mundane treasure, guano (dried bird droppings).<sup>247</sup> Rich in phosphates used for fertilizer during the 19<sup>th</sup> century, guano deposits on islands and rocks throughout the Caribbean and Pacific, became immensely valuable.<sup>248</sup> By the middle of the 19<sup>th</sup> century, most of the guano deposits in the United States were exhausted, and concerns mounted that American farmers were being gouged by foreign interests.<sup>249</sup> Guano was so important

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<sup>241</sup> *McGuinn*, 37 F. at 641.

<sup>242</sup> David S. Bogen, *The Forgotten Era*, 19 MD. BAR J. 10, 10 (1986).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 11.

<sup>246</sup> *Id.* at 11-13.

<sup>247</sup> Millard Fillmore, U.S. President, Remarks Addressing Congress: First Annual Message, (Dec. 2, 1850) (transcript available at <https://millercenter.org/the-presidency/presidential-speeches/december-2-1850-first-annual-message>).

<sup>248</sup> *Id.*

<sup>249</sup> Christina Duffy Burnett, *The Edges of Empire and the Limits of Sovereignty: American Guano Islands*, 57 AM. Q. 779, 782 (2005).

that in 1850, President Millard Fillmore proclaimed that it was “the duty of the Government” to secure it at “a reasonable price.”<sup>250</sup> On August 18, 1856, Congress passed the Guano Islands Act, which provided:

Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other Government, and not occupied by the citizens of any other Government, and takes peaceable possession thereof, and occupies the same such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.<sup>251</sup>

In a November 18, 1857 letter to the U.S. Department of State, an American sea captain named Peter Duncan claimed Navassa Island for the United States under the Guano Act, and an official reply by the State Department, dated December 8, 1859, formally recognized Navassa as appertaining to the United States.<sup>252</sup> The uninhabited Caribbean Island was three square miles, located approximately 100 miles south of Guantanamo Bay, Cuba, and about 30 miles west of Haiti.<sup>253</sup> It had been first discovered by Columbus in 1493, who sailed past it and named it “Navaza.”<sup>254</sup> No one ever landed on the island, and for good reason; the pear-shaped island lacked any sheltered harbor or safe landing spaces, had steep vertical limestone cliffs, and was surrounded by a submerged reef.<sup>255</sup> The island had snakes, no freshwater, and little vegetation—but, of course, it was a favorite spot for defecating birds.<sup>256</sup> Honeycombed with caves and crevices packed with phosphates, Navassa was estimated by Captain Duncan to have at least one million tons of phosphatic guano.<sup>257</sup>

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<sup>250</sup> Fillmore, *supra* note 247.

<sup>251</sup> 48 U.S.C. § 1411 (2018).

<sup>252</sup> Burnett, *supra* note 249, at 787-88. A fascinating and exhaustive treatment of the United States’ foray into imperialism with the Guano Islands can be found in JIMMY SKAGGS, *THE GREAT GUANO RUSH: ENTREPRENEURS AND AMERICAN OVERSEAS EXPANSION* (St. Martine’s, 1994).

<sup>253</sup> Adam Clanton, *The Men Who Would Be Kings: Forgotten Challenges in U.S. Sovereignty*, 26 UCLA PAC. BASIN L.J. at 39 (2008).

<sup>254</sup> *Navassa Island Government 2016*, ALL COUNTRIES, (Feb. 16, 2016), [https://allcountries.org/world\\_fact\\_book\\_2016/navassa\\_island/navassa\\_island\\_government.html](https://allcountries.org/world_fact_book_2016/navassa_island/navassa_island_government.html).

<sup>255</sup> Nick Pietrowicz, *Navassa: America’s Forgotten Caribbean Island*, THE INST. OF WORLD POL., (Feb. 10, 2021), <https://www.iwp.edu/articles/2021/02/10/navassa-americas-forgotten-caribbean-island/>.

<sup>256</sup> *Id.*

<sup>257</sup> *Jones v. United States*, 137 U.S. 202, 205 (1890).



Duncan's employer, Edward Cooper, applied for exclusive rights to Navassa under the Guano Island Act, but not without dispute.<sup>258</sup> Citing the 1697 Treaty of Ryswick, which divided up the island of Hispaniola between France and Spain, Haiti claimed ownership of the island by virtue of gaining independence from France.<sup>259</sup> In 1858, prompted by attacks by the Haitian military, the U.S. Navy intervened to secure America and Cooper's interests. On December 8, 1859, Cooper was officially granted exclusive possession of Navassa, and he then transferred his rights to the newly formed Navassa Phosphate Company.<sup>260</sup> With the Civil War looming, the company did not begin active mining operations until 1865.<sup>261</sup> Mining operations were difficult; two "harbors" were created by dynamiting cutouts into the side of the island, enabling supplies (including food, water, and building materials) to be brought ashore via block and tackle.<sup>262</sup> Labor, however, was the biggest issue.<sup>263</sup>

Working conditions on Navassa during its first two-plus decades have been described as "abysmal," "horrific," and "grotesque"; when an American sailor on the *U.S.S. Galena* visited the island in 1889, he could "hardly understand how human beings . . . [could] live in such a place and not go mad."<sup>264</sup> As if the backbreaking labor of digging into dried guano for long hours in the tropical heat was not bad enough, the overpowering stench of ammonia made work even worse.<sup>265</sup> Living quarters hewn out of native limestone were rudimentary and the company's supervisors, some of whom were former slave overseers, abused the laborers.<sup>266</sup> The workers' pay was docked if they were injured, wildly inflated prices were charged at "the company store," and workers deemed insubordinate were punished by being placed in "the stocks," a "barbarous instrument" in which a man was cuffed by his hands and feet.<sup>267</sup> Who would work under such conditions?

Cooper, based in Baltimore, initially contracted with the State of Maryland for convict labor that was mostly White.<sup>268</sup> But after the convicts rebelled against the treatment resulting in several shootings by overseers, the company began to recruit Black laborers, both the recently emancipated and

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<sup>258</sup> Clanton, *supra* note 253, at 39.

<sup>259</sup> *Id.* at 39 n.205.

<sup>260</sup> *Id.* at 39-40.

<sup>261</sup> *Id.* at 40.

<sup>262</sup> Pietrowicz, *supra* note 255.

<sup>263</sup> SKAGGS, *supra* note 252, at 172.

<sup>264</sup> John Cashman, "Slaves Under Our Flag:" *The Navassa Island Riot of 1889*, 24 MD. HISTORIAN 1, 1 (1993).

<sup>265</sup> Burnett, *supra* note 249, at 788.

<sup>266</sup> SKAGGS, *supra* note 252, at 172-73.

<sup>267</sup> *Id.* at 5-6.

<sup>268</sup> Burnett, *supra* note 249 at 788-89.

those who had always been free.<sup>269</sup> Black Baltimoreans were lured into signing labor contracts with the promise of working in a tropical paradise.<sup>270</sup> For most, however, there were limited alternative prospects.<sup>271</sup> Black people living in the Chesapeake Bay region, and indeed, most of the United States, between 1865 and 1889, faced widespread poverty and limited employment opportunities.<sup>272</sup> Mining employed more Black people than any other southern industry, according to one expert.<sup>273</sup> The typical labor contract with the Navassa Phosphate Company paid eight dollars (\$8.00) per month (plus room, board, and transportation) and had a term of fifteen months.<sup>274</sup>

By 1889, there were 139 Black laborers on Navassa, and at least 11 White managers led by a superintendent, Dr. Charles Smith.<sup>275</sup> Under Dr. Smith's watch, working conditions had steadily deteriorated, and discipline had become more capricious.<sup>276</sup> On September 14, 1889, what had once been simmering boiled over.<sup>277</sup> After a White manager, Charles Roby, threatened one of the Black workers, another laborer struck Roby with a metal bar.<sup>278</sup> Chaos erupted on the island, and in the ensuing violence, five White managers were killed.<sup>279</sup> During a lull, Dr. Smith managed to send word to a British naval vessel offshore to call the U.S. Navy.<sup>280</sup> Ultimately, the British ship transported the surviving White managers and several Black workers to Kingston, Jamaica, and from there, the American consul arranged passage to Baltimore.<sup>281</sup>

On October 4, 1889, the *U.S.S. Galena* arrived at Navassa.<sup>282</sup> Its captain sent ashore a 5-man board of inquiry to investigate the uprising and interview witnesses, accompanied by a detachment of Marines to maintain order.<sup>283</sup> After a week of interviews, the sailors arrested six Black laborers believed to be the "ringleaders": James Johnson, Henry Jones, George S.

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<sup>269</sup> *Id.*

<sup>270</sup> See Jones, 137 U.S. at 224 (quoting the contract between Navassa Phosphate Company and their workers) ("Should they fail to obey the orders and instructions of said Navassa Phosphate Company, or its agents, or refuse at any time to labor, they shall forfeit all claim for wages and compensation which may be due them.").

<sup>271</sup> SKAGGS, *supra* note 252, at 173.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 174.

<sup>274</sup> *Id.*

<sup>275</sup> Cashman, *supra* note 264, at 3.

<sup>276</sup> SKAGGS, *supra* note 252, at 177-78.

<sup>277</sup> See Burnett, *supra* note 249, at 789.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> SKAGGS, *supra* note 252, at 184.

<sup>282</sup> Burnett, *supra* note 249, at 789.

<sup>283</sup> SKAGGS, *supra* note 252, at 185.

Key, and Amos Lee, all of whom were suspected of murder, and Albert Jones and James Phillips, both of whom were suspected of mutiny and assault.<sup>284</sup> Three other workers were taken into protective custody as material witnesses while the remaining Black laborers were loaded into two commandeered freighters to be transported back to Baltimore.<sup>285</sup>

Baltimore's U.S. district attorney, Thomas G. Hayes, had gotten word of the riot and met the *Galena* off the coast of Virginia.<sup>286</sup> On board, Hayes "practically held court," and ultimately selected 18 of the laborers to present to the grand jury for indictment.<sup>287</sup> When the *Galena* docked at Baltimore on October 27, the prisoners were identified by Charles Roby, who survived the incident, and were turned over to the deputy U.S. Marshal.<sup>288</sup> When the two freighters arrived several days later, the process was repeated.<sup>289</sup> In a scene that evoked Baltimore's slaveholding past, the defendants were marched through the city streets in chains, dressed in rags; onlookers said "they had never beheld men in such a degraded condition before."<sup>290</sup> Seven of the laborers were charged with murder: George S. Key, Henry Jones, Caesar Fisher, Edward Smith, Stephen Peters, Charles H. Smith, and Charles H. Davis, while the remaining eleven were charged with aiding and abetting.<sup>291</sup> Faced with defense objections to trying all the defendants together, the judges decided to hold five separate trials, which were later consolidated into three main trials.<sup>292</sup>

Newspapers around the country ran lurid, racially charged stories.<sup>293</sup> The *Washington Post* titillated readers with "A Horrible Butchery," claiming the murdering Black laborers had uttered, "fiendish yells that a Comanche Indian would have envied."<sup>294</sup> The *New York Times* headline shouted, "Hunted Down by Negroes."<sup>295</sup> The *Galveston Daily News* described the defendants as "Black Butchers," while the *New Orleans Daily Picayune* branded them as "a murderous gang of mutineers."<sup>296</sup> Even the hometown

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

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

<sup>286</sup> Burnett, *supra* note 249, at 789.

<sup>287</sup> *Id.*

<sup>288</sup> SKAGGS, *supra* note 252, at 185.

<sup>289</sup> *Id.*

<sup>290</sup> HALPIN, *supra* note 120, at 82.

<sup>291</sup> *Navassa Rioters Indicted*, WASH. POST, Nov. 11, 1889, at 7; *Indicted on Five Separate Charges*, BALT. SUN, Nov. 15, 1889, at 4.

<sup>292</sup> *Indicted on Five Separate Charges*, *supra* note 291, at 4.

<sup>293</sup> See *infra* notes 294-97 and accompanying text.

<sup>294</sup> *A Horrible Butchery*, WASH. POST, Oct. 2, 1889, at 1.

<sup>295</sup> *Hunted Down by Negroes*, N.Y. TIMES, Oct. 2, 1889, at 1.

<sup>296</sup> *The Black Butchers*, GALVESTON DAILY NEWS, Oct. 11, 1889, at 1; *The Navassa Riot*, NEW ORLEANS DAILY PICAYUNE, Oct. 19, 1889, at 2.

paper, *The Baltimore Sun*, joined in, calling the laborers as “fine a collection of scoundrels as could be gathered together in any jail in the country.”<sup>297</sup>

The Brotherhood of Liberty, along with a Black fraternal organization based in Baltimore, the Order of Galilean Fishermen, quickly mobilized a defense team.<sup>298</sup> It consisted of Everett J. Waring, Joseph S. Davis, and four white attorneys—Archibald J. Stirling, his son J. Edward Stirling, Robert B. Graham, and James D. Cotter.<sup>299</sup> On November 3, 1889, Waring filed a writ of habeas corpus on behalf of Henry Jones, arguing that the United States did not have jurisdiction over Navassa Island.<sup>300</sup> Although the court rejected Waring’s request, he was clearly laying the basis for an appeal to the Supreme Court, which had never previously ruled on that issue.<sup>301</sup>

Between November 19, 1889, and February 15, 1890, the trials were held in Baltimore’s U.S. Circuit Court as the (then) court of general jurisdiction.<sup>302</sup> Two judges presided over the trials: Judge Thomas J. Morris, U.S. District Judge for the District of Maryland, and Justice Hugh Lennox Bond, a federal circuit judge fulfilling his “circuit-riding” duty for the Fourth Circuit.<sup>303</sup> Before an all-White jury, the prosecution called all but one of the surviving White managers as witnesses, along with all twenty-one of the Black laborers.<sup>304</sup> The prosecution’s strategy was to highlight the brutality of the violence itself and claim that the violence was the result of a conspiracy rather than a spontaneous uprising, all while denying that the living and working conditions on Navassa were as horrible as described.<sup>305</sup> The defense, meanwhile, did not deny the violent events themselves, but argued that there was no conspiracy and that the white supervisors had instigated the violence by their mistreatment of the Black laborers and abusive working conditions.<sup>306</sup> In the end, even as the prosecution’s witnesses bolstered their claims of conspiracy, witness after witness detailed the horrific conditions on the island.<sup>307</sup> The defense called 16 witnesses (all Black), eleven of whom were defendants.<sup>308</sup> Most testified to the living and working conditions that

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<sup>297</sup> *The Navassa Rioters*, BALT. SUN, Oct. 18, 1889, at 1.

<sup>298</sup> SKAGGS, *supra* note 252, at 186.

<sup>299</sup> HALPIN, *supra* note 120, at 84.

<sup>300</sup> *Id.*

<sup>301</sup> *See id.*

<sup>302</sup> SKAGGS, *supra* note 252, at 186.

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

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

<sup>305</sup> HALPIN, *supra* note 120, at 85.

<sup>306</sup> *Id.*

<sup>307</sup> SKAGGS, *supra* note 252, at 187.

<sup>308</sup> *Id.*

had led to the events of September 14 and the subsequent spontaneity of the riot, such as the heavy drinking by white managers.<sup>309</sup>

On December 2, 1889, the first verdict was reached by the jury.<sup>310</sup> Key was found guilty of murder, Moses Williams was acquitted, and the jury deadlocked on the remaining sixteen defendants.<sup>311</sup> Subsequent trials would not turn out as well for the defense.<sup>312</sup> The second trial began on December 13, and in it, Henry Jones was convicted of murder, while Caesar Fisher and seven others were found guilty of manslaughter.<sup>313</sup> Two defendants were found not guilty, and the jury deadlocked on the remaining seven.<sup>314</sup> The third trial, which began on February 10, 1890, resulted in Key, Smith, and Jones being found guilty of murder, while the remaining defendants were convicted of crimes ranging from manslaughter to participating in a riot.<sup>315</sup> There were two remaining trials for those charged with rioting; in the first, twenty-three of the twenty-five defendants were convicted.<sup>316</sup> In the second trial, three defendants pleaded guilty to manslaughter.<sup>317</sup>

The final tally by February 15, 1890, was three men convicted of murder; fourteen convicted of manslaughter; and twenty-three convicted of rioting.<sup>318</sup> One defendant, Moses Williams, was exonerated in every proceeding except for the last.<sup>319</sup> On February 20, 1890, the 40 defendants stood before both Judges Morris and Bond for sentencing.<sup>320</sup> The three convicted of murder—Henry Jones, George S. Key, and Edward Smith—were sentenced to hang on March 28 in Baltimore’s city jail.<sup>321</sup> Of the fourteen convicted of manslaughter, eight were sentenced to ten years in prison at hard labor, while four received five-year sentences and two received two-year sentences.<sup>322</sup> The twenty-three convicted of rioting received terms ranging from six months to two years in Maryland’s House of Correction.<sup>323</sup>

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<sup>309</sup> *Id.*

<sup>310</sup> HALPIN, *supra* note 120, at 85.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> SKAGGS, *supra* note 252, at 189.

<sup>314</sup> *Saturday’s City News*, BALT. SUN, Dec. 23, 1889, at 4.

<sup>315</sup> SKAGGS, *supra* note 252, at 189; *Fate of Navassa Rioters*, BALT. SUN, Feb. 21, 1890, at 5.

<sup>316</sup> SKAGGS, *supra* note 252, at 190.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

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

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> SKAGGS, *supra* note 252, at 190.

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

The executions of Jones, Key, and Smith were stayed pending an appeal to the U.S. Supreme Court.<sup>324</sup> In the fall of 1890, a lawyer making history would attempt to make even more history with an innovative jurisdictional argument.<sup>325</sup>

## VI. A BLACK ADVOCATE BEFORE THE COURT

It has been said that *Jones v. United States* “lays the basis for the legal foundation for the U.S. empire because it establishes the constitutionality of the fact that the United States can claim overseas territory and that it is consonant with the U.S. Constitution.”<sup>326</sup> But, before considering the *Jones* case’s significance from a purely legal standpoint, let us acknowledge another basis for its importance. While several other Black lawyers had followed in the footsteps of John Swett Rock and had been admitted to the Supreme Court bar between 1865 and 1890, a Black lawyer was not admitted to argue in front of the Supreme Court until 1880.<sup>327</sup> On the brief for appellants Jones, Smith, and Key were *two* Black lawyers—Everett J. Waring and Joseph S. Davis—along with three white attorneys, John Henry Keene, Jr., Archibald Stirling, and J. Edward Stirling.<sup>328</sup>

The historic nature of a Black lawyer arguing before the nation’s highest court, especially in a case marked by the dehumanizing, slavery-like working conditions endured on Navassa by the appellants, was not lost on the Black press.<sup>329</sup> The *New York Age* commented, “On Wednesday of last week one of the most impressive and significant events in the jurisprudential history of the Republic transpired at Washington, and none the less so

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

<sup>325</sup> See Brief for Plaintiffs in Error, *Jones v. United States*, 137 U.S. 202 (1890) (No. 1143). The three defendants on appeal had become the “plaintiffs in error”; however, the Court in its opinion refers to them as the “defendants,” and I have referred to them by name or as the appellants.

<sup>326</sup> Fresh Air, *The History of American Imperialism, from Bloody Conquest to Bird Poop*, NAT’L PUB. RADIO, at 08:48 (Feb. 18, 2019), <https://www.npr.org/2019/02/18/694700303/the-history-of-american-imperialism-from-bloody-conquest-to-bird-poop> (interviewing Daniel Immerwahr, author of *HOW TO HIDE AN EMPIRE – A HISTORY OF THE GREATER UNITED STATES* (2019)).

<sup>327</sup> Karanjot Gill, *Samuel R. Lowery (1830 or 1832-1900)*, BLACKPAST (Oct. 9, 2018), <https://www.blackpast.org/african-american-history/lowery-samuel-r-1830-or-1832-1900/>.

<sup>328</sup> *Jones*, 137 U.S. 202. While all three of the defendants convicted in the U.S. District Court for the District of Maryland had separate appeals in which they were represented by Waring, their cases were consolidated for oral argument. See *Smith v. United States*, 137 U.S. 224 (1890); see *Key v. United States*, 137 U.S. 224 (1890). Sadly, by the time the Court decided *Jones*, Joseph Davis had passed away. Smith, *supra* note 9 at 179.

<sup>329</sup> See, e.g., *An Historical Event*, N.Y. AGE, Nov. 15, 1890.

because the leading papers of the country allowed the event to pass without emphasizing it in any manner.”<sup>330</sup> The paper went on to put the oral argument in perspective by referencing the dramatic turn since the 1857 *Dred Scott* decision that denied the citizenship of Black Americans, proclaiming “Mark the change. Thirty-four years after the rendering of this monstrous decision, three ‘Negroes’ appear before the same Court, full-fledged attorneys and counselors of law, residents of the erstwhile slave State of Maryland, and argue a question of Federal jurisdiction.”<sup>331</sup>

Waring’s argument, as much as his mere presence, was groundbreaking, too.<sup>332</sup> His fourteen-page brief did not contest the facts, instead focusing on the argument that his clients were not subject to prosecution because Navassa—having never been legally acquired—was not part of the United States and therefore was not subject to its jurisdiction.<sup>333</sup> Relying on both international and constitutional law doctrines, Waring argued that the “peculiar species of discovery” envisioned under the Guano Islands Act lacked the support of either international law or the U.S. Constitution.<sup>334</sup> Title, Waring stated, was acquired by “occupancy, discovery, conquest, or cession.”<sup>335</sup> Waring summarily dismissed all but discovery as viable options (although, perhaps *too* summarily in the case of occupancy), and then proceeded to assert that title by right of discovery “means a title that is permanent, fixed, and indefeasible.”<sup>336</sup> As Waring pointed out, the discovery contemplated by the Act could not possibly be permanent, since the Act’s own provisions stated that all rights would terminate once the guano had been removed, under the law’s abandonment provision.<sup>337</sup>

According to Waring, the question that remained was whether Congress had the power to legislate over territory that was acquired in a different manner, a form of “discovery” that only involved temporary possession and never conveyed title under either international or constitutional law.<sup>338</sup> Territory that had been taken only temporarily, Waring maintained, cannot constitute “part of the territorial domain of the United States.”<sup>339</sup> While Waring acknowledged that the Constitution’s Territory Clause “empowers Congress to make rules respecting territory belonging to the United States,” he argued that the United States had not attempted to

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<sup>330</sup> *Id.* at 2.

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

<sup>332</sup> See *infra* notes 334–47 and accompanying text.

<sup>333</sup> Brief for Plaintiffs, *supra* note 325.

<sup>334</sup> *Id.* at 3.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* at 4.

<sup>339</sup> *Id.*

acquire title to Navassa so the island “[did] not belong to the United States.”<sup>340</sup>

Waring also took a shot at the Act’s use of the vague word “appertain,” questioning whether it actually meant anything at all.<sup>341</sup> In the brief, he asked, “It is respectfully inquired what is the significance or meaning of this desultory phrase ‘appertain to?’”<sup>342</sup> Later, of course, in *The Insular Cases*, the Court itself would use the term to explain the status of the Philippines, Puerto Rico, and Guam in the wake of the Spanish-American War.<sup>343</sup> The Supreme Court would adopt the position that territories “appertaining” to the United States are territories “belonging to,” but not “part of” the United States, rendering them part of the nation’s “territorial domain” while not part of the United States proper. As Justice White would later describe it in *Downes v. Bidwell*:

The result of what has been said is that whilst in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island has not been incorporated into the United States, but was merely *appurtenant thereto as a possession*.<sup>344</sup>

Waring’s argument had merit.<sup>345</sup> The U.S. government had never conducted an investigation into whether Haiti or any other nation had a superior claim to Navassa, and, while it had asserted an economic interest, it had never claimed Navassa to be “part of” the nation, despite Haiti laying claim to it.<sup>346</sup> In the face of government silence, even the press noted Haiti’s declared interest.<sup>347</sup> However, the government’s response to Waring’s brief

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

<sup>341</sup> *Id.* at 5. As a State Department memorandum in 1932 would later admit, the term “appertaining” was “deft, since it carries no precise meaning and lends itself readily to circumstances and the wishes of those using it.” OFF. OF THE LEGAL ADVISOR, U.S. DEP’T. OF STATE, THE SOVEREIGNTY OF ISLANDS CLAIMED UNDER THE GUANO ISLANDS ACT AND OF THE NORTHWEST HAWAIIAN ISLANDS, MIDWAY, AND WAKE 317 (Aug. 9, 1932).

<sup>342</sup> Brief for Plaintiffs, *supra* note 325, at 5.

<sup>343</sup> *See, e.g., Downes v. Bidwell*, 182 U.S. 244, 307 (1901).

<sup>344</sup> *Downes*, 182 U.S. at 341–42 (White, J., concurring) (emphasis added).

<sup>345</sup> *See infra* notes 346–50 and accompanying text.

<sup>346</sup> *See generally* Joseph Blocher & Mitu Gulati, *Navassa: Property, Sovereignty, and the Law of the Territories*, 131 YALE L.J. 2390, 2412–15 (2022) (discussing U.S. and Haitian ambivalence to Navassa’s sovereignty).

<sup>347</sup> *See, e.g., Jurisdiction in Navassa*, N.Y. TIMES, Nov. 3, 1889 (“The latest reports from the West Indies declare that the newly-adopted Constitution of Hayti declares that the



began with a dismissive aside that his argument was “not easy to understand.”<sup>348</sup> The government ignored the defense’s observations about the lack of permanent title conveyed by the Guano Islands Act and instead offered the suggestion that Navassa “being thus in the possession of this Government, it must be for the time being regarded as part of the national domain.”<sup>349</sup> Without taking pains to define this amorphous “national domain,” the government asserted that “Congress has the power to legislate co-extensive with the national domain; not only co-extensive with the national domain, but co-extensive with the national authority, according to the maritime and international law.”<sup>350</sup>

The Court, in a unanimous opinion, rejected Waring’s argument, holding that the Guano Islands Act was “constitutional and valid” and “that the Island of Navassa must be considered as appertaining to the United States.”<sup>351</sup> The Court reasoned that the determination of sovereignty over a territory was a political question properly reserved for the executive and legislative branches—not the judicial branch.<sup>352</sup> The Court discussed the evidence of discovery, possession and occupation of Navassa—not to draw its own conclusion about sovereignty, but to demonstrate that the other two branches had come to their own conclusion, one which it was the Court’s role to accept.<sup>353</sup> As the Justices concluded,

[I]f the executive, in his correspondence with the government of Hayti [sic], has denied the jurisdiction which it claimed over the Island of Navassa, the fact must be taken and acted on by this court as thus asserted and maintained; it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong; it is enough to know that in the exercise of his constitutional functions he has decided the question.<sup>354</sup>

The Court’s holding that the islands acquired under the Guano Islands Act were “in the possession of the United States” meant that the Navassa Phosphate Company’s claim to Navassa was valid and thus the defendants

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Black Republic has jurisdiction over Navassa, and the action of the Counsel Waring is to determine the question of jurisdiction.”)

<sup>348</sup> Brief for Defendant in Error at 5, *Jones v. United States*, 137 U.S. 202 (1890) (No. 1143).

<sup>349</sup> *Id.* at 6.

<sup>350</sup> *Id.* at 7.

<sup>351</sup> *Jones*, 137 U.S. at 224.

<sup>352</sup> *Id.* at 212.

<sup>353</sup> *Id.* at 217-21.

<sup>354</sup> *Id.* at 221.

were properly subject to prosecution in American courts.<sup>355</sup> But on a greater level, it would be a distinction central to the reasoning of the *Insular Cases* ten years later, and would have repercussions that resonate even today.<sup>356</sup> In the Court's most recent term, Justice Gorsuch issued a blistering concurrence in a case involving Social Security benefits for a resident of Puerto Rico.<sup>357</sup> Calling the *Insular Cases*, a "rotten foundation" of racial stereotypes when it came to affording constitutional rights and protections for territory residents, Justice Gorsuch called for this "shameful" precedent to be overruled.<sup>358</sup>

The Court's decision didn't actually settle the exact legal status of the various guano islands (Navassa had been the first one claimed, but more than 100 such islands were eventually claimed), nor did it determine the fate of Jones, Key, and Smith.<sup>359</sup> While their death sentences were affirmed, the tide of public opinion had turned.<sup>360</sup> Coverage of the case shined a spotlight on the abuses endured on Navassa by the Black laborers, and the defendants sought executive clemency.<sup>361</sup> Media coverage, even by newspapers that had initially condemned the violent uprising, supported the clemency campaign.<sup>362</sup> In an 1891 editorial, the *Washington Post* argued,

The men employed by the Navassa Phosphate Company were subjected to brutal and inhuman treatment of "bosses" worse than the worst of the proverbial overseers of old slave times, and that there was great provocation for the outbreak and mutiny which culminated in the murder of five of the white men who had themselves precipitated the riot.<sup>363</sup>

The Brotherhood of Liberty mobilized a petition-writing campaign, with leading Baltimore citizens, clergymen, attorneys, the Baltimore

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<sup>355</sup> *Id.* at 216, 223-24.

<sup>356</sup> *See generally* *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. New York and Porto Rico Steamship Co.*, 182 U.S. 392 (1901). *See, e.g., infra* text accompanying notes 357-58.

<sup>357</sup> *United States v. Vaello Madero*, 142 S. Ct. 1539, 1552-57 (2022) (Gorsuch, J., concurring).

<sup>358</sup> *Id.* at 1554, 1557.

<sup>359</sup> *Jones*, 137 U.S. at 224 (holding that Navassa Island specifically appertained to the United States and that the United States District Court for the District of Maryland had jurisdiction to indict Jones, Key, and Smith.).

<sup>360</sup> *See A Good Case for Clemency*, WASH. POST, Mar. 17, 1891, at 4.

<sup>361</sup> *Id.*

<sup>362</sup> *See* Dan Fesperman, *A Man's Claim to Guano Knee-Deep in Bureaucracy: Island Fortune in Fertilizer Has Baltimore Connection*, BALT. SUN, July 19, 1998 (describing how the defendants were portrayed in the press by newspapers such as the Baltimore Sun and the New York Times).

<sup>363</sup> *A Good Case for Clemency*, *supra* note 360, at 4.

Federation of Labor, and even some of the original trial jurors supporting the clemency effort.<sup>364</sup> J.T. Ensor, the U.S. Attorney for the District of Maryland, even penned a letter, stating that “[e]xpediency and justice justify the exercise of executive clemency in these cases.”<sup>365</sup> On April 1, 1891, the Brotherhood of Liberty representatives personally delivered the petition to President Benjamin Harrison, along with an appeal written by Waring and the defense team.<sup>366</sup> A month later, President Harrison commuted the defendants’ death sentences to life in prison, saying that there were mitigating circumstances as a result of the inhumane working conditions in which “[t]heir employers were, in fact, their masters.”<sup>367</sup> Such a state, the president wrote, “might make men reckless and desperate.”<sup>368</sup> Negative publicity continued to plague the Navassa Phosphate Company, and it ceased mining operations in 1898 before going into receivership.<sup>369</sup>

## VII. CONCLUSION

His historic defense ensured Everett J. Waring prominence in Baltimore’s Black community.<sup>370</sup> The fact that a Black lawyer had argued before the U.S. Supreme Court brought him a steady stream of clients, both Black and white.<sup>371</sup> Financial success led to Waring becoming active in real estate, and at one point, he owned as many as forty properties.<sup>372</sup> He was also a president and co-founder of the Lexington Savings Bank, the first bank in Maryland started and run by Black Americans.<sup>373</sup> But on March 8, 1897, the Lexington Savings Bank went into receivership.<sup>374</sup> Waring was charged with embezzlement, and the man who was once one of Baltimore’s leading citizens had to seek a change of venue to Howard County, believing he would not receive a fair trial in the city.<sup>375</sup> Although he was acquitted and although

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<sup>364</sup> See HALPIN, *supra* note 120, at 87.

<sup>365</sup> *The City Courts: The Navassa Island Murderers—Decision Reversed—Damage Suits*, BALT. SUN, Apr. 10, 1891, at 4.

<sup>366</sup> HALPIN, *supra* note 120, at 89.

<sup>367</sup> *Imprisonment for Life: The President Commutes the Sentences of the Navassa Rioters*, WASH. POST, May 19, 1891, at 7.

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

<sup>369</sup> Brennen Jensen, *Poop Dreams: It’s a Guano-Covered Rock in the Sea. So Why Do So Many People Want a Piece of Navassa Island?*, BALT. CITY PAPER, Feb. 21, 2001, at 4.

<sup>370</sup> See *Everett J. Waring: 1859–1914*, *supra* note 171, at 2 (describing Waring’s reputation as a leader in Baltimore’s Black community).

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> *Id.* at 3.

evidence showed Waring had tried to use his own personal funds to save the bank, Waring's fall from grace was complete.<sup>376</sup> He moved back to Ohio, where he died on September 2, 1914.<sup>377</sup>

Everett J. Waring remains, sadly, a “forgotten first” despite his historic achievement.<sup>378</sup> While his portrait hangs in Baltimore's Clarence Mitchell Courthouse, and while a minority bar association in Maryland bears his name, few even in the legal profession are aware of his significance.<sup>379</sup> In a former slave state that clung to a “whites-only” legal profession for more than 20 years after the Civil War, and with the support of Black community organizing that helped pave the way for groups like the NAACP, Waring broke through the color barrier and then immediately set to work challenging discriminatory laws.<sup>380</sup> And in only his fifth year as a lawyer, he found himself challenging U.S. sovereignty over a far-flung island in an effort to spare the lives of Black men who had endured slavery by another name.<sup>381</sup> As if being the first Black lawyer to argue before the U.S. Supreme Court wasn't intimidating enough, Waring had to make that argument before a Court that included five of the justices who would decide *Plessy v. Ferguson* six years later.<sup>382</sup>

While largely overlooked by scholars, Waring's historical significance is undeniable.<sup>383</sup> His admission ushered in the beginning of an era of distinguished Black civil rights lawyers in Maryland, ranging from William Ashbie Hawkins to Charles Hamilton Houston to Thurgood Marshall.<sup>384</sup> Virtually anywhere that Black lawyers practiced, they struggled to earn a living: after all, white clients generally didn't hire them, and most Black clients could not afford to pay substantial fees.<sup>385</sup> Recognizing this, early Black lawyers devoted significant time and energy to building up the Black community's economic infrastructure and mobilizing the political clout that would pave the way for future growth and opportunity.<sup>386</sup> In Maryland, this translated to getting Harry S. Cummings elected in 1890 as

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<sup>376</sup> *Everett J. Waring: 1859–1914*, *supra* note 171, at 2.

<sup>377</sup> *Everett J. Waring Obituary*, PHILA. INQUIRER, Sept. 4, 1914, at 7.

<sup>378</sup> Bogen, *supra* note 30, at 10, 13.

<sup>379</sup> *Clarence M. Mitchell Jr. Courthouse: Courtroom 231*, MD. STATE ARCHIVES, <https://msa.maryland.gov/msa/speccol/sc5500/sc5590/html/waring.html> (last visited Sept. 28, 2022); WARRING MITCHELL L. SOC'Y, <http://www.waringmitchell.org/> (last visited Sept. 28, 2022).

<sup>380</sup> Bogen, *supra* note 30, at 10, 12.

<sup>381</sup> *Id.* at 11 (citing *Jones*, 137 U.S. at 224).

<sup>382</sup> Bogen, *supra* note 30, at 11; *see also Justices 1789 to Present*, SUP. CT. OF THE U.S., [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx) (last visited Sept. 26, 2022).

<sup>383</sup> Bogen, *supra* note 30, at 10.

<sup>384</sup> *Id.* at 10-13.

<sup>385</sup> *Id.* at 11.

<sup>386</sup> *Id.* at 11-12.

the first Black person to serve on the Baltimore City Council.<sup>387</sup> Although he was defeated in his reelection bid in 1892, Cummings worked tirelessly for Black constituents and managed to integrate the Maryland Institute of Art and Design by appointing its first Black student.<sup>388</sup> In 1890, Cummings—along with Joseph Seldon Davis, future lawyer William Ashbie Hawkins, and other businessmen—founded the Economics Association, a support network for Black-owned businesses.<sup>389</sup>

However, the fight for Black representation in Maryland’s legal profession was far from over.<sup>390</sup> With vocal cries for segregation reaching a fever pitch in 1890, the University of Maryland School of Law expelled its only two Black students, William Ashbie Hawkins and James L. Dozier.<sup>391</sup> Both finished their legal education at Howard.<sup>392</sup> The University of Maryland School of Law’s doors would remain closed to Black students for nearly half a century, until Thurgood Marshall and Charles Hamilton Houston won Donald Murray’s suit seeking admission to the school.<sup>393</sup>

Yet more Black lawyers continued to walk through the doors opened by Everett Waring and the Brotherhood of Liberty.<sup>394</sup> William Ashbie Hawkins, admitted in 1892, was present at the Niagara Conference that led to the founding of the NAACP, and he went on to become Maryland’s leading civil rights lawyer for decades—challenging segregation in housing and transportation as well as attempts at disenfranchising Black voters.<sup>395</sup> By 1935, the end of the first half of the century of Black admission to the Maryland bar, there were 32 Black lawyers in Baltimore alone.<sup>396</sup> As one scholar noted, “[m]easured by the forces arrayed against them, the achievements of the black lawyers in Maryland in these first four decades were substantial,” and black lawyers’ “economic survival was itself a triumph.”<sup>397</sup>

Acknowledgment for the pioneering Black lawyers in Maryland’s history is long overdue.<sup>398</sup> One positive step toward restorative justice would

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<sup>387</sup> *Id.* at 11.

<sup>388</sup> *Id.*

<sup>389</sup> Bogen, *supra* note 30, at 11.

<sup>390</sup> *Id.* at 11-12.

<sup>391</sup> *Id.* at 11.

<sup>392</sup> *Id.*

<sup>393</sup> *Id.* (citing *Pearson v. Murray*, 169 Md. 478, 590-94 (1936)).

<sup>394</sup> *Id.* at 11-12.

<sup>395</sup> Bogen, *supra* note 30, at 11-13.

<sup>396</sup> *Id.* at 13.

<sup>397</sup> *Id.*

<sup>398</sup> *Id.* at 10, 13 (explaining that the struggle of black lawyers to establish themselves in Maryland is little known, and these early lawyers should not be forgotten).

be the posthumous bar admission of Edward Garrison Draper.<sup>399</sup> In the same year the United States Supreme Court proclaimed Black people “beings of an inferior order”<sup>400</sup> who could not be considered citizens, Draper displayed such a command of the law that a White judge found him “qualified in all respects” and worthy of bar admission but for the color of his skin.<sup>401</sup> Recognizing Draper—a living, breathing repudiation of the racist beliefs manifested in Chief Justice Taney’s opinion in *Dred Scott v. Sandford*—with posthumous admission to the Maryland bar would be more than a symbolic gesture.<sup>402</sup> It would right a historic wrong and racial injustice, while simultaneously serving as homage to the Black legal trailblazers on whose shoulders we stand.<sup>403</sup>

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<sup>399</sup> See John G. Browning, *Righting Past Wrongs: Posthumous Bar Admissions and the Quest for Racial Justice*, 21 BERKELEY J. AFR.-AM. L. & POL’Y 1, 34 (2021) (explaining that one purpose of posthumous bar admissions is to foster restorative justice by giving a person something that was wrongly withheld from them, or by removing a stain on one’s reputation).

<sup>400</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857); see also D. Dumont Smith, *Decisive Battles of Constitutional Law: VIII. Dred Scott vs. Sandford*, 9 A.B.A. 649, 650 (1923) (discussing Chief Justice Taney’s opinion regarding Black people as an inferior people); see also David S. Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland’s First Black Lawyers*, 44 MD. L. REV. 939, 977 (1985).

<sup>401</sup> Bogen, *supra* note 30, at 10.

<sup>402</sup> See Browning, *supra* note 399, at 3 (examining whether posthumous bar admissions are “merely symbolic coda,” or if they are “meaningful steps toward racial healing”).

<sup>403</sup> *Id.* at 3, 28, 34, 36 (explaining that posthumous bar admissions of legal trailblazers are useful tools in righting wrongs and racial injustices).

## ARTICLE

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### CONSTITUTIONALITY OF BALTIMORE CITY'S LOCAL HIRING ORDINANCE

*By: R. Stark Merrifield IV\**

#### I. INTRODUCTION

The construction industry provides numerous benefits to local governments, economies, and residents.<sup>1</sup> First, it offers substantial employment opportunities and, therefore, a way to ease unemployment.<sup>2</sup> Second, it provides those without an advanced degree “a path to [the] middle class.”<sup>3</sup> Third, it helps channel resources back into the local economy.<sup>4</sup> Recognizing the potential benefits, public officials have begun tapping the construction industry as a potential source for reducing unemployment.<sup>5</sup>

One way to reduce unemployment is by implementing local hiring requirements on public works projects.<sup>6</sup> Generally, local hiring requirements compel contractors on public works projects to use local labor as part of their workforce.<sup>7</sup> That is, a contractor must hire a certain percentage of the local workforce to help complete the project or risk losing the contract.<sup>8</sup>

Local hiring promotes the use of local businesses and creates jobs for disadvantaged community members, i.e., long-term unemployed workers,

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\* R. Stark Merrifield, IV – This paper and the research behind it would not have been possible without the exceptional support of Professor Audrey McFarlane. I would also like to extend my deepest gratitude to the Honorable Angela Eaves for her profound belief in my abilities. I am extremely grateful to Taylor Bayat as my success would not have been possible without her continued support and patience. An especially heartfelt thanks to my family—Rob, Karyn, and Ariana Merrifield—who never wavered in their support. Finally, my sincere thanks to Professor Dionne Koller for her encouragement throughout my law school career. Thank you to each and every one of you.

<sup>1</sup> Werner Z. Hirsch, *The Constitutionality of State Preference (Residency) Laws Under the Privileges and Immunity Clause*, 22 SW. UNIV. L. REV. 1, 1, 24 (1992).

<sup>2</sup> *Id.* at 24.

<sup>3</sup> S.F., CAL., ADMIN. CODE ch. 82 § 82.2(a) (2017).

<sup>4</sup> George T. Reynolds, *Constitutional Law - Constitutional Assessment of State and Municipal Residential Hiring Preference Laws*, 40 VILL. L. REV. 803, 803 (1995).

<sup>5</sup> *Id.* at 812; see generally, Hannah Roditi & Naomi Zauderer, *Breaking Down the Wall: Opening Building-Trade Careers to Low-Income People of Color*, 36 CLEARINGHOUSE REV. 154 (2002) (discussing generally the construction industry's potential benefits in reducing unemployment).

<sup>6</sup> See Roditi & Zauderer, *supra* note 5, at 161.

<sup>7</sup> BALT., MD., CODE art. 5, §§ 27-5 to -6 (2022).

<sup>8</sup> *Id.* § 27-10.

workers with a history of homelessness, or individuals residing in areas with high poverty rates.<sup>9</sup> Local hiring may also provide living wages to underrepresented groups, such as women, people of color, and veterans.<sup>10</sup> Further, public officials are implementing local hiring laws because negotiations between unions and contractors rarely procure employment from the low-income workforce or the previously mentioned groups.<sup>11</sup>

Contractors, however, may avoid the local hiring requirements altogether.<sup>12</sup> The requirements may be exempted if, for instance, the beneficiary is located outside the locale and none of the contract work is performed inside said locale or the local workforce has an insufficient number of members who possess the necessary skills required to complete the job.<sup>13</sup>

Contractors may also seek to avoid a public works project's local hiring requirement by challenging the law as unconstitutional.<sup>14</sup> A contractor may challenge the requirement as violating Article IV Privileges and Immunities Clause because it discriminates against non-residents or the Article I Interstate Commerce Clause because it promulgates hiring preferences regarding residents over non-residents.<sup>15</sup>

Like many cities before it, Baltimore City passed a local hiring law in 2013.<sup>16</sup> Although the ordinance has not been challenged in court, the City's Law Department was skeptical of its constitutionality from the moment it was passed.<sup>17</sup>

This article examines whether Baltimore City's local hiring ordinance would succeed against a claim that the ordinance violates the Privileges and Immunities Clause and the Commerce Clause.<sup>18</sup> This article will analyze

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<sup>9</sup> Roditi & Zauderer, *supra* note 5, at 159.

<sup>10</sup> *Id.* at 156, 158-9; *see generally* S.F., CAL., ADMIN CODE art. 2, §§ 6.27(b)(9), (e)(6) (2022).

<sup>11</sup> *See* Roditi & Zauder, *supra* note 5, at 154.

<sup>12</sup> BALT., MD., CODE art. 5, § 27-6(b) (2022).

<sup>13</sup> *Id.* § 27-6(b)(2), (4).

<sup>14</sup> Carl J. Schuman, *Domicile Preferences in Employment: The Case of Alaska Hire*, 1978 DUKE L.J., 1069, 1070, 1073 (1978).

<sup>15</sup> U.S. CONST. art. IV, § 2, cl. 2 [hereinafter *The Privileges and Immunities Clause*]; U.S. CONST., art. I, § 8, cl. 3; Schuman, *supra* note 14, at 1070.

<sup>16</sup> *Local Hiring*, MAYOR'S OFF. OF EMP. DEV., <https://moed.baltimorecity.gov/employer-services/hiring-strategies-local> (last visited Mar. 20, 2019); *see generally* BALT., MD., CODE, art. 5, § 27 (2022).

<sup>17</sup> *Baltimore Noble but Flawed Hiring Bill*, BALT. SUN (May 15, 2013, 12:00 AM), <https://www.baltimoresun.com/opinion/bs-xpm-2013-05-15-bs-ed-local-hiring-20130515-story.html>; Luke Broadwater, *City Council Approves Local Hiring Requirement*, BALT. SUN (June 4, 2013), <https://www.baltimoresun.com/maryland/baltimore-city/bs-xpm-2013-06-03-bs-md-ci-local-hiring-vote-20130603-story.html> [hereinafter *Balt. Approves Local Hire*].

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



## 2022] Constitutionality of Baltimore City's Local Hiring Ordinance 45

those two issues by comparing Baltimore City's local hiring ordinance to others across the United States while analyzing previous United States Supreme Court cases that have discussed similar issues.<sup>19</sup> Accordingly, this article seeks to argue that Baltimore City's local hiring ordinance is constitutional under the Commerce Clause but may be excessively broad and restrictive under the Privileges and Immunities Clause.<sup>20</sup>

Part II of this article explores the different local hiring laws across the United States in cities such as Boston, Massachusetts; St. Louis, Missouri; San Francisco, California; New Orleans, Louisiana; Cleveland, Ohio; and Alaska.<sup>21</sup> Part III outlines the current Baltimore City local hiring ordinance, its effect on the local labor force and compares it to similar local hiring laws.<sup>22</sup> Part IV will explore the history of the Privileges and Immunities Clause and the Commerce Clause.<sup>23</sup> Furthermore, Part IV will analyze two seminal cases on local hiring laws: *Hicklin v. Orbeck* and *White v. Massachusetts Council of Construction Employers*, where the latter decision found the local hiring law unconstitutional, and the former did not.<sup>24</sup> Finally, Part V will apply the Privileges and Immunities Clause and the Commerce Clause to Baltimore City's local hiring ordinance to determine its constitutionality.<sup>25</sup>

### II. LOCAL HIRING LAWS ACROSS THE UNITED STATES

In addition to Baltimore City, various other cities across the country and one state have attempted to enact local hiring laws.<sup>26</sup> In some instances, those laws have been repealed or deemed unconstitutional by the court.<sup>27</sup>

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<sup>19</sup> See *infra* Part III; see *infra* Part V.

<sup>20</sup> See *infra* Part V.

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

<sup>22</sup> See *infra* Part III.

<sup>23</sup> See *infra* Part IV.

<sup>24</sup> See *infra* Part IV. A. i. (discussing *Hicklin v. Orbeck*, 437 U.S. 518 (1978)); *White v. Mass. Council of Constr. Emps.* 460 U.S. 204 (1983).

<sup>25</sup> See *infra* Part V.

<sup>26</sup> See generally ST. LOUIS, MO., ORDINANCE 69427 § 5 (May 21, 2009) (repealed 2013); S. F., CAL., ADMIN. CODE art. 2, § 6.22(g) (2010); CLEVELAND, OHIO, CODE OF ORDINANCES tit. XV, chap. 188, § 2 (2004); BALT., MD., CODE art. 5, § 27-5 to -6 (2022).

<sup>27</sup> Schuman, *supra* note 14, at 1094.

### *A. Boston, Massachusetts*

In 1983, the Mayor of Boston approved the Boston Resident Job Policy (“BRJP”).<sup>28</sup> The BRJP “set employment standards for Boston residents, people of color, and women construction workers.”<sup>29</sup> The standards the BRJP sets are as follows: (1) at least 51% of the total work hours of journey people and 51% of the total work hours of apprentices in each trade must go to Boston citizens; (2) at least 40% of the total work hours of journey people and 40% of total work hours of apprentices in each trade must go to people of color; and (3) at least 12% of the total work hours of journey people and 12% of total work hours of apprentices in each trade must go to women.<sup>30</sup>

### *B. St. Louis, Missouri*

In 2009, St. Louis adopted an ordinance establishing apprenticeship training, workforce diversity, and a city resident program for locally funded public works over \$1 million.<sup>31</sup> In the relevant part, it states that minorities are to perform 25% of the project’s labor hours (hours performed by workers employed by the contractor), and women are to perform 5% of the labor hours.<sup>32</sup> Additionally, residents of the City of St. Louis are to perform 20% of all labor hours.<sup>33</sup> If the city resident is, however, a minority or a woman, the contractor can count that towards the former requirement.<sup>34</sup>

### *C. San Francisco, California*

In 2011, San Francisco implemented a local hiring law to promote the employment of local residents on locally sponsored public works projects.<sup>35</sup> The law applies, with limited exceptions, to “all construction projects on real property owned by the City, and all construction projects on City-owned real property” over \$1,000,000.<sup>36</sup> Moreover, it requires that “30% of all Project Work Hours within each trade be performed by local residents, with no less than 15% of all Project Work Hours within each trade being performed by

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<sup>28</sup> *Boston Residents Jobs Policy on Construction Projects*, BOS. EMP. COMM’N, <https://www.boston.gov/boston-residents-jobs-policy-construction-projects> (last updated Sept. 21, 2022).

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

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

<sup>31</sup> ST. LOUIS, MO. ORDINANCE 68412 § 4 (repealed 2013).

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

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

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

<sup>35</sup> S.F., CAL., ADMIN. CODE § 6.22(g) (effective June 16, 2011).

<sup>36</sup> *Id.* § 6.1.

## 2022] Constitutionality of Baltimore City’s Local Hiring Ordinance 47

Disadvantaged Workers.”<sup>37</sup> Also, “at least 50% of the Project Work Hours performed by Apprentices within each trade shall be performed by Local Residents, with no less than 25% of Project Work Hours performed by Apprentices within each trade be performed by Disadvantaged Workers.”<sup>38</sup>

### *D. New Orleans, Louisiana*

In 2016, New Orleans implemented HIRE Nola, a law that requires contractors and their subcontractors to comply with the following requirements: (1) at least 30% of all work hours must be performed by state residents on public work projects costing in excess of \$150,000; and (2) at least 10% of all work hours must be performed by disadvantaged local workers.<sup>39</sup>

### *E. Cleveland, Ohio*

In 2003, Cleveland adopted a local hiring ordinance that requires city residents to perform 20% of the total construction work hours on public works projects in the amount of \$100,000 or more.<sup>40</sup> However, thirteen years later, the Ohio Legislature enacted a law that superseded and repealed the City of Cleveland’s ordinance.<sup>41</sup> The law repealing the local hiring ordinance stated, in relevant part, the following:

No public authority shall require a contractor, as part of a prequalification process or for the construction of a specific public improvement or the provision of professional design services for that public improvement, to employ as laborers a certain number or percentage of individuals who reside within

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<sup>37</sup> *Id.* § 82.5(a)(1).

<sup>38</sup> *Id.* § 82.5(a)(2).

<sup>39</sup> *Hire NOLA*, CITY OF NEW ORLEANS WORKFORCE DEV., (Feb. 12, 2020, 11:16 AM), <http://www.nola.gov/economic-development/workforce-development/hire-nola/>; *see also* Robert McClendon, ‘Hire NOLA’ Local Hiring Law Approved by New Orleans City Council, NOLA.COM (Oct. 2, 2015, 4:36 AM), [https://www.nola.com/news/politics/article\\_23118fd9-7563-5a48-8c58-3d35eaa85ed5.html](https://www.nola.com/news/politics/article_23118fd9-7563-5a48-8c58-3d35eaa85ed5.html).

<sup>40</sup> CLEVELAND, OHIO, CODE OF ORDINANCES §§ 188.01(A), 188.02(a)(1) (2004).

<sup>41</sup> *City of Cleveland v. State*, 157 Ohio St. 3d 330, 330 (2019) (challenging the law on the basis of whether the State of Ohio had the ability to enact a law that supersedes a City of Cleveland ordinance); *see also id.* at 340 (holding that the Ohio Constitution permitted the enactment of the law, and therefore repealing the local hiring ordinance).

the defined geographic area or service area of the public authority.

No public authority shall provide a bid award bonus or preference to a contractor as an incentive to employ as laborers a certain number or percentage of individuals who reside within the defined geographic area or service area of the public authority.<sup>42</sup>

The General Assembly reasoned that the local hire ordinance infringed on an individual's inalienable and fundamental right to choose where to live.<sup>43</sup> And repealing the ordinance was to protect the health, safety, and general welfare of all employees.<sup>44</sup>

#### *F. Alaska, United States*

In 1972, Alaska enacted legislation requiring private employers to give Alaskan residents priority by being the first ones hired and the last ones fired from jobs arising from state oil and gas leases.<sup>45</sup> In particular, the law stated that “all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes, unitization agreements, or any renegotiation of any of the preceding to which the state is a party” include a stipulation “requiring the employment of qualified Alaska residents in preference to non-residents.”<sup>46</sup> Six years later, however, the United States Supreme Court held that the law was unconstitutional because it violated the Privileges and Immunities Clause.<sup>47</sup> This will be analyzed further in Part IV.<sup>48</sup>

### III. BALTIMORE CITY LOCAL HIRING

Article 5 Subtitle 27 of the Baltimore City Code sets forth the requirements for local hiring.<sup>49</sup> The Code states, in the relevant part, the following:

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<sup>42</sup> *Cleveland*, 157 Ohio St. 3d at 331.

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

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

<sup>45</sup> *Hicklin v. Orbeck*, 437 U.S. 518, 520 (1978).

<sup>46</sup> *Id.* (quoting ALASKA STAT. ANN. § 38.40.030(a) (1977)).

<sup>47</sup> *Hicklin*, 437 U.S. at 533–34.

<sup>48</sup> See discussion *infra* Section IV.A.i.

<sup>49</sup> BALT., MD., CODE art. 5, § 27-6 (2022).

## 2022] Constitutionality of Baltimore City's Local Hiring Ordinance 49

(a) *In general.*

At least 51% of the new jobs required to complete the contract or project must be filled by Baltimore City residents.

(b) *Exceptions.*

MOED may waive or lower the requirements of subsection (a) of this section if it finds that:

- (1) Good faith effort to comply has been made by the beneficiary;
- (2) The beneficiary is located outside the Baltimore Standard Metropolitan Statistical Area and none of the contract work is performed inside the Baltimore Standard Metropolitan Statistical Area;
- (3) The beneficiary has entered into a satisfactory special workforce development training or placement arrangement with MOED; or
- (4) There are insufficient numbers of Baltimore City residents in the labor market who possess the skills required by the new jobs needed to be filled for the contract or project.<sup>50</sup>

The Subtitle was added by Council Bill 12-0159 and became effective on December 22, 2013.<sup>51</sup> The implementation of the local hiring ordinance, however, was met with criticism before it was even voted on by the City Council.<sup>52</sup> In a memorandum addressed to the City Council dated January 2, 2013, the Baltimore City Law Department stated their concerns with the ordinance.<sup>53</sup> The memo briefly reviewed the current law surrounding the constitutionality of local hiring laws—which is overwhelming in favor of deeming them unconstitutional.<sup>54</sup> Thus, the Law Department could not approve the ordinance.<sup>55</sup>

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

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

<sup>52</sup> Memorandum from Dep't Law to Balt. City Council (January 2, 2013) (on file with Balt. City Council) [hereinafter Jan. 2, 2013 Law Memo].

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

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

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

In a supplemental letter to the City Council on January 9, 2013, the Law Department suggested other constitutional ways to increase local employment.<sup>56</sup> Moreover, the Law Department noted that although “the City Council President asked for assistance in amending [the local hiring ordinance] to make it legally sufficient . . . the [ordinance] cannot be amended to make it legal.”<sup>57</sup> And after another review of the law surrounding the constitutionality of local hiring requirements, the Law Department reiterated that it could not recommend amendments to make the ordinance lawful.<sup>58</sup>

Not only did the ordinance face criticism from Baltimore City’s lawyers but also the local contractors.<sup>59</sup> Contractors noted that the law would “increase their liability, exposure, and costs, and place” their non-resident employees at risk of unemployment.<sup>60</sup>

Nevertheless, the City Council President at the time, Bernard C. “Jack” Young, stated that “the legislation is modeled after the San Francisco law and is designed to pass legal tests.”<sup>61</sup> However, Baltimore City’s Local Hiring Ordinance is not modeled after San Francisco’s.<sup>62</sup> San Francisco’s local hiring law is a multi-part and very specific requirement.<sup>63</sup> Baltimore City’s, however, consists of one broad statement and a handful of exceptions.<sup>64</sup>

The specificity with which San Francisco’s law is written versus the broadness of Baltimore City’s is one reason why the former is more likely to withstand a constitutional challenge.<sup>65</sup> Moreover, the San Francisco local hiring law is written in terms of work hours.<sup>66</sup> Simply, San Francisco’s hiring law does not restrict who is hired.<sup>67</sup> Instead, the law only limits how many

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<sup>56</sup> Letter from Dep’t. Law to Balt. City Council (Jan. 9, 2013) (on file with Balt. City Council) [hereinafter Jan. 9, 2013 Law Memo].

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

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

<sup>59</sup> Luke Broadwater, *Bill Would Force Contractors to Hire City Residents*, BALT. SUN (May 12, 2013, 12:00 AM), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-local-hiring-20130512-story.html>.

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

<sup>61</sup> *Balt. Approves Local Hire*, *supra* note 17.

<sup>62</sup> *Baltimore’s Local Hiring Bill Worth a Try*, BALT. SUN: OPINION (May 16, 2013, 12:00 AM), <https://www.baltimoresun.com/opinion/bs-xpm-2013-05-16-bs-ed-city-jobs-letter-20130516-story.html>.

<sup>63</sup> *See generally* S.F., CAL., ADMIN. CODE § 82.5 (2022).

<sup>64</sup> BALT., MD., CODE art. 5, § 27-6 (2022).

<sup>65</sup> *Baltimore’s Local Hiring Bill Worth a Try*, *supra* note 63.

<sup>66</sup> *See* S.F., CAL., ADMIN. CODE § 82.5(a)(1)-(2) (2022).

<sup>67</sup> *Id.*

## 2022] Constitutionality of Baltimore City’s Local Hiring Ordinance 51

hours workers may work.<sup>68</sup> Baltimore City’s ordinance, however, restricts who is employed.<sup>69</sup>

### IV. CONSTITUTIONAL CHALLENGES TO LOCAL HIRING LAWS

Local hiring laws are threatened by two constitutional challenges—the Privileges and Immunities Clause and the Commerce Clause.<sup>70</sup> Importantly, these constitutional challenges are not mutually exclusive.<sup>71</sup> When a constitutional challenge is brought against a local hiring law, the claim usually states it violates both clauses.<sup>72</sup> Therefore, when drafting any local hiring law, it is important to consider the two clauses together.<sup>73</sup> Accordingly, this article will address each challenge in turn.<sup>74</sup>

#### A. *The Privileges and Immunities Clause*

The Privileges and Immunities Clause of Article IV of the United States Constitution provides “[t]hat the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States.”<sup>75</sup> In other words, “a citizen of State A who ventures into State B [is afforded] the same

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<sup>68</sup> S.F., CAL., ADMIN. CODE § 82.5 (2022).

<sup>69</sup> *Id.*; BALT., MD., CODE art. 5, § 27-6 (2022).

<sup>70</sup> Schuman, *supra* note 14, at 1070.

<sup>71</sup> Hirsch, *supra* note 1, at 11.

<sup>72</sup> Jennifer D. Cantrell & Supama Jain, *Enforcement of Local Hire Preference Program*, LEGAL RSCH. DIG., Apr. 2013, at 1, 5.

<sup>73</sup> Thomas H. Day, *Hiring Preferences Acts: Has the Supreme Court Rendered Them Violations of the Privileges and Immunities Clause?*, 54 FORDHAM L. REV. 271, 292–93 (1985).

<sup>74</sup> *See* discussion *infra* Sections A, B.

<sup>75</sup> U.S. CONST. art. IV, § 2, cl. 1. The United States Supreme Court has determined two things of relevance for purposes of this Comment. First, the terms “resident” and “citizen” have been deemed “essentially interchangeable” for the purposes of the Privileges and Immunities Clause because a non-citizen who seeks employment in a city would not enjoy the same privileges as a state citizen residing in said city. *See* *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 216 (1984). Therefore, regardless of a local hiring law being enacted solely by a local municipality to boost the local economy, it must withstand scrutiny under the Privileges and Immunities Clause. *See id.* at 216-17; *see also* *Austin v. New Hampshire*, 420 U.S. 656, 662 n. 8 (1975). As such, when this Comment talks about discrimination for Privileges and Immunities purposes, it will use the words “State” and “city” interchangeably. Often referred to as the “interstate privileges and immunities clause,” it is distinct from the virtually dormant privileges or immunities clause of the 14<sup>th</sup> Amendment.

privileges which the citizens of State B enjoy.”<sup>76</sup> This puts each state's citizens on a level playing field with one another.<sup>77</sup> Ultimately, this reflects the framers’ intent to keep a newly independent state from adopting “highly protectionist economic policies” and instead allow for a free flow of commerce through the United States.<sup>78</sup>

Although many Supreme Court cases have interpreted the Privileges and Immunities Clause since its inception, its modern-day jurisprudence “stems from *Toomer v. Witsell*.”<sup>79</sup> In *Toomer*, the Court was asked to decide whether a South Carolina law that “requires non-residents. . . to pay license fees one hundred times as great as those which residents must pay” is unconstitutional.<sup>80</sup> Writing for the majority, Chief Justice Frederick Moore Vinson opined that the Privileges and Immunities Clause “is not absolute.”<sup>81</sup> Instead,

[i]t does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus, the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.<sup>82</sup>

Chief Judge Vinson’s opinion has been distilled down to a two-part test aptly named the *Toomer* test.<sup>83</sup> According to the *Toomer* test, [a] state may not discriminate against non-residents unless (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against non-residents bears a substantial relationship to the State’s objective.<sup>84</sup> “Substantial reason” refers to a showing by the state “that non-citizens constitute a peculiar source of the evil at which the statute is

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<sup>76</sup> *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

<sup>77</sup> *Paul v. Virginia*, 75 U.S. 168, 180 (1869).

<sup>78</sup> See generally *Toomer*, 334 U.S. 385 (1948).

<sup>79</sup> *Reynolds*, *supra* note 4, at 807.

<sup>80</sup> *Toomer*, 334 U.S. at 395.

<sup>81</sup> *Id.* at 396.

<sup>82</sup> *Id.*

<sup>83</sup> *Toomer*, 334 U.S. at 397; Schuman, *supra* note 14, at 1079.

<sup>84</sup> *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 284 (1985) (citing *Toomer*, 334 U.S. at 396) (condensing the two-pronged test formulated in *Toomer* to a single sentence).



## 2022] Constitutionality of Baltimore City’s Local Hiring Ordinance 53

aimed.”<sup>85</sup> Further, courts should consider the availability of less restrictive alternatives to alleviate unemployment.<sup>86</sup>

However, before analyzing a privileges and immunities clause claim under the *Toomer* test, a court must first decide whether the non-resident’s right that is discriminated against is a fundamental one.<sup>87</sup> In *Baldwin v. Fish & Game Commission of Montana*, the petitioner asked the Court to decide whether a law requiring greater hunting license fees for non-residents violates the Privileges and Immunities Clause.<sup>88</sup>

The Court’s holding determined that the Privileges and Immunities Clause did not apply because hunting is not a fundamental right covered by the Clause.<sup>89</sup> In other words, the Court created a threshold test for bringing a Privileges and Immunities Clause claim.<sup>90</sup> Accordingly, the aforementioned test was first applied to an Alaskan local hiring law in 1972.<sup>91</sup>

### i. Hicklin v. Orbeck

In 1972, Alaska’s Legislature passed a law named “Local Hire Under State Leases” (“Alaska Hire”).<sup>92</sup> The purpose of Alaska Hire was to alleviate unemployment problems by requiring “all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes, unitization agreements, or any renegotiation of any of the preceding to which the state is a party [included stipulation] requiring the employment of qualified Alaska residents in preference to non-residents.”<sup>93</sup> Five non-Alaskan pipeline workers, however, challenged Alaska Hire as unconstitutional.<sup>94</sup> Specifically, the non-residents claimed that the law infringed upon their right to work.<sup>95</sup>

Based on the tests stated above, the appellants first needed to prove that the right to work was a fundamental one protected by the Privileges and Immunities Clause.<sup>96</sup> In the past, the courts have held that the Privileges and

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<sup>85</sup> *Toomer*, 334 U.S. at 398.

<sup>86</sup> *Id.* at 405-06.

<sup>87</sup> *Baldwin v. Fish & Game Comm’n*, 436 U.S. 361, 377 (1978) (citing *Mont. Outfitters Action Grp. v. Fish & Game Comm’n*, 417 F. Supp. 1005, 1007 (D. Mont. 1976)).

<sup>88</sup> *Baldwin*, 436 U.S. at 372-73.

<sup>89</sup> *Id.* at 388.

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

<sup>91</sup> *See Hicklin*, 437 U.S. at 526.

<sup>92</sup> *Id.* at 520.

<sup>93</sup> *Id.* (quoting ALASKA STAT. ANN. § 38.40.030(a) (1977)).

<sup>94</sup> *Id.* at 520-21.

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

<sup>96</sup> *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (“[T]hose privileges and immunities which are, in their nature, fundamental . . . [include] [t]he right of a citizen of

Immunities Clause “plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business . . .”<sup>97</sup> In other words, the right to work is fundamental and falls squarely within the purview of the Clause’s protections.<sup>98</sup>

Next, the Court analyzed Alaska Hire’s discrimination against non-residents’ right to work under the *Toomer* test.<sup>99</sup> First, the Court held nothing in the record to prove that non-residents were “a peculiar source of evil.”<sup>100</sup> Instead, the evidence in the record:

Indicates that the major cause of Alaska’s high unemployment was not the influx of non[-]residents seeking employment, but rather the fact that a substantial number of Alaska’s jobless residents . . . were unable to secure employment either because of their lack of education and job training or because their geographical remoteness from job opportunities . . . .<sup>101</sup>

Thus, the Court concluded Alaska could not even satisfy the first prong of the *Toomer* test.<sup>102</sup>

The Court, assuming *arguendo* that Alaska did satisfy the first prong, stated it could not satisfy the second prong.<sup>103</sup> The Court reasoned that the “discrimination . . . against non-residents does not bear a substantial relationship to the particular ‘evil’ they are said to present.”<sup>104</sup> The Court opined that Alaska Hire “simply grants all Alaskans, regardless of their employment status, education, or training, a flat employment preference . . . [and is not] more closely tailored.”<sup>105</sup> Thus, “Alaska Hire’s across-the-board grant of job preference to all Alaskan residents” is not permissible.<sup>106</sup>

Likewise, the Court disagreed with Alaska’s alternative argument.<sup>107</sup> The State argued that because the oil and gas which are subjected to Alaska Hire are owned by Alaska, “the privileges and immunities clause [does] not apply, and was never meant to apply to decisions by the states as to how they

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one state to pass through, or to reside in any other state, for purpose of trade, agriculture, professional pursuits, or otherwise . . . .”)

<sup>97</sup> *Hicklin*, 437 U.S. at 525 (quoting *Ward v. Maryland*, 79 U.S. 418, 430 (1871)).

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

<sup>99</sup> *Id.* at 526.

<sup>100</sup> *Id.*

<sup>101</sup> *Hicklin*, 437 U.S. at 526-27.

<sup>102</sup> *Id.* at 526.

<sup>103</sup> *Id.* at 527.

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

<sup>105</sup> *Id.* at 527-28.

<sup>106</sup> *Id.* at 528.

<sup>107</sup> *Hicklin*, 437 U.S. at 528.

## 2022] Constitutionality of Baltimore City’s Local Hiring Ordinance 55

would permit, if at all, the use and distribution of the natural resources which they own . . . ”<sup>108</sup>

Considering the State’s argument, the Court held that the “State’s ownership of the property . . . is a factor[,]” and often a dispositive factor, but in this case, it was not.<sup>109</sup> The Court reasoned that:

Alaska has little or no proprietary interest in much of the activity swept within the ambit of Alaska Hire; and the connection of the State’s oil and gas with much of the covered activity is sufficiently attenuated so this it cannot justifiably be the basis for requiring private employers to discriminate against non[-]residents.<sup>110</sup>

In other words, Alaska Hire’s restrictions dealt with control over employment rather than control over the State’s natural resources.<sup>111</sup>

Although the Court did not explicitly state so, its reasoning does give way to an inference that a challenge to the Privileges and Immunities Clause could be defeated if the State’s natural resources were directly connected to the covered activity.<sup>112</sup> What the Court did explicitly assert, however, was that if the legislature drafted Alaska Hire to “grant[] an employment preference to unemployed residents or to residents enrolled in job-training programs [it] might be permissible.”<sup>113</sup> Thus, the legislature must narrowly tailor Alaska Hire to achieve Alaska’s purpose of quelling local unemployment.<sup>114</sup>

Ultimately, the Court ruled in favor of the non-resident workers and against Alaska, holding that Alaska Hire was unconstitutional under the Privileges and Immunities Clause.<sup>115</sup> Likewise, the Court inferred that Alaska Hire would be invalid pursuant to the Commerce Clause.<sup>116</sup> Which will now be examined.

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

<sup>109</sup> *Id.* at 529.

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

<sup>111</sup> *Id.* at 530.

<sup>112</sup> *Id.* at 528.

<sup>113</sup> *Hicklin*, 437 U.S. at 526.

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

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

<sup>116</sup> *Id.* at 534; The Court further noted that: “[a]lthough appellants raise no Commerce Clause challenge to the Act, the mutually reinforcing relationship between the Privileges and Immunities Clause . . . and the Commerce Clause . . . renders several Commerce Clause decisions appropriate support for our conclusion.” *Id.* at 531-32.

### *B. Commerce Clause*

The Commerce Clause provides Congress with the power “to regulate commerce with foreign nations, among the several states . . . .”<sup>117</sup> Also, “to rescue it from the embarrassing and destructive consequences, resulting from the legislation of so many different States, and to place it under the protection of a uniform law.”<sup>118</sup> In other words, Congress can affirmatively act to regulate commerce.<sup>119</sup>

The Commerce Clause also serves to regulate commerce in another way.<sup>120</sup> If Congress is silent in the area, meaning that federal law does not preempt state law, and the state law places an unreasonable burden on interstate commerce, then the state law violates the Commerce Clause in its dormant state—this legal doctrine has been coined the Dormant Commerce Clause.<sup>121</sup>

The Constitution, however, does not explicitly define “commerce.”<sup>122</sup> Instead, the term has been the subject of judicial interpretation.<sup>123</sup> Beginning in *Gibbons v. Ogden*, the Supreme Court held that commerce broadly covers “every species of commercial intercourse between the United States and foreign nations . . . [and] among the several States.”<sup>124</sup> Essentially, all business dealings are part of a larger interstate commercial transaction.<sup>125</sup>

In *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, the Supreme Court opined that:

[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relationship to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise their control.<sup>126</sup>

Accordingly, this interpretation took the once narrow *Gibbons* definition of commerce and expanded it to include any activity that has a substantial

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<sup>117</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>118</sup> *Gibbons v. Ogden*, 22 U.S. (9. Wheat.) 1, 11 (1824).

<sup>119</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>120</sup> *Gibbons*, 22 U.S. at 160.

<sup>121</sup> *Id.* at 189; *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245, 252 (1829).

<sup>122</sup> *Gibbons*, 22 U.S. at 189.

<sup>123</sup> *See id.* at 2; *N.L.R.B. v. Jones & Laughlin*, 301 U.S. 1, 621 (1973); *Wickard v. Filburn*, 317 U.S. 111, 120-24 (1942); *U.S. v. Lopez*, 514 U.S. 549, 552-58 (1995).

<sup>124</sup> *Gibbons*, 22 U.S. at 193-94.

<sup>125</sup> *Id.* at 194.

<sup>126</sup> *Jones & Laughlin Steel Corp.*, 301 U.S. at 37.

## 2022] Constitutionality of Baltimore City's Local Hiring Ordinance 57

relationship to interstate commerce, even if that activity is an intrastate one.<sup>127</sup>

The Court in *Wickard v. Filburn* went even further and held that an intrastate activity, even when it had an inconsequential effect on interstate commerce, was subject to the Commerce Clause so long as the activity had a cumulative effect on interstate commerce.<sup>128</sup> In other words, if the intrastate activity viewed in the aggregate influenced interstate commerce, it was subject to the Clause.<sup>129</sup>

The Supreme Court, however, began tightening the definition of commerce, starting with *United States v. Lopez*.<sup>130</sup> In *Lopez*, the respondent argued that the government had no authority to regulate firearms in local school zones.<sup>131</sup> On the other hand, the State argued that possessing a firearm around schools would lead to violent crime and affect economic conditions.<sup>132</sup> Ultimately, the Court held that the criminal statute banning guns in a school zone:

Is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our case upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.<sup>133</sup>

Thus, holding that the criminal statute has nothing to do with any economic activity.<sup>134</sup>

The Court, nevertheless, returned to its broader interpretation of “commerce” in *Gonzalez v. Raich*.<sup>135</sup> In *Gonzalez*, the respondents were medical marijuana users who grew their own cannabis plants.<sup>136</sup> Their plants, however, were destroyed by Drug Enforcement Agents under the Controlled

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<sup>127</sup> *Id.*

<sup>128</sup> *Wickard*, 317 U.S. at 127-29.

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

<sup>130</sup> *See Lopez*, 514 U.S. at 567-68.

<sup>131</sup> *Id.* at 552.

<sup>132</sup> *Id.* at 563.

<sup>133</sup> *Id.* at 561.

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

<sup>135</sup> *Gonzalez v. Raich*, 545 U.S. 1, 33 (2005).

<sup>136</sup> *Id.* at 6-7.

Substances Act.<sup>137</sup> The respondents filed suit seeking injunctive relief claiming that the Controlled Substance Act did not prevent them from growing cannabis for their own medical consumption.<sup>138</sup>

Relying on the Commerce Clause, the Court held that the Controlled Substance Act could prevent the personal growing of marijuana because the act had a substantial effect on interstate commerce.<sup>139</sup> The Court reasoned that, like *Wickard*, the respondents, although cultivating marijuana for personal use, the marijuana was still a commodity in an established, albeit illegal, interstate market.<sup>140</sup> And therefore, “Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would [] affect price and market conditions.”<sup>141</sup>

However, a state or local government can escape prosecution under the Commerce Clause if they can prove they are acting as a market participant.<sup>142</sup> First recognized in *Hughes v. Alexandria Scrap Corp.*, the Court held that “[n]othing in the purpose of animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.”<sup>143</sup>

This judicially created market participant exception simply means that States do not violate the Commerce Clause when favoring their own residents when buying and selling goods or services.<sup>144</sup> Accordingly, the Court has subsequently held that local hiring requirements are protected under the market participant exception.<sup>145</sup> Which is exemplified in the following Supreme Court case.

### **i. White v. Massachusetts Council of Construction Employers**

In 1983, Boston’s Mayor signed an executive order that “set employment standards for Boston residents, people of color, and women construction workers” for projects over 100,000 square feet.<sup>146</sup> The ordinance set Boston’s local hiring requirements as follows:

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<sup>137</sup> *Id.* at 7.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 17–19.

<sup>140</sup> *Gonzalez*, 545 U.S. at 19 (citing *Wickard*, 317 U.S. at 127-129).

<sup>141</sup> *Gonzalez*, 545 U.S. at 19.

<sup>142</sup> *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976).

<sup>143</sup> *Id.*

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

<sup>145</sup> *Id.* at 809-10.

<sup>146</sup> *Boston Residents Jobs Policy on Construction Projects*, BOS. EMP. COMM’N, (last updated Sept. 21, 2022) <https://www.boston.gov/boston-residents-jobs-policy-construction-projects> [hereinafter CITY OF BOSTON].

## 2022] Constitutionality of Baltimore City’s Local Hiring Ordinance 59

At least 50 percent of the total work hours in each trade must go to Boston residents. At least 25 percent of the total employee work hours in each trade must go to people of color. And at least 10 percent of the total employee work hours in each trade must go to women.<sup>147</sup>

The Council of Construction Employers challenged the 1983 ordinance as unconstitutional under the Commerce Clause.<sup>148</sup> Specifically, the Council argued that the local hiring ordinance hindered interstate commerce and encroached upon Congress's exclusive commerce powers.<sup>149</sup> On the other hand, the City of Boston argued that the ordinance was exempt from the purview of the Commerce Clause under the market participant exception.<sup>150</sup>

In *White v. Massachusetts Council of Construction Employers, Inc.*, the Court reviewing the market participant exception noted that “when a state or local government enters the market as a participant, it is not subject to the restraints of the Commerce Clause.”<sup>151</sup> Within that frame of reference, the Court applied the exception to the case *sub judice*.<sup>152</sup>

The Court ultimately held that “insofar as the city expended only its own funds in entering into construction contracts for public projects, it was a market participant and entitled to be treated as such under the rule of *Hughes v. Alexandria Scrap Corp.*”<sup>153</sup>

Although the City of Boston was using funds obtained from federal revitalization programs, the local hiring requirements were “affirmatively sanctioned by the pertinent regulations of those [federal] programs.”<sup>154</sup> In other words, the City of Boston was “specifically authorized by Congress” to

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<sup>147</sup> *Id.*; see BOS., MASS., MUN. CODE § 8-9.1 (2021). In 2017 the ordinance was amended, and new local hire requirements for projects over 50,000 square feet were as follows: at least 51 percent of the total work hours of journey people and 51 percent of the total work hours of apprentices in each trade must go to Boston residents; at least 40 percent of the total work hours of journey people and 40 percent of the total work hours of apprentices in each trade must go to people of color; and at least 12 percent of total work hours of journey people and 12 percent of the total work hours of apprentices in each trade must go to women. CITY OF BOSTON, *supra* note 145.

<sup>148</sup> *White v. Mass. Council of Constr. Emps., Inc.*, 460 U.S. 204, 206 (1983).

<sup>149</sup> *Id.* at 208–09.

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

<sup>151</sup> *White*, 460 U.S. at 208.

<sup>152</sup> *Id.* at 214.

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

<sup>154</sup> *Id.* at 215.

act how they did, and therefore “not subject to the Commerce Clause even if it interferes with interstate commerce.”<sup>155</sup> Thus, the Court held that the ordinance was constitutional.<sup>156</sup>

It is important to note, however, that the Council of Construction did ask the Court to decide whether the executive order violated the Privileges and Immunities Clause.<sup>157</sup> But, in a footnote, the Court observed that the issue “has not been, to any great extent, briefed or argued in this Court[,] [w]e [do] not grant certiorari on the issue and remand without passing on its merits.”<sup>158</sup> Nevertheless, the Court did allude to the notion that if the question were properly before them, it would have found the executive order to be “a violation of [the Privileges and Immunities Clause].”<sup>159</sup>

With the Privileges and Immunities Clause and Commerce Clause explained, it is time to apply them to Baltimore City’s local hiring ordinance.

## V. CONSTITUTIONALITY OF BALTIMORE’S LOCAL HIRING ORDINANCE

Baltimore City’s Law Department has previously stated that unless the City can show that it suffers from high unemployment and the employment of non-residents is the cause of the problem, the ordinance

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<sup>155</sup> *Id.* at 213.

<sup>156</sup> *White*, 460 U.S. at 214.

<sup>157</sup> *Id.* at 214, n.12.

<sup>158</sup> *Id.*

<sup>159</sup> *White*, 460 U.S. at 205 n.1. Just one year later, in *United Building & Construction Trades Council v. Mayor of Camden*, 465 U.S. 208 (1984), the Court rejected a similar hiring preference law. The ordinance allowed for the State Treasurer to establish hiring requirements. *Id.* at 210. Additionally, it permitted municipalities to submit local hiring plans to the treasurer for approval. *Id.* Subsequently, Camden submitted a plan which was approved after conducting a “brief administrative proceeding.” *Id.* at 212. The *Camden* Court held the Commerce Clause did not prevent Camden from pressuring private employers to hire Camden residents, but [the] ordinance implicated [the] Privileges and Immunities Clause. See *United Building & Construction Trades Council*, 465 U.S. 208. This is particularly interesting because *White* appeared to uphold preferences just a year earlier. *Id.* at 214. The Supreme Judicial Court of Massachusetts held that the ordinance in *White* violated the Privileges and Immunities Clause, and Camden’s ordinance was very similar to Boston’s. See *Massachusetts Council of Constr. Employers v. Mayor of Boston*, 425 N.E. 2d 346, 352-53 (Mass. 1981) (holding Mayor’s order violated Privileges and Immunities Clause), *rev’d on other grounds*, 460 U.S. 204 (1983). Yet, the Supreme Court did not consider the Privileges and Immunities Clause claim. *White*, 460 U.S. at 214 n.12. Thus, prior to the Camden decision, the market participant exception seemed to provide “blanket immunity” for preferences similar to those in *White*. See Michael J. Polelle, *A Critique of the Market Participant Exception*, 15 WHITTIER L. REV. 647, 677-82 (1994) (noting that lower courts refused to make factual determinations believing *White* resolved issue); *Reynolds*, *supra* note 4.



## 2022] Constitutionality of Baltimore City’s Local Hiring Ordinance 61

would most likely violate the Privileges and Immunities Clause.<sup>160</sup> Although the Law Department never explicitly stated that the ordinance implicated the Commerce Clause, research has shown that the two are not mutually exclusive and are often brought together.<sup>161</sup> Thus, Baltimore City’s local hiring ordinance must withstand scrutiny under the Privileges and Immunities Clause and the Commerce Clause.<sup>162</sup>

### *A. Privileges and Immunities Clause*

The applicable test that the ordinance must pass when challenged under the Privileges and Immunities Clause comes from the Supreme Court’s ruling in *Baldwin* and *Toomer*.<sup>163</sup>

As previously noted, *Baldwin* establishes that a challenging party must first show that the local hiring law it purports to be unconstitutional infringes on a fundamental right.<sup>164</sup> Baltimore City’s local hiring ordinance states that “at least 51% of the new jobs required to complete the contract or project must be filled by Baltimore City residents.”<sup>165</sup> Simply put, hiring a Baltimore City resident deprives a non-Baltimore City resident of the job and their right to work. Accordingly, a reviewing court would have to determine whether this right to work is fundamental for the purposes of the Privileges and Immunities Clause.<sup>166</sup>

In *Corfield v. Coryell*, the Circuit Court for the Eastern District of Pennsylvania established that the Privileges and Immunities Clause are fundamental rights in their nature, including the right of a citizen to pass through other states for professional purposes, such as work.<sup>167</sup> Here, Baltimore City’s local hiring ordinance, stated in the negative, would stop up to 49 percent of out-of-state workers on covered construction projects from being hired.<sup>168</sup> Therefore, a reviewing court would most likely find Baltimore City’s local hiring ordinance infringing on a person’s right to pass through Baltimore City for work.<sup>169</sup>

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<sup>160</sup> *Baltimore Noble but Flawed Hiring Idea*, *supra* note 17.

<sup>161</sup> Hirsch, *supra* note 1.

<sup>162</sup> *See Day*, *supra* note 73.

<sup>163</sup> *Baldwin*, 436 U.S. at 405; *Toomer*, 334 U.S. at 396.

<sup>164</sup> *Baldwin*, 436 U.S. at 377.

<sup>165</sup> BALT., MD., CODE art. 5, § 27-6 (2022).

<sup>166</sup> *See Hicklin*, 437 U.S. at 520-21.

<sup>167</sup> *Corfield*, 6 F. Cas. 546 at 551.

<sup>168</sup> *See BALT., MD., CODE art. 5, § 26-6* (2022).

<sup>169</sup> *See Corfield*, 6 F. Cas. at 551-52.

Next, a reviewing court would have to analyze Baltimore City's local hiring ordinance in the context of the two-part *Toomer* test.<sup>170</sup> First, Baltimore City would need to be a "substantial reason for" hiring 51% of Baltimore City residents on public works projects.<sup>171</sup> And second, the discrimination practiced against non[-]residents bears a substantial relationship to the City's goal of lowering unemployment.<sup>172</sup>

In addressing the first prong, courts have already deemed a state's interest in upgrading human resources and reducing unemployment as a substantial one.<sup>173</sup> Therefore, this prong is most likely satisfied.<sup>174</sup>

The second prong, however, will be more difficult for Baltimore City's local hiring law to satisfy. To overcome this prong, the City must prove that the non-residents are a "peculiar source of evil."<sup>175</sup> And, there are no less restrictive alternatives.<sup>176</sup>

Regarding the first second prong, six Baltimore City public schools, five of which were high schools, did not have a single student who scored proficient in math or reading.<sup>177</sup> Furthermore, a 2009 study noted that over 700,000 Baltimore City residents (200,000 adults) were illiterate.<sup>178</sup> Thus, Baltimore City residents' inadequate literacy and math skills lead to limited employment opportunities.<sup>179</sup> Thus, just as the Court in *Hicklin* found, a reviewing court would likely find that unemployment is more closely related to lack of education than the employment of non-residents.<sup>180</sup>

Nevertheless, Baltimore City's local hiring law is sweepingly broad.<sup>181</sup> The law gives the same preference to highly skilled and educated Baltimore City residents as it does to unskilled and routinely unemployed

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<sup>170</sup> *Toomer*, 334 U.S. at 396.

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

<sup>172</sup> *Id.*

<sup>173</sup> *See Corfield*, 6 F. Cas. at 551–52.

<sup>174</sup> *See id.*

<sup>175</sup> *Id.* at 398.

<sup>176</sup> *Id.* at 398–99.

<sup>177</sup> Chris Papst, *6 Baltimore Schools, No Students Proficient in State Tests*, FOX 45 NEWS BALT. (May 17, 2017), <https://foxbaltimore.com/news/project-baltimore/6-baltimore-schools-no-students-proficient-in-state-tests>.

<sup>178</sup> Autumn A. Arnett, *Several Baltimore Schools Report 0 Students Proficient in Math, Reading*, K-12 DIVE (May 19, 2017), <https://www.educationdive.com/news/several-baltimore-schools-report-0-students-proficient-in-math-reading/443155/>.

<sup>179</sup> Mara Braverman & Martha Holleman, *Baltimore's Unemployment Problem*, BALT. SUN (Jan. 15, 2020), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0115-baltimore-unemployment-20200115-urcqmi467vcqnlw4usgtonzwja-story.html>.

<sup>180</sup> *See Hicklin*, 437 U.S. at 526–27. Although, the City could urge that education is not a barrier to construction jobs and therefore should not be considered, it is likely a meritless argument; BALT., MD., CODE art. 5, § 27-6 (2022).

<sup>181</sup> BALT., MD., CODE art. 5, § 27-6 (2022).

## 2022] Constitutionality of Baltimore City’s Local Hiring Ordinance 63

residents.<sup>182</sup> Moreover, it is not the least restrictive means of lowering unemployment rates.<sup>183</sup>

In a memo from Baltimore City’s Law Department to the City Council, the Law Department noted, in part, that the City can increase local hiring by:

- Creating job linkage and training programs
- Focusing the hiring preference on income level rather than residency in a way that satisfies the Equal Protection Clause of the United States Constitution
- Focusing on those who are unemployed or have graduated from job training programs in a way that satisfies the Equal Protection Clause of the United States Constitution<sup>184</sup>

In sum, although the ordinance was passed with good intentions, it is not narrowly tailored, nor does it provide for the least restrictive means to lower unemployment; therefore, the ordinance would most likely be deemed invalid under the Privileges and Immunities Clause.<sup>185</sup>

### ***B. Dormant Commerce Clause***

As previously noted, the Dormant Commerce Clause prevents states or local governments from placing a discriminatory or undue burden on interstate commerce.<sup>186</sup> Here, Baltimore City’s local hiring law states that “at least 51% of the new jobs required to complete the contract or project must be filled by Baltimore City residents.”<sup>187</sup> By nature, the law stops non-resident workers from working in Baltimore City, restricting their movement.<sup>188</sup>

As the Court in *Edwards v. California* held, the movement of persons is commerce, and restricting it is a burden on interstate commerce.<sup>189</sup> Furthermore, restricting the flow of labor has been deemed a burden on

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

<sup>183</sup> Memorandum from the Baltimore City L. Dep’t to the Baltimore City Council (Jan. 9, 2013) [hereinafter Memorandum].

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

<sup>185</sup> See *Toomer*, 334 U.S. at 398-99.

<sup>186</sup> See *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

<sup>187</sup> BALT., MD., CODE art. 5, § 27-6 (2022).

<sup>188</sup> *Id.*

<sup>189</sup> *Edwards v. California*, 314 U.S. 160, 172 (1941).

interstate commerce.<sup>190</sup> Thus, Baltimore City's local hiring law violates the Dormant Commerce Clause.<sup>191</sup>

If local law violates the Dormant Commerce Clause, it can be analyzed in two different ways.<sup>192</sup> If a law is facially discriminatory it "invoke[s] the strictest scrutiny of any purported legitimate local purpose and of the absence of non-discriminatory alternatives."<sup>193</sup> If, however, the law burdens interstate commerce in a non-discriminatory way, then the law is subject to a balancing test.<sup>194</sup> Often referred to as the *Pike* balancing test, a local law "will be upheld unless the burden imposed on [interstate commerce] is clearly excessive in relation to the putative local benefit."<sup>195</sup>

Baltimore City is, nevertheless, unlikely to have to prove validity under either of the two tests.<sup>196</sup> The ordinance will be protected under the judicially created market participant exception.<sup>197</sup> The ordinance allows Baltimore City to act as a market participant by buying and selling goods and services in the form of labor.<sup>198</sup>

Although Baltimore City's ordinance provides that portions of the funding may come from federal programs, this is not enough to remove it from the purview of the market participant exception.<sup>199</sup> As in *White*, Baltimore City's use of federal funds does not infringe on the Commerce Clause since Congress sanctioned the grants.<sup>200</sup> Thus, the ordinance is safe from invalidation under the Commerce Clause due to the market participant exception.<sup>201</sup>

## VI. CONCLUSION

Baltimore City's Law Department was correct in stating that the City's local hiring law was unconstitutional.<sup>202</sup> The ordinance's residential preference failed on one of the two constitutionality issues it raised.<sup>203</sup> First,

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<sup>190</sup> *Brown v. Anderson*, 202 F. Supp. 96, 103 (D. Alaska 1941).

<sup>191</sup> *Compare id.*, with BALT., MD., CODE art. 5, § 27-6 (2022).

<sup>192</sup> *See Hughes*, 441 U.S. at 337; *see also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>193</sup> *Hughes*, 441 U.S. at 337.

<sup>194</sup> *Pike*, 397 U.S. at 142.

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

<sup>196</sup> *Hughes*, 426 U.S. at 810.

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

<sup>198</sup> *Id.* at 808-09; BALT. MD., CODE art. 5, § 27-2 (2022).

<sup>199</sup> *White*, 426 U.S. at 213; BALT., MD., CODE art. 5, § 27-2 (2022).

<sup>200</sup> *Id.*

<sup>201</sup> *White*, 426 U.S. at 213; BALT., MD., CODE art. 5, § 27-2 (2022).

<sup>202</sup> *Broadwater*, *supra* note 17.

<sup>203</sup> *See* discussion *supra* Part V.

## 2022] Constitutionality of Baltimore City's Local Hiring Ordinance 65

it most likely does not violate the Commerce Clause, specifically, the Dormant Commerce Clause. Baltimore City, by expending its own funds on city construction projects, regardless of whether or not it uses federal grants, is acting as a market participant.<sup>204</sup> By acting as a market participant, Baltimore City has escaped scrutiny under the Commerce Clause and is free to employ the local hiring law in that regard.<sup>205</sup>

Conversely, the ordinance most likely does violate the Privileges and Immunities Clause. While lowering the unemployment rate has been historically found to constitute a substantial purpose, it does not pass prong two for the purpose of the *Toomer* test.<sup>206</sup>

Baltimore City has shown that the City struggles when it comes to the education of its residents.<sup>207</sup> In turn, studies have shown that poor education equates to poor job opportunities and high unemployment in the uneducated population.<sup>208</sup> Therefore, it is unlikely that Baltimore will be able to prove that hiring non-residents is the reason for the City's high unemployment rate. Furthermore, in writing the ordinance, the legislature failed to tailor it narrowly.<sup>209</sup> In other words, the statute is too broad, ultimately hurting Baltimore City's argument if brought to court.<sup>210</sup>

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<sup>204</sup> See *White*, 460 U.S. at 214-15 (citing *Hughes*, 426 U.S. at 794; BALT., MD., CODE art. 5, § 27-2 (2022)).

<sup>205</sup> *White*, 460 U.S. at 214-15.

<sup>206</sup> See Memorandum *supra* note 182; see *Piper*, 470 U.S. at 285 (citing *Toomer*, 344 U.S. at 398-99).

<sup>207</sup> See *Braverman & Holleman*, *supra* note 178.

<sup>208</sup> See *id.*; see generally Timothy E. Zimmer, *The Importance of Education for the Unemployed*, 91 IND. BUS. REV. 9, 9-16 (2016).

<sup>209</sup> See *Toomer*, 344 U.S. at 398-99.

<sup>210</sup> See *Hicklin*, 437 U.S. at 527-28.

## COMMENT

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### ADDRESSING PARENTAL DENIAL OF GENDER DYSPHORIA TREATMENT UNDER MARYLAND'S CHILD ABUSE AND NEGLECT LAWS\*

*By: Olga Petrovskikh\*\**

#### I. INTRODUCTION

On December 18, 2014, transgender teenager Leelah Alcorn died by suicide.<sup>1</sup> The suicide note scheduled to post on her Tumblr blog after her death spawned a viral awareness campaign and a petition calling for legislators to pass a law in her name banning conversion therapy.<sup>2</sup> A few months before her death, she posted a cry for help on Reddit titled “Is this considered abuse?”<sup>3</sup> In her post, Alcorn detailed the derogatory way her parents spoke to her after they found out about her gender identity and the toll it took on her psyche.<sup>4</sup> Instead of allowing her to see a gender therapist, her parents took her to conversion therapy, which worsened her depression

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\* This comment discusses self-harm, suicide, abuse, and neglect, especially pertaining to children. If you are experiencing a mental health crisis, please call 988.

\*\* Olga Petrovskikh: J.D. Candidate, May 2023, University of Baltimore School of Law; B.A. & B.S., 2020, University of Maryland, College Park. My gratitude to the 2021-22 and present *Law Forum* staff for their editorial assistance. I would like to thank my advisor, Professor Odeana Neal, for her unparalleled guidance throughout the entire writing process, as well as Professor Shanta Trivedi and Ms. Kinda E. France, Esq., for their invaluable insights into family law. Special thank you goes to my friends Jamie Weber, Irene Angelos, Ariana Gladstone, and Anushka Gerald for their scientific and emotional support (and JSTOR access).

<sup>1</sup> Maura Johnston, *Transgender Teen Leelah Alcorn: ‘My Death Needs to Mean Something’*, THE BOS. GLOBE (Dec. 31, 2014), <http://www.bostonglobe.com/lifestyle/2014/12/31/transgender-teen-leelah-alcorn-death-needs-mean-something/4hw6uPd8NtjIbn8kAdyAbM/story.html>.

<sup>2</sup> *Id.*; Zoe Mintz, *Leelah Alcorn’s Transgender Suicide Sparks ‘Leelah’s Law’ Petition to Ban Conversion Therapy*, INT’L BUS. TIMES (Dec. 31, 2014), <https://www.ibtimes.com/leelah-alcorns-transgender-suicide-sparks-leelahs-law-petition-ban-conversion-therapy-1771324>.

<sup>3</sup> Leelah Alcorn (u/nostalgia princess), *Is This Considered Abuse?*, REDDIT (Oct. 28, 2014), [https://www.reddit.com/r/asktransgender/comments/2km6yt/is\\_this\\_considered\\_abuse/](https://www.reddit.com/r/asktransgender/comments/2km6yt/is_this_considered_abuse/); see also *In re T.*, 115 Misc.2d 161, 453 N.Y.S.2d 590 (Fam. Ct. 1982) (holding that a child’s father abused him by repeatedly calling him homophobic slurs, and that the child’s mother abused him by permitting the abuse to occur, thereby subjecting him to a substantial risk of harm to his emotional health).

<sup>4</sup> *Id.*

## 2022] Addressing Parental Denial of Gender Dysphoria Treatment 67

despite the increasing dosages of anti-depressant she took.<sup>5</sup> Alcorn eventually came out as gay in school, “hoping to ease [her] friends into the whole LGBT<sup>6</sup> thing before [she] came out as trans.”<sup>7</sup> However, her parents reacted to her public coming out by unenrolling her from school and isolating her from her peers.<sup>8</sup> Alcorn’s parents eventually permitted her to speak with her friends again, but she discovered that five months without communication had significantly weakened her friendships, furthering her isolation.<sup>9</sup> Alcorn concluded:

The way I feel when I talk to my parents and the way my parents treat me like I'm subhuman and that my feelings aren't valid all make me think that I'm going through abuse, but I don't know if it counts or not. I'm not physically beaten or hit, but I feel like this is a different kind of abuse . . . . Please help me, I don't know what I should do and I can't take much more of this. I don't know if my problem is serious enough that I can contact authorities for help . . . I'm stuck.<sup>10</sup>

From the comments on her thread, Alcorn reached the consensus that her parents’ actions did not constitute abuse.<sup>11</sup> Other commenters assured her of helplines and alternative accommodations for LGBT youth.<sup>12</sup> However, Alcorn took her life two months later.<sup>13</sup>

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<sup>5</sup> *Id.*; Leelah Alcorn (u/nostalgia princess), *I'm Sure Someone On Here Can Convince Me Not to Kill Myself*, REDDIT (Dec. 2014), [https://www.reddit.com/r/SuicideWatch/comments/2lt3cf/im\\_sure\\_someone\\_on\\_here\\_can\\_convince\\_me\\_not\\_to/](https://www.reddit.com/r/SuicideWatch/comments/2lt3cf/im_sure_someone_on_here_can_convince_me_not_to/) [[https://web.archive.org/web/20150103015641https://www.reddit.com/r/SuicideWatch/comments/2lt3cf/im\\_sure\\_someone\\_on\\_here\\_can\\_convince\\_me\\_not\\_to/](https://web.archive.org/web/20150103015641https://www.reddit.com/r/SuicideWatch/comments/2lt3cf/im_sure_someone_on_here_can_convince_me_not_to/)]. Conversion therapy is a set of inhumane practices, not based in science or medicine, that aim “to change or alter an individual's sexual orientation or gender identity.” Djordje Alempijevic et al., *Statement on Conversion Therapy*, 74 J. FORENSIC & LEGAL MED. at 1, 2 (May 2020).

<sup>6</sup> See generally Mike C. Parent et al., *Approaches to Research on Intersectionality: Perspectives on Gender, LGBT, and Racial/Ethnic Identities*, SPRINGER SCI. & BUS. MEDIA (2013) (reflecting on the intersection of gender, race, and LGBT identities).

<sup>7</sup> Alcorn, *supra* note 3.

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

<sup>9</sup> *Id.* (“It's like [my parents] want me to have enough social interaction so I won't forget how to interact with humans, but they don't want me to actually have healthy relationships with people.”).

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

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

<sup>12</sup> See, e.g., u/PenguinbananaKaoru, *Is This Considered Abuse?*, REDDIT (Oct. 28, 2014), [https://www.reddit.com/r/asktransgender/comments/2km6yt/is\\_this\\_considered\\_abuse/clmpk68/?utm\\_source=reddit&utm\\_medium=web2x&context=3](https://www.reddit.com/r/asktransgender/comments/2km6yt/is_this_considered_abuse/clmpk68/?utm_source=reddit&utm_medium=web2x&context=3).

<sup>13</sup> Johnston, *supra* note 1.

For all the activism Alcorn's suicide note engendered, there is still no clear answer to her question.<sup>14</sup> Alcorn sought help through the law, but the law does not guarantee respite for transgender ("trans") children suffering from gender dysphoria in unsupportive households.<sup>15</sup> This comment will examine how parental hostility to gender dysphoric children should fit under civil and potentially criminal child abuse and neglect laws. Though many state child abuse and neglect laws are similarly broad, for specificity, this comment will focus on Maryland law.<sup>16</sup> Part II will examine the scope and origins of parental authority and the state's limitations on parental powers.<sup>17</sup> Part III will review the effects of untreated gender dysphoria in children, circumstances that worsen it, and how laws and courts currently regard transgender children.<sup>18</sup> Finally, Part IV will argue for the classification of parental failure to treat a child's gender dysphoria as child neglect and the active parental interference with a child's treatment of gender dysphoria as child abuse under Maryland law.

## II. HISTORICAL DEVELOPMENT

U.S. law recognizes children as a vulnerable population that lacks the capacity to make difficult decisions or independently care for themselves.<sup>19</sup> The law prioritizes the rights of parents to raise and care for their children over independently recognizing children's rights based on the idea that children's rights are heavily intertwined with parental rights.<sup>20</sup> Rather than centering the state's interest in protecting a vulnerable population, the focus on parental rights centers on protecting parental interests in raising children from undue intervention by the state.<sup>21</sup> Because the presumption that "fit" parents act in their children's best interests, the centering of parental interests

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<sup>14</sup> See, e.g., *id.*; Nico Lang, *Six Ohio Cities Have Now Banned Conversion Therapy Since Leelah Alcorn's Death*, INTO (Oct. 17, 2018), <https://www.intomore.com/impact/six-ohio-cities-have-now-banned-conversion-therapy-since-leelah-alcorns-death/>.

<sup>15</sup> See, e.g., U.S. Dept. of Health and Human Services, *Children's Bureau, Definitions of Child Abuse and Neglect*, CHILD WELFARE INFO. GATEWAY (2019).

<sup>16</sup> See *id.*

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

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

<sup>19</sup> *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions.").

<sup>20</sup> *In re Yve S.*, 373 Md. 551, 571, 819 A.2d 1030, 1042 (2003) ("[T]he best interests of the child standard embraces a strong presumption that the child's best interests are served by maintaining parental rights."); see also Samantha Godwin, *Against Parental Rights*, 47 COLUM. HUM. RTS. L. REV. 1, 7 (2015).

<sup>21</sup> See, e.g., *Troxel v. Granville*, 530 U.S. 57, 94 (2000).



theoretically serves to protect children.<sup>22</sup> Consequently, to protect parental autonomy and promote diversity of upbringing, U.S. law endows parents with the right to raise their children as they see fit.<sup>23</sup> To have custody over a child means having the right to rear them under a particular religion, consent to their medical treatments, choose their education and upbringing, and the right to their earnings.<sup>24</sup> The totality of these rights enables parents to make virtually every decision for their children.<sup>25</sup> The presumption under which this approach operates is not always true: fit parents do not always know what actions are in the best interests of their children or prioritize those interests.<sup>26</sup> Parents may honestly believe they act in their children's best interests when they act against those interests.<sup>27</sup> Critics of the considerable powers and deference that U.S. law provides to parents have highlighted the superficial evolution of parental rights from a subset of its ancient predecessor, property rights.<sup>28</sup> Regardless, the Supreme Court has recognized the right to parent as a fundamental, unenumerated right under the U.S. Constitution.<sup>29</sup>

### *A. The Right to Parent Under the Constitution*

Several sections of the Constitution — most prominently the Due Process Clause of the Constitution's Fourteenth Amendment — support the right to parent.<sup>30</sup> Part A.i of this article provides an overview of some of the Supreme Court cases that have established parental powers as a

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<sup>22</sup> *Parham*, 442 U.S. at 602 (“[H]istorically it [the law’s] concept of the family has recognized that natural bonds of affection lead parents to act in the best interests of their children.”).

<sup>23</sup> Elizabeth Bartholet, *Ratification by the United States of the Convention on the Rights of the Child: Pros and Cons from a Child’s Rights*, 633.1 ANNALS AM. ACAD. POL. & SOC. SCI. 80, 86 (2011) (“These limits on state power are justified based on assumptions that parents will be likely to protect children’s best interests, beliefs that parental autonomy will promote healthy diversity, and concerns about the dangers of undue state intervention.”).

<sup>24</sup> 59 AM. JUR. 2D *Parent and Child* § 26 (2012) (“Custody embraces the sum of parental rights with respect to the rearing of a child, including his or her care. It includes the right to the child’s services and earnings and the right to direct his or her activities and make decisions regarding his or her care and control, education, health, and religion.”).

<sup>25</sup> *Id.*; see Ann McNary, *Consent to Treatment of Minors*, 11.3-4 INNOVATIONS CLINICAL NEUROSCIENCE 43 (2014); but see Nat’l Dist. Att’ys Assoc., *Minor Consent to Medical Treatment Laws* (listing exceptions to the parental consent requirement).

<sup>26</sup> See Maura Priest, *Transgender Children and The Right to Transition: Medical Ethics When Parents Mean Well But Cause Harm*, 19(2) AM. J. BIOETHICS, 45, 48 (2019).

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

<sup>28</sup> *Id.* at 31-32.

<sup>29</sup> See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Stanley v. Illinois*, 405 U.S. 645 (1972); U.S. CONST. amend. XIV.

<sup>30</sup> See *Meyer*, 262 U.S. 390.

constitutionally protected right.<sup>31</sup> Part A.ii will then address Supreme Court cases that have limited that right.<sup>32</sup>

### i. Constitutionally Protected Parental Powers

*Meyer v. Nebraska* was one of the first cases where the Court recognized substantive due process for civil liberties.<sup>33</sup> When a schoolteacher was convicted of violating a Nebraskan law that prohibited teaching foreign languages to children below a particular grade,<sup>34</sup> the Supreme Court struck down the law as unconstitutional on the ground that the Fourteenth Amendment guaranteed the right of the individual “to engage in any of the common occupations of life,” including the right to “bring up children.”<sup>35</sup> The Court held that parents, not the state, have the power to control their children’s education and the right to engage teachers in their children’s education.<sup>36</sup> It employed an unspecified heightened standard of review in determining whether the statute infringed on this due process right.<sup>37</sup> While the Court recognized the state’s interest in promoting patriotism in a post-World War I context, it nonetheless held that the statute’s mechanism of preventing children from growing up without English as a first language was not reasonably related to that goal, thus infringing on the fundamental rights of parents to raise and educate their children.<sup>38</sup>

This right was again recognized by the Supreme Court in *Pierce v. Society of Sisters*, in which the Court struck down a state law mandating

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<sup>31</sup> See *infra* Part II.A.i.

<sup>32</sup> See *infra* Part II.A.ii.

<sup>33</sup> *Meyer*, 262 U.S. 390.

<sup>34</sup> *Id.* at 396.

<sup>35</sup> *Id.* at 399.

<sup>36</sup> *Id.* at 400 (“[The teacher’s] right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.”).

<sup>37</sup> Heather M. Good, “*The Forgotten Child of Our Constitution*”: *The Parental Free Exercise Right to Direct the Education and Religious Upbringing of Children*, 54 EMORY L.J. 641, 647 (2005) (“While the Court did use the ‘reasonable relation’ language, it is clear that the rational basis test, as understood today, was not used in this case. Under the Court’s current rational basis test, the statute at issue in *Meyer* would most likely have been upheld. It seems the Court applied an unspecified form of heightened scrutiny - either intermediate scrutiny or strict scrutiny. The balancing test the Court used favored the fundamental right over the state interest.”); Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127, 129 (2018) (While the Supreme Court has classified the right to parent as a fundamental right, it has never provided a consistent level of scrutiny for the review of legal restrictions on parental rights.).

<sup>38</sup> *Meyer*, 262 U.S. at 401 (“Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution — a desirable end cannot be promoted by prohibited means.”).

## 2022] Addressing Parental Denial of Gender Dysphoria Treatment 71

public education because it “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>39</sup> In emphasizing the protection of parental rights from the state, the Court noted, “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>40</sup> Unlike parental rights, which the Constitution protects, parental duty must be defined by statute.<sup>41</sup>

The Supreme Court further clarified the rationale behind parental rights in *Stanley v. Illinois*, where it struck down an Illinois statute that de facto classified unwed fathers as unfit parents.<sup>42</sup> The Court characterized the parental right to conceive and raise children as a fundamental civil right “far more precious . . . than property rights.”<sup>43</sup> The Court recognized the “integrity of the family unit” as a right protected under the Fourteenth, Ninth, and First Amendments, and that by denying the father a hearing on his paternal qualifications, the statute denied him equal protection of the law.<sup>44</sup> Additionally, the Court held that the statute did not accomplish the state’s goal of protecting the welfare of illegitimate children.<sup>45</sup> It emphasized: “the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”<sup>46</sup> However, the Supreme Court has qualified that parental rights are not absolute.<sup>47</sup>

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<sup>39</sup> *Pierce*, 268 U.S. at 543-35.

<sup>40</sup> *Id.* at 535; However, many legal authorities take issue with this passage, as “the federal courts tend generally to treat *Pierce* like a quirky aged relative who, although she is still invited to Thanksgiving dinner, is watched nervously for fear she will embarrass the family and start tossing mashed potatoes.” Symposium, *Taking Pierce Seriously: The Family, Religious Education, And Harm to Children*, 76 NOTRE DAME L. REV. 109, 125-26 (2000).

<sup>41</sup> See e.g., MD. CODE ANN., FAM. LAW § 5-203 (LexisNexis 2022) (codifying “[t]he parental duty of supervision looking to the care and welfare of a child” and the duty of parents to “obtain necessary medical care for their minor children”).

<sup>42</sup> *Stanley v. Illinois*, 405 U.S. 645 (1972).

<sup>43</sup> *Id.* at 651 (citing *May v. Anderson*, 345 U.S. 528, 533 (1953)). The Supreme Court analogizing parental rights to property rights lends further credence to the idea that modern parental rights are simply a special subset of property rights.

<sup>44</sup> *Id.* at 651, 658 (“We have concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.”).

<sup>45</sup> *Id.* at 652 (“We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents.”).

<sup>46</sup> *Id.* at 651 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

<sup>47</sup> *Prince*, 321 U.S. at 166 (“Acting to guard the general interest in youth’s well-being, the state as *parens patriae* may restrict the parent’s control . . .”).

## ii. Constitutional Limitations on Parental Rights

In *Prince v. Massachusetts*, the Court held that the state's authority over parents' actions is broader than those of adults because children are a particularly vulnerable population.<sup>48</sup> When a mother was convicted of violating a Massachusetts statute that prohibited children under a certain age from selling goods on public highways,<sup>49</sup> she asserted that her daughter's selling of religious magazines was protected under the Equal Protection and Free Exercises Clauses of the Constitution.<sup>50</sup> While the Court recognized the mother's interest in raising her child under her chosen religion, it nonetheless held that "neither rights of religion nor rights of parenthood are beyond limitation."<sup>51</sup>

The Court acknowledged that the statute would be unconstitutional if applied to adults;<sup>52</sup> however, in its rationale, the Court invoked *parens patriae* — the authority of the state to act as the legal guardian of citizens who are unable to protect themselves.<sup>53</sup> This authority gives the state "a wide range of power" to limit parental freedom and make decisions in a child's best interest in place of a parent.<sup>54</sup> As a result, states have enacted compulsory education and child labor laws.<sup>55</sup> Regarding the mother's Free Exercise claim in *Prince*, the Court simply stated "[the state's] authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience."<sup>56</sup> Given the possibilities of emotional, psychological, and physical damage a child can sustain by "propagandizing the community," the Court upheld the Constitutional validity of the statute.<sup>57</sup> Thus, the Court reaffirmed the state's power to limit parental authority and religious freedom when a child's welfare is at stake: "[p]arents may be free to become martyrs themselves. But it does not follow they are free . . . to make martyrs of their children before they . . . can make that choice for themselves."<sup>58</sup>

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<sup>48</sup> *Id.* at 168.

<sup>49</sup> *Id.* at 160-61.

<sup>50</sup> *Id.* at 164.

<sup>51</sup> *Id.* at 166.

<sup>52</sup> *Id.* at 169 ("Street preaching, whether oral or by handing out literature, is not the primary use of the highway, even for adults. While for them it cannot be wholly prohibited, it can be regulated within reasonable limits in accommodation to the primary and other incidental uses.").

<sup>53</sup> *Prince*, 321 U.S. at 166.

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

<sup>55</sup> *Id.*; but see *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (exempting the children of Amish parents from high school education based on their parents' religious beliefs).

<sup>56</sup> *Prince*, 321 U.S. at 166.

<sup>57</sup> *Id.* at 169-70.

<sup>58</sup> *Id.* at 170.

## 2022] Addressing Parental Denial of Gender Dysphoria Treatment 73

This limitation becomes more apparent in the realm of medicine, when a child's health is at stake.<sup>59</sup> The Supreme Court affirmed a Washington District Court's application of *Prince* when parents who were Jehovah's Witnesses sought to enjoin the state from ever ordering that custody of their children be transferred to the state for the purpose of authorizing blood transfusions.<sup>60</sup> The parents argued that the order violated their religious freedom and parental rights guaranteed under the First and Fourteenth Amendments.<sup>61</sup> However, the district court noted that because blood transfusions may be necessary to save lives,<sup>62</sup> the state has the power to do what it must to save the children from "ill health or death" regardless of religious or parental objections, per the holding in *Prince*.<sup>63</sup> In the past, state courts have held that when a parent denies their child life-saving treatment, that parent is neglectful, or at minimum, not acting in the child's best interest.<sup>64</sup>

Multiple cases have affirmed the state's power to order that a child receive "medical treatment necessary for the protection of its life or limb – including treatment for mental or emotional ills," even when the procedure is not lifesaving.<sup>65</sup> These cases hold that the exercise of this power to protect the health of children does not violate parents' or children's religious rights.<sup>66</sup> Notably, a state's interest in preventing the spread of contagious diseases may override parental religious objection to schools' vaccination prerequisites.<sup>67</sup> Likewise, courts have found that the state has the power to order treatment in

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<sup>59</sup> See *Jehovah's Witnesses in Wash. v. King Cnty. Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967).

<sup>60</sup> *Id.* at 500 ("The court order makes the child a ward of the court and authorizes blood transfusions to be given to him when the attending physician determines the transfusion is necessary."); *Jehovah's Witnesses in Wash v. King Cnty. Hosp. Unit No. 1*, 390 U.S. 598 (1968) (affirming the District Court's opinion).

<sup>61</sup> *Jehovah's Witnesses in Wash.*, 278 F. Supp. at 504.

<sup>62</sup> *Id.* at 495.

<sup>63</sup> *Id.* at 504 (quoting *Prince*, 321 U.S. at 170). Intriguingly, in its pretrial orders, the court noted that in a case where the state appointed a guardian to an adult woman with five children to consent to transfusions over her religious objections, "[t]he Constitutional right to the free practice of religion is not absolute but must be balanced against other rights, such as the right of children of tender years to have a good and loving parent." *Id.* at 496, n.5. Thus, the court not only restricted parental and religious rights, but also individual adult bodily autonomy where it concerned a child's welfare.

<sup>64</sup> See e.g., *People ex rel. Wallace v. Labrenz*, 411 Ill. 618 (1952); *State v. Perricone*, 37 N.J. 463 (1962); *In re McCauley*, 409 Mass. 134 (1991).

<sup>65</sup> See, e.g., *infra* Part IV.A.ii; Jay M. Zitter, Annotation, *Power of Court or Other Public Agency to Order Medical Treatment Over Parental Religious Objections for Child Whose Life Is Not Immediately Endangered*, 21 A.L.R.5th 248 Art. 2a (1994).

<sup>66</sup> See *infra* Part IV.A.ii.

<sup>67</sup> Marjorie A. Shields, Annotation, *Power of Court or Other Public Agency to Order Vaccination over Parental Religious Objection*, 94 A.L.R.5th 613 Art. 7. (2001).

cases of acute gonorrhea, hydrocephalus, dental treatment, tonsil removal, and cancer.<sup>68</sup> However, this power is limited when a mature minor refuses it, or when the potential side effects and suffering caused by the treatment outweigh the probability of the treatment's success.<sup>69</sup> On the state level, the standard of intervention into parental rights can differ.<sup>70</sup>

### ***B. Maryland Statutory Limitations on Parental Rights***

In Maryland, parents have both a common law and statutory duty to support and care for their children.<sup>71</sup> By statute, parents specifically "are jointly and severally responsible for the child's support, care, nurture, welfare, and education."<sup>72</sup> The failure to perform this duty may constitute child abuse or neglect.<sup>73</sup>

Child Protective Services ("CPS"), under the local Department of Social Services ("DSS"), completes an investigative response to a report of child abuse or neglect.<sup>74</sup> At its conclusion, the investigator must determine if the report is indicated, unsubstantiated, or ruled out.<sup>75</sup> CPS enters indicated or unsubstantiated findings, along with the names of those found responsible, into a central confidential state database.<sup>76</sup> Employers and other agents screen candidates for fostering, adopting, or working with children using this database.<sup>77</sup> A registered person can appeal their finding to the Office of Administrative Hearings ("OAH").<sup>78</sup> An administrative law judge ("ALJ")

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<sup>68</sup> Zitter, *supra* note 65, at Art. 3-6.

<sup>69</sup> *Id.* at Art. 2b, 5b.

<sup>70</sup> *See, e.g.*, Garay v. Overholtzer, 332 Md. 339, 631 A.2d 429 (1993).

<sup>71</sup> *Id.* at 368-69, 631 A.2d at 444.

<sup>72</sup> MD. CODE ANN., FAM. LAW § 5-203(b)(1) (LexisNexis 2022).

<sup>73</sup> *See, e.g.*, cases cited *infra* Part IV.A.i.

<sup>74</sup> Md. Dep't of Hum. Servs., *What Happens After Reporting to CPS*, <https://dhs.maryland.gov/child-protective-services/reporting-suspected-child-abuse-or-neglect/what-happens-after-reporting-to-cps/> (last visited Feb. 2, 2022).

<sup>75</sup> Md. Dep.'t of Hum. Servs., *Appealing Child Protective Services Findings*, <https://dhs.maryland.gov/child-protective-services/appealing-child-protective-services-findings/> (last visited Feb. 2, 2022) [hereinafter *Appealing CPS Findings*]; MD. CODE ANN., FAM. LAW §§ 5-701 (m), (aa), (w) (LexisNexis 2022) ("Indicated' means a finding that there is credible evidence, which has not been satisfactorily refuted, that abuse, neglect, or sexual abuse did occur"; "Unsubstantiated' means a finding that there is an insufficient amount of evidence to support a finding of indicated or ruled out"; "Ruled out' means a finding that abuse, neglect, or sexual abuse did not occur.").

<sup>76</sup> *Appealing CPS Findings, supra* note 75.

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

<sup>78</sup> *Appealing CPS Findings, supra* note 75. Findings of unsubstantiated child abuse or neglect are appealed to the local department supervisor before the OAH. *Id.*

## 2022] Addressing Parental Denial of Gender Dysphoria Treatment 75

then reassesses the finding based on the characteristics of child abuse and neglect provided in COMAR 07.02.07.11-12.<sup>79</sup>

For a finding of indicated child abuse with mental injury, the laws in question require credible evidence of a child having a “mental injury characterized by an observable, identifiable, substantial impairment to the child's mental or psychological ability to function, which may be shown by the need for specific psychiatric, psychological, or social work intervention” caused by an intentional act of a parent, and “[c]ircumstances including the nature and extent of the mental injury indicating that the alleged victim’s health or welfare was harmed or was at substantial risk of harm.”<sup>80</sup>

For a finding of indicated child neglect with mental injury, the law requires credible evidence of a child having a “mental injury caused by a failure to provide proper care and attention regardless of whether there was an intent to harm the child” under the same circumstances as that of indicated child abuse with mental injury.<sup>81</sup> In a single case, a judge usually finds only abuse or neglect – not both.<sup>82</sup>

If CPS receives a report of child abuse or neglect and finds that the child requires court intervention for the child's safety, DSS can file a Child in Need of Assistance (“CINA”)<sup>83</sup> petition if it concludes that doing so would be in the child’s best interests.<sup>84</sup> In an adjudicatory hearing, the juvenile court determines by a preponderance of the evidence if the allegations set forth in the petition are true.<sup>85</sup> It decides so based on the definitions of abuse and neglect laid out in section 3-801 of Maryland Courts and Judicial Proceedings.<sup>86</sup>

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<sup>79</sup> *Id.*; MD. CODE REGS. 07.02.07.11-12 (LexisNexis 2022).

<sup>80</sup> MD. CODE REGS. 07.02.07.11(3) (LexisNexis 2022).

<sup>81</sup> MD. CODE REGS. 07.02.07.12(a)(2) (LexisNexis 2022).

<sup>82</sup> Telephone Interview with Shanta Trivedi, Professor of Law at the University of Baltimore (Feb. 19, 2022).

<sup>83</sup> A child that “requires court intervention because: (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2) The child’s parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child’s needs.” MD. CODE ANN., CTS. & JUD. PROC. § 3-801(f) (LexisNexis 2022).

<sup>84</sup> MD. CODE ANN., CTS. & JUD. PROC. § 3-809(a) (LexisNexis 2022).

<sup>85</sup> MD. CODE ANN., CTS. & JUD. PROC. §§ 3-817(b)-(c) (LexisNexis 2022).

<sup>86</sup> Child abuse is “[p]hysical or mental injury of a child under circumstances that indicate that the child’s health or welfare is harmed or is at substantial risk of being harmed by: (i) A parent or other individual who has permanent or temporary care or custody or responsibility for supervision of the child; or (ii) A household or family member.” MD. CODE ANN., CTS. & JUD. PROC. § 3-801(b) (LexisNexis 2022). Child neglect is “the leaving of a child unattended or other failure to give proper care and attention to a child by any parent or individual who has permanent or temporary care or custody or responsibility for supervision of the child under circumstances that indicate: (1) That the child’s health or

The court then holds a separate hearing to determine if the child is a CINA.<sup>87</sup> If the court finds that the child has suffered serious harm or a substantial risk of harm by failing or refusing to provide necessary medical care, it will hold that the parent has medically neglected the child.<sup>88</sup> The state may then grant limited guardianship to someone other than the parent for the specific purpose of consenting to the child's medical treatment where treatment would be in the child's best interests.<sup>89</sup> If the parent objects to the treatment, they are afforded the opportunity to explain their concerns at a separate hearing upon request.<sup>90</sup> The purpose of the CINA statute is to "ensure that juvenile courts (and local departments of social services) exercise authority to protect and advance a child's best interests when court intervention is required."<sup>91</sup>

The State of Maryland has a "*parens patriae* interest in caring for those, such as minors, who cannot care for themselves."<sup>92</sup> Accordingly, judicial decisions in child custody disputes have confirmed that child welfare takes precedence over parental liberty interests.<sup>93</sup> The Court of Appeals of Maryland held that "the child's welfare is a consideration that is of transcendent importance when the child might . . . be in jeopardy."<sup>94</sup> Thus, depriving children of necessary medical care constitutes neglect.<sup>95</sup> Consistent with the Supreme Court's holdings, the Court of Special Appeals of Maryland and the Court of Appeals of Maryland have also noted that the First Amendment guarantees a parent the right to believe what they choose — not

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welfare is harmed or placed at substantial risk of harm; or (2) That the child has suffered mental injury or been placed at substantial risk of mental injury." MD. CODE ANN., CTS. & JUD. PROC. § 3-801(S) (LexisNexis 2022).

<sup>87</sup> MD. CODE ANN., CTS. & JUD. PROC. § 3-817(A) (LexisNexis 2022).

<sup>88</sup> RESTATEMENT OF THE L., CHILDREN & L. TENT. DRFT. 1-3.26 cmt. A (Am. L. INST. 2018).

<sup>89</sup> *In re Priscilla B.*, 214 Md. App. 600, 621, 78 A.3d 500, 513 (2013); RESTATEMENT OF THE L., CHILDREN & L. TENT. DRFT. 1-3.26 cmt. G (AM. L. INST. 2018); MD. CODE ANN., CTS. & JUD. PROC. § 3-819(C)(1)(II) (LexisNexis 2022).

<sup>90</sup> Telephone Interview with Kinda E. France, Assistant County Attorney for the Baltimore County Department of Social Services (Feb. 14, 2022).

<sup>91</sup> *In re J.R.*, 246 Md. App. 707, 751, 232 A.3d 324, 350 (2020) (quoting *In re Najasha B.*, 409 Md. 20, 33, 972 A.2d 845, 852 (2009)).

<sup>92</sup> *In re Najasha B.*, 409 Md. at 33.

<sup>93</sup> *Boswell v. Boswell*, 352 Md. 204, 219, 721 A.2d 662, 669 (1998) ("[W]hile a parent has a fundamental right to raise his or her own child, this Court has held that the best interests of the child may take precedence over the parent's liberty interest in the course of a custody, visitation, or adoption dispute.").

<sup>94</sup> *In re Mark M.*, 365 Md. 687, 706, 782 A.2d 332, 343 (2001).

<sup>95</sup> *Robey v. State*, 54 Md. App. 60, 77, 456 A.2d 953, 961-62 (1983) ("The law requires parents to obtain necessary medical care for their minor children. This is an independent duty, gross neglect of which subjects the parent to criminal sanction.").



## 2022] Addressing Parental Denial of Gender Dysphoria Treatment 77

act however they choose.<sup>96</sup> Article 36 of the Maryland Declaration of Rights, which guarantees religious freedom, similarly does not entitle a parent to deny a child life-saving medical care.<sup>97</sup>

While modern legislation defining abuse generally includes psychological abuse, “for most of the history of liberal democratic societies, parents ‘psychologically’ harming their children was not considered a matter for the state to deal with at all.”<sup>98</sup> This, combined with the fact that psychological harm rarely leaves evidence as visible and traceable as the manifestations of physical harm, leads to a societal view of psychological harm as less damaging than physical harm.<sup>99</sup> However, Maryland law includes “mental injury” in its definitions of child abuse and neglect – defined as “the observable, identifiable, and substantial impairment of a child’s mental or psychological ability to function.”<sup>100</sup> Hence, Maryland law recognizes both physical and non-physical forms of parental abuse and neglect.<sup>101</sup>

### III. ISSUE

Transgender people are those who do not identify with the gender they were assigned at birth.<sup>102</sup> Because of external pressures to conform to their assigned gender’s expectations, transgender individuals may face gender dysphoria: “discomfort or distress that is caused by a discrepancy

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<sup>96</sup> *In re K.Y.-B.*, 242 Md. App. 473, 495, 215 A.3d 471, 484 (2019) (holding that the Circuit Court for Baltimore City did not abuse its discretion when it authorized a child to be vaccinated against his mother’s religious objections) (“[A] parent is free to believe as she wishes, but she cannot act on her beliefs in such a way as to pose a serious danger to the child’s life or health or impair or endanger the child’s welfare.”); *Levitsky v. Levitsky*, 231 Md. 388, 396, 190 A.2d 621, 625 (1963) (discussing a hospital’s decision to contact a child’s father to receive permission to perform a blood transfusion against the wishes of his Jehovah’s Witness mother) (“Under the First and Fourteenth Amendments to the Constitution of the United States, [the mother’s] freedom to believe whatever she chooses is absolute, but her freedom to act is not.”).

<sup>97</sup> *Levitsky*, 231 Md. at 398, 190 A.2d at 626 (“To deny one’s child medical care necessary to save his life because of one’s own religious views, falls within the kind of conduct which is not protected by the guaranty of religious freedom contained in Art. 36.”).

<sup>98</sup> Priest, *supra* note 26, at 46.

<sup>99</sup> Priest, *supra* note 26, at 51 (“there remains a lingering tendency for experts and lay persons alike to think of psychological harm in a distinct and less important category than physical harm.”).

<sup>100</sup> MD. CODE ANN., CTS. & JUD. PROC. § 3-801(r) (LexisNexis 2022).

<sup>101</sup> *See id.*; *see also infra* Part IV.A.i.

<sup>102</sup> *See* Am. Psych. Assoc., *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCH. 832, 864 (2015).

between a person's gender identity and that person's sex assigned at birth."<sup>103</sup> Psychotherapy is available for transgender individuals to cope with these external pressures and somatic treatments allow an individual to "transition" to present more closely to their gender identity.<sup>104</sup> Treatments that allow a transgender individual to transition (i.e. modify their body and/or presentation to align with societal expectations of their gender identity) can include invasive methods, such as puberty suppressing hormones ("puberty blockers"), hormone replacement therapy, and surgery, or non-invasive methods such as name change or voice training.<sup>105</sup> Likewise, psychological support and social recognition of gender have been shown to significantly reduce gender dysphoria.<sup>106</sup> This section aims to examine the impact of gender dysphoria and anti-trans attitudes on transgender youth. Part A of this section will discuss the status of gender dysphoria as a medical condition. Part B will address current anti-trans legislation in the U.S. Part C will examine where Maryland stands on the rights of minors and trans people.

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<sup>103</sup> WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 5 (7th ed. 2012) [hereinafter WPATH SOC]; see also AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 452, (5th ed. 2013) [hereinafter DSM-V] (defining gender dysphoria as "[a] marked incongruence between one's experienced/expressed gender and assigned gender.").

<sup>104</sup> WPATH SOC, *supra* note 103, at 9-10. Debate exists on whether gender dysphoria should stay in the DSM given that the medicalization of transgender identities leads to further stigmatization. Am. Psychiatric Ass'n, *Gender Dysphoria Diagnosis*, TGNC GUIDE, <https://www.psychiatry.org/psychiatrists/cultural-competency/education/transgender-and-gender-nonconforming-patients/gender-dysphoria-diagnosis> (last visited Mar. 16, 2022). Homosexuality, for example, was considered a mental illness until 1973. Allison Turner, *#FlashbackFriday -- Today in 1973, the APA Removed Homosexuality from List of Mental Illnesses*, HUM. RTS CAMPAIGN (Dec. 15, 2017), <https://www.hrc.org/news/flashbackfriday-today-in-1973-the-apa-removed-homosexuality-from-list-of-me>. The discomfort individuals with these identities experience stem from societal disapproval and hostility; the mismatch in subjective identity and bodily integrity that gender dysphoric individuals may face results from a societal expectation of characteristics a man or woman are supposed to have, differentiating it from body dysmorphia, which does not depend on societal preconceptions. See Sean Bray, *Gender Dysphoria, Body Dysmorphia, and the Problematic of Body Modification*, 29 J. SPECULATIVE PHILOSOPHY, 424, 431 (2015). This is supported by the fact that transgender adolescents with accepting parents are less likely to experience gender dysphoria than those without accepting parents. Priest, *supra* note 26, at 48. However, the current state of transgender medicine recognizes gender dysphoria as a psychiatric issue, the diagnosis for which can only be provided by specialized medical professionals. See also DSM-V, *supra* note 103, at 451-59. Because the U.S. healthcare system is set up so that transgender people can only obtain access to certain trans-affirming healthcare through a mental health professional, for the purposes of this comment, I will treat it as a psychiatric issue. *Id.*

<sup>105</sup> WPATH SOC, *supra* note 103, at 9-10.

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

*A. Gender Dysphoria and Harassment Among Transgender Youth*

Exacerbated by marginalization, untreated gender dysphoria may lead to serious consequences and lasting harm.<sup>107</sup> One narrative review found that trans and gender non-conforming people face discrimination, bullying, and “an alarming rate” of assault, leading to suicide attempt rates between 30% and 81%.<sup>108</sup> Noted suicide risk factors included discrimination, family rejection, internalized transphobia, and denial of appropriate bathroom or housing access.<sup>109</sup> Suicide rates among transgender individuals are highest in adolescents, with suicide rising to the second-leading cause of death among all adolescents.<sup>110</sup> Transgender youth are noted to be ten times as likely to attempt suicide as cisgender adolescents.<sup>111</sup> A report by the Trevor Project found that in 2018, 35% of trans youth reported attempting suicide, 31% experienced sexual violence, and 24% were threatened or injured by a weapon at school.<sup>112</sup> Moreover, “refusing timely medical interventions for adolescents might prolong gender dysphoria and contribute to an appearance that could provoke abuse and stigmatization.”<sup>113</sup> Likewise, social acceptance of identity leads to a significant decrease in the likelihood a transgender person will die by suicide.<sup>114</sup> Unfortunately, transgender teenagers report higher rates of psychological abuse perpetrated by parents than their cisgender peers, exacerbating gender dysphoria and leading to greater rates of suicidal ideation and self-harm.<sup>115</sup>

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<sup>107</sup> See Puneet Narang, Simrat Kaur Sarai, Stephanie Aldrin, & Steven Lippmann, *Suicide Among Transgender and Gender-Nonconforming People*, 20 PRIMARY CARE COMPANION CNS DISORDERS 26899 (2018).

<sup>108</sup> See *id.* (comparing the attempted suicide rate of trans and gender non-conforming people to the 1% attempted suicide rate of the general population).

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

<sup>110</sup> *Id.*; Nat’l Ctr. for Injury Prevention and Control & Ctrs. for Disease Control and Prevention, *Ten Leading Causes of Death by Age Group, United States – 2018*, CTRS. DISEASE CONTROL & PREVENTION (2018), [https://www.cdc.gov/injury/wisqars/leadingcauses\\_images.html](https://www.cdc.gov/injury/wisqars/leadingcauses_images.html).

<sup>111</sup> Priest, *supra* note 26, at 46.

<sup>112</sup> *The Trevor Project Research Brief: Data on Transgender Youth*, TREVOR PROJECT (Feb. 22, 2019), <https://www.thetrevorproject.org/wp-content/uploads/2021/08/The-Trevor-Project-Research-Brief-February-2019.pdf>.

<sup>113</sup> WPATH SOC, *supra* note 103, at 21.

<sup>114</sup> Amanda Davey, Walter P. Bouman, Jon Arcelus & Caroline Meyer, *Social Support and Psychological Well-Being in Gender Dysphoria: A Comparison of Patients With Matched Controls*, 11 J. SEXUAL MED. 2976-85 (2014).

<sup>115</sup> Arnold Grossman & Anthony D’Augelli, *Transgender Youth and Life-Threatening Behaviors*, 37(5) SUICIDE & LIFE-THREATENING BEHAVIOR 527, 534-35 (2007).

### *B. Anti-Trans Backlash*

Despite the existence of vast amounts of medical knowledge about gender dysphoria and its treatment, greater societal recognition of transgender identities has resulted in significant pushback against those identities.<sup>116</sup> 2021 saw more than a record-setting 130 anti-trans bills introduced at the state level; fourteen of them passed.<sup>117</sup> On February 18, 2022, the attorney general of Texas released a legal opinion declaring gender-affirming treatments to be considered child abuse.<sup>118</sup> In response, Governor Greg Abbott directed the Texas Department of Family and Protective Services (DFPS) Commissioner to investigate any reported instances of pediatric trans-affirming treatments.<sup>119</sup> DFPS responded in kind, and one of the first parents investigated was a DFPS employee with a 16-year-old transgender child.<sup>120</sup> The child's parents filed a lawsuit against Governor Abbott, seeking an injunction to stop DFPS from acting on Governor Abbott's orders, which a judge granted on March 11, 2022.<sup>121</sup> The judge additionally scheduled a trial on the merits for June 11, noting "there is a substantial likelihood that Plaintiffs will prevail after a trial on the merits because the Governor's directive is *ultra vires*, beyond the scope of his authority, and unconstitutional."<sup>122</sup> Nevertheless, Governor Abbott's order had wide-reaching effects: Texas's largest children's hospital revised its

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<sup>116</sup> Sam Feder & Alexandra Juhasz, *Setting the Terms of Our Own Visibility*, in *INSURGENT MEDIA FROM THE FRONT: MEDIA ACTIVISM READER* 67, 72 (Chris Robé & Stephen Charbonneau 2020) ("Our [transgender people's] visibility created a new target, a face, and a singular issue for people to rally around. Since marriage equality and trans military inclusion became law, there has been an upswing in backlash against LGBT rights . . . The media gave a ton of airtime to the legislation in North Carolina. Before that, legislatures in twenty-two states proposed bills threatening equal rights, with transgender people receiving the brunt of it. Visibility has created the space for the media to see this issue as newsworthy.").

<sup>117</sup> Roxanna Asgarian, *She Supported Her Child Being Trans. So the State Separated Them*, *INTELLIGENCER* (Dec. 15, 2021), <https://nymag.com/intelligencer/2021/12/she-supported-her-child-being-trans-so-they-were-separated.html>.

<sup>118</sup> See Ken Paxton, Tex. Att'y Gen., Opinion Letter on Whether Certain Medical Procedures Performed on Children Constitute Child Abuse (Feb. 18, 2022).

<sup>119</sup> See Letter from Greg Abbot, Tex. Gov., to Jaime Masters, Comm'r Dep't of Fam. & Protective Servs. (Feb. 22, 2022), <https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf>.

<sup>120</sup> Zoe Christen Jones, *Lawsuit Seeks to Block Texas From Investigating Gender-Transitioning Procedures As Child Abuse*, *CBS NEWS* (Mar. 1, 2022), <https://www.cbsnews.com/news/texas-transgender-care-lawsuit-greg-abbott/>.

<sup>121</sup> *Doe v. Abbott*, No. D-1-GN-22-000977, 2022 WL 831383 (Tex. Dist. Mar. 11, 2022) (order granting temporary injunction).

<sup>122</sup> *Id.* at \*1.

## 2022] Addressing Parental Denial of Gender Dysphoria Treatment 81

policy, stopping the administration of gender-affirming care in fear of potential legal ramifications.<sup>123</sup>

Why this sudden legal pushback against transgender people and transgender minors specifically? Lauren McGaughy, a reporter for the Dallas Morning News, attributed the shift in conservative attention to trans issues as a response to the Supreme Court's ruling in *Obergefell v. Hodges*.<sup>124</sup> Having failed to ban same-sex marriage, conservatives shifted their efforts to thwart the emergent recognition of the rights of trans people.<sup>125</sup> When legislation banning trans people from using bathrooms matching their gender identity likewise failed, conservative politicians again shifted their attention – this time to trans children.<sup>126</sup> Texas successfully passed a law banning trans children from participating in sports consistent with their gender identity, and now, McGaughy says, conservative lawmakers have shifted their efforts to preventing trans children from accessing trans-affirming healthcare.<sup>127</sup> Contextualized among this pattern of legal animosity toward trans people, Texas lawmakers have sent a stark message to trans youth.<sup>128</sup> In the words of the Transgender Education Network of Texas's executive director, "[t]he state leadership has said, '[w]e would rather see dead children ... instead of happy, loved, supported, thriving trans kids that are alive and well.'"<sup>129</sup>

Where Texas goes, conservative states tend to follow.<sup>130</sup> On March 8, Idaho passed a bill amending its statute prohibiting genital mutilation to include the provision of puberty blockers, hormone therapy, and gender-affirmation surgery to minors.<sup>131</sup> The statute now makes providing these treatments and traveling outside of Idaho to obtain these treatments for a minor a felony punishable by up to life in prison.<sup>132</sup> Alabama passed a law

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<sup>123</sup> Anne Branigin, *In Texas, the Nation's Largest Children's Hospital Is Halting Gender-Affirming Care for Trans Youths*, WASH. POST (Mar. 8, 2022) ("This step was taken to safeguard [Texas Children's Hospital's] healthcare professionals and impacted families from potential legal ramifications.").

<sup>124</sup> Today, Explained, *The Texas Transgender Panic*, VOX, at 16:11 (Mar. 3, 2022), <https://podcasts.apple.com/us/podcast/the-texas-transgender-panic/id1346207297?i=1000552851514>.

<sup>125</sup> *Id.* at 17:00.

<sup>126</sup> *Id.* at 17:08, 18:00.

<sup>127</sup> *Id.* at 18:08, 18:25.

<sup>128</sup> See Rina Torchinsky, *In Texas, an Unrelenting Assault on Trans Rights Is Taking a Mental Toll*, NPR (Feb. 25, 2022), <https://www.npr.org/2022/02/25/1082975946/anti-trans-bills-texas>.

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

<sup>130</sup> Today, Explained, *supra* note 124, at 22:16.

<sup>131</sup> See H.R. 675, 66th Leg., 2nd Reg. Sess. (Idaho 2022); Tyler Kingkade, *Idaho Lawmakers Seek to Punish Parents Who Take Trans Youth to Other States for Health Care*, NBC NEWS (Mar. 9, 2022) (noting the bill's sponsor cited Texas's decision as his incentive).

<sup>132</sup> See H.R. 675, 66th Cong., 2nd Reg. Sess. (Idaho 2022).

that made it a felony for a medical provider to assist anyone younger than 19 in accessing trans-affirming medical care, though a federal judge blocked the enforcement of this law on the grounds that there is no credible evidence to support the assertion that gender-affirming healthcare is experimental.<sup>133</sup> On August 19, 2022, Representative Marjorie Taylor Greene introduced the “Protect Children’s Innocence Act” to Congress, which would classify the administration of gender-affirming surgical or hormonal treatments to a minor as a felony.<sup>134</sup> As of October 31, 2022, the bill has 49 cosponsors, including Maryland District 1 representative, Andy Harris.<sup>135</sup>

Similarly, some state courts have penalized parents that allow their children to express a gender identity different from the one assigned at birth.<sup>136</sup> Penalties range from injunctions requiring a parent to force a child to comply with the socially-accepted presentation of the child’s gender assigned at birth,<sup>137</sup> to complete removal of custody.<sup>138</sup> The courts issuing such penalties view supportive parents of trans children as abusive for “pushing” their children to identify as transgender.<sup>139</sup>

In one such case, a Michigan child’s school filed a report of child abuse against his mother, Katee Churchill, because she encouraged her son<sup>140</sup> to explore his gender identity by letting him choose a different name and style

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<sup>133</sup> Brooke Migdon & Emily Brooks, *Marjorie Taylor Greene Introduces Bill to Make Gender-Affirming Care for Transgender Youth a Felony*, THE HILL (Aug. 19, 2022), <https://thehill.com/changing-america/respect/equality/3607955-marjorie-taylor-greene-introduces-bill-to-make-gender-affirming-care-for-transgender-youth-a-felony/>.

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

<sup>135</sup> See H.R. 8731, 117th Cong. (2022) (as introduced by Rep. Marjorie Green, Aug. 19, 2022); *Cosponsors - H.R.8731*, LIBR. OF CONG., <https://www.congress.gov/bill/117th-congress/house-bill/8731/cosponsors?s=1&r=21&overview=closed> (last visited Oct. 31, 2022).

<sup>136</sup> See Maria Polletta, *Why Parents Are Losing Custody of Trans and Gender Non-Conforming Kids*, THE REPUBLIC (Apr. 10, 2018), <https://www.azcentral.com/story/news/local/arizona/2018/04/10/why-parents-losing-custody-trans-and-gender-non-conforming-kids/485928002/>.

<sup>137</sup> Gender standards change over time much like fashion fads. For example, in the 1880s it was not just standard, but “socially dictated” that boys wear dresses and keep their hair long until 6 or 7-years-old. A famous photo of a young former president Franklin D. Roosevelt in such an ensemble illustrates this trend. Jeanne Maglaty, *When Did Girls Start Wearing Pink?*, SMITHSONIAN MAGAZINE (Apr. 7, 2011), <https://www.smithsonianmag.com/arts-culture/when-did-girls-start-wearing-pink-1370097/>. Thus, injunctions enforcing a certain gender presentation are at minimum short-sighted and ironically dogmatic, if not outright harmful.

<sup>138</sup> See, e.g., Polletta, *supra* note 136.

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

<sup>140</sup> The child alternated on which pronouns and names he used, but because he “settled into a typically male gender presentation” and identity, I will use he/him pronouns when referring to him. Asgarian, *supra* note 117.

## 2022] Addressing Parental Denial of Gender Dysphoria Treatment 83

of clothing.<sup>141</sup> A probate and family court judge found that she had not abused or neglected her son, but CPS opened a second case against Churchill with a jury trial.<sup>142</sup> The jury of citizens of the conservative, rural Michigan county where the family resided, found that Churchill did abuse her child when she “grossly overreacted and attempted to force a female gender identity after [the child] decided he was no longer interested.”<sup>143</sup> The court awarded custody of the child to his father despite his prior record of domestic violence.<sup>144</sup> On appeal, the new attorney general, a former civil rights attorney, reversed the decision of the lower court and vacated the verdicts against Churchill.<sup>145</sup>

### C. *Maryland on the Rights of Minors and Transgender Individuals*

In contrast to Michigan and conservative-leaning states like Texas, Maryland shows progressive efforts in supporting its LGBTQ+<sup>146</sup> population — especially in the realm of transgender equality.<sup>147</sup> It is one of the few states that offers a neutral gender marker on driver’s licenses without requiring forms or provider certification.<sup>148</sup> More pertinently, Maryland is one of the few states that has an outright ban on conversion therapy for minors.<sup>149</sup>

To obtain medical treatment, minors in Maryland, like in most states, generally must obtain parental consent.<sup>150</sup> A few exceptions exist such as

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<sup>141</sup> Asgarian, *supra* note 117.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*; *In re Churchill*, No. 337790, 2018 Mich. App. LEXIS 592, at \*6 (Ct. App. Mar. 15, 2018). While a report by a therapist determined that the child was not transgender because he would switch his gender presentation, there was no evidence that he expressed a desire to cease presenting as a girl. The child later explained that he voluntarily “chose to be transgender” and clarified that while his mother did encourage him to express himself how he wanted, she did not force him into identifying in any one way. Asgarian, *supra* note 117.

<sup>144</sup> Asgarian, *supra* note 117.

<sup>145</sup> *Id.*; *In re Churchill*, 503 Mich. 984, 923, N.W.2d 885 (2019); see *Department of the Attorney General*, SOM – STATE OF MICH., <https://www.michigan.gov/ag/> (last visited Oct. 5, 2022).

<sup>146</sup> Lesbian, Gay, Bisexual, Transgender, Queer, and others in the community.

<sup>147</sup> The Movement Advancement Project has given Maryland a policy tally score of 13.25/20.5 and a gender identity policy tally of 17/22. Michigan and Texas have respective scores of 8.75 and 12.755; and 1 and 0. *Compare* Maryland’s LGBTQ Policy Tally, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality-maps/profile\\_state/MD](https://www.lgbtmap.org/equality-maps/profile_state/MD) [hereinafter “MD Equality Map”]; *with* Michigan’s LGBTQ Policy Tally, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality\\_maps/profile\\_state/MI](https://www.lgbtmap.org/equality_maps/profile_state/MI); *Texas’ LGBTQ Policy Tally*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality\\_maps/profile\\_state/TX](https://www.lgbtmap.org/equality_maps/profile_state/TX) (last visited Aug. 8, 2022).

<sup>148</sup> MD Equality Map, *supra* note 147.

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

<sup>150</sup> See MD. CODE ANN., HEALTH-GEN. II § 20-102 (LexisNexis 2022).

when a minor is seeking contraception or STI treatment.<sup>151</sup> The mature minor doctrine gives a minor the power to obtain treatment without parental consent and applies when a minor is married, has a child, or is self-supporting and living apart from any guardians.<sup>152</sup> Emergency exceptions exist when “the life or health of the minor would be affected adversely by delaying treatment to obtain the consent of another individual.”<sup>153</sup> Thus, a dysphoric transgender minor must receive consent from their parents to obtain treatment for gender dysphoria with few exceptions.<sup>154</sup> If the parent refuses to provide this consent, the transgender child will have to live with untreated gender dysphoria.<sup>155</sup> People with untreated gender dysphoria experience prolonged discomfort that often results from dissociative disorders, behavior problems, poor peer relations, and self-harm.<sup>156</sup> “The consequences of extended, untreated gender dysphoria . . . are observable in higher rates of suicide and mental illness,” and are only made worse by parental rejection — “one of the strongest predictors of suicidality among transgender people.”<sup>157</sup>

#### IV. PARENTAL DENIAL OF TREATMENT TO GENDER DYPHORIC CHILDREN SHOULD BE CLASSIFIED AS CHILD NEGLECT, AND ACTIVE PARENTAL INTERFERENCE WITH TREATMENT SHOULD BE CLASSIFIED AS CHILD ABUSE UNDER MARYLAND LAW

To fulfill the purpose of the CINA statute and to uphold Maryland’s interest in protecting minors, parental denial of treatment for a child’s gender dysphoria should be classified as child neglect, and active interference with treatment should be classified as child abuse under the standards of both the DSS and OAH. The state has a *parens patriae* duty to protect minors who cannot care for themselves, and this duty gives the state the power to consent to a child’s medical treatment in place of a parent.<sup>158</sup> Additionally, the active interference with treatment should be classified as child abuse under those same standards. In the same way that Texas is a leader for conservative states in anti-trans legislation,<sup>159</sup> Maryland can be a leader for progressive states in

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<sup>151</sup> MD. CODE ANN., HEALTH-GEN. II § 20-102(c)(1)-(5) (LexisNexis 2022).

<sup>152</sup> MD. CODE ANN., HEALTH-GEN. II § 20-102(a) (LexisNexis 2022).

<sup>153</sup> MD. CODE ANN., HEALTH-GEN. II § 20-102(b) (LexisNexis 2022).

<sup>154</sup> See generally MD. CODE ANN., HEALTH-GEN. II § 20-102 (LexisNexis 2022).

<sup>155</sup> See Ana Rabasco, *Factors Influencing Suicide Risk in Transgender and Gender-Non Conforming Individuals* (2019) (Doctoral dissertation, Fordham University).

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

<sup>157</sup> Nicolle K. Strand & Nora L. Jones, *Invisibility of ‘Gender Dysphoria’*, 23 AMA J. ETHICS 557, 554 (2021); Ashley Florence, *A Critical Commentary on ‘Rapid-Onset Gender Dysphoria’*, 68(4) SOCIO. REV. 779, 787 (2020).

<sup>158</sup> *In re Najasha B.*, 409 Md. at 33.

<sup>159</sup> Today, Explained, *supra* note 124, at 22:16.



## 2022] Addressing Parental Denial of Gender Dysphoria Treatment 85

protecting the health of trans children. Part A will discuss how courts interpret parental failure to treat non-life-threatening conditions to argue that precedent exists to treat gender dysphoria at minimum like any other non-life-threatening psychological condition.<sup>160</sup> Part B further contextualizes gender dysphoria as a potentially life-threatening condition.<sup>161</sup> Finally, Part C addresses counterarguments.<sup>162</sup>

### *A. Gender Dysphoria as a Non-Life-Threatening Condition*

Maryland has exercised its power to consent to medical treatment in a parent's place in non-life-threatening conditions.<sup>163</sup> Maryland courts have not only recognized the importance of non-life-threatening medical procedures in keeping children from harm and ensuring their quality of life, but they have also previously recognized that neglect can occur when a parent takes care of a child's physical needs but fails to provide for a child's emotional and psychological needs.<sup>164</sup>

#### **i. Maryland Case Law on Psychological Harm**

In *Jurovich v. Harford County Department of Social Services*, the Court of Special Appeals of Maryland affirmed a finding of indicated child neglect by both the Harford County DSS and an ALJ for the parents of two children.<sup>165</sup> While the parents had never physically harmed the children, the court found the parents neglected them by failing to provide for their emotional and psychological needs, resulting in mental injury.<sup>166</sup> The verbal abuse and isolation to which the parents subjected the children had exacerbated their chronic, pre-existing mental illnesses.<sup>167</sup> The court noted that one child took medication for her depression and initially saw a therapist

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<sup>160</sup> See *infra* Part IV.A.

<sup>161</sup> See *infra* Part IV.B; see generally RESTATEMENT OF THE L., CHILDREN & L. TENT. DRFT. 1-3.26 cmt. B (AM. L. INST. 2018) (“As a practical matter, criminal liability is generally reserved for cases in which the conduct is repugnant and the injury to the child is life-threatening or fatal.”).

<sup>162</sup> See *infra* Part IV.C.

<sup>163</sup> Zitter, *supra* note 65, at Art. 4-5.

<sup>164</sup> See, e.g., *Jurovich v. Harford Ct[n]y. Dep't Soc. Servs.*, No. 0924, 2021 Md. App. LEXIS 705 at \*25-26 (Md. Ct. Spec. App. Aug. 6, 2021); see also [Redacted] v. [Redacted] Cnty. Dep't Health & Hum. Servs., DHR-[Redacted]-52-16-36906, at 4, 6, 14 (MD Off. Admin. Hearings Jan. 15, 2019) (pulled from the Office of Administrative Hearings and redacted) [hereinafter “Chapman”] (pulled from the Office of Administrative Hearings and redacted).

<sup>165</sup> *Jurovich*, 2021 Md. App. LEXIS 705, at \*28-29.

<sup>166</sup> *Id.* at \*25-26, \*28-29.

<sup>167</sup> *Id.* at \*26-27, \*29.

but discontinued treatment out of fear that her stepmother would discover the content of those sessions.<sup>168</sup> Both children contemplated suicide and displayed post-traumatic stress symptoms.<sup>169</sup> Although one of the children received mental health care, the court nonetheless found it to be inadequate, holding that the parents' failure to provide proper care and attention to the children's needs harmed their health and welfare.<sup>170</sup>

Similarly, in a redacted case from the OAH, an ALJ found that a mother who drove her child to self-harm driven through constant verbal beratement had neglected and caused her mental injury:

Her failure to provide emotional support and parental nurturance constitutes child neglect . . . I conclude that the local department has established that the Child sustained a mental injury caused by the failure of the appellant to provide proper care and attention, specifically by her continual denigration of the Child.<sup>171</sup>

In a redacted Montgomery County case, an ALJ found that a father had not provided his child with proper care and attention when he failed to model a healthy relationship by assaulting his wife.<sup>172</sup> Subsequently, the father failed to create “an environment that helps the son grow and develop.”<sup>173</sup> In finding that the father placed the child at substantial risk of harm, the ALJ found he “acted ‘in reckless disregard of the [child’s] welfare[]’ when he was so wildly out of control that he choked the Wife over television noise and the only person present to stop him from killing her was the Child.”<sup>174</sup> Accordingly, the ALJ found the report of child neglect was indicated.<sup>175</sup>

Moreover, another redacted case from the OAH shows that indicated child neglect can be found when a parent simply places a child at *risk* of emotional harm.<sup>176</sup> In that case, the ALJ found that a mother neglected her

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<sup>168</sup> *Id.* at \*4.

<sup>169</sup> *Id.* at \*26, \*27-\*29.

<sup>170</sup> *Id.* at \*14, \*28-\*29.

<sup>171</sup> [Redacted] v. [Redacted] Dep’t Health & Hum. Servs., at 15, 19, [Redacted]-20-23614, (MD Off. Admin. Hearings July 20, 2021) (pulled from the Office of Administrative Hearings and redacted).

<sup>172</sup> Chapman, *supra* note 164, at 12.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 14. The ALJ did not find mental injury because DSS did not meet the requirement of having two mental health professionals assess the child for mental injury. *Id.* at 15.

<sup>175</sup> *Id.* at 15.

<sup>176</sup> See [Redacted] v. [Redacted] Dep’t Health & Hum. Servs., at 11, [Redacted]-20-10242, (MD Off. Admin. Hearings Apr. 08, 2021) (pulled from the Office of Administrative Hearings and redacted).

## 2022] Addressing Parental Denial of Gender Dysphoria Treatment 87

sixteen-year-old child when she, as the only present adult, lost consciousness due to alcohol poisoning, leaving the child to call for help.<sup>177</sup> The ALJ found that the mother parentified the child by placing her “in the role of parent for the Appellant.”<sup>178</sup> More pertinently, the ALJ held that “the Appellant placed [the child] at a substantial risk of harm in the form of *emotional* trauma,” and “recklessly disregarded the likelihood that [the child] would be emotionally traumatized by the Appellant’s actions” even though the child testified that she did not suffer trauma from the event.<sup>179</sup>

### ii. Court-Ordered Treatment for Non-Life-Threatening Conditions

At a minimum, gender dysphoria should be treated as a harmful, but non-life-threatening, condition because it has the potential to severely alter a child’s quality of life.<sup>180</sup> Courts have ordered dental treatments against parents’ religious objections because they would improve a child’s health, reduce present and future pain, and subsequently, their quality of life.<sup>181</sup> In such situations, courts have weighed the side effects and dangers of the treatment with its likelihood of success.<sup>182</sup> For example, courts have refused certain cancer treatments that are invasive, painful, and “dangerously life threatening,” with low probability of a better quality of life post-treatment.<sup>183</sup> Comparatively, somatic treatments, like hormone therapy and gender affirmation surgery, improve quality of life post-treatment despite potential side effects.<sup>184</sup> Moreover, these treatments have much higher rates of success.<sup>185</sup> Psychotherapeutic treatments are also similarly successful.<sup>186</sup> The outlook for gender dysphoric children is so much more positive than that for untreated children, that the principle stands that there is no infringement on

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<sup>177</sup> *Id.* at 3-4.

<sup>178</sup> *Id.* at 9.

<sup>179</sup> *Id.* at 10 (emphasis added).

<sup>180</sup> See Rabasco, *supra* note 155, at 11.

<sup>181</sup> Zitter, *supra* note 65, at Art. 3.

<sup>182</sup> *Id.* at Art. 2-3.

<sup>183</sup> *Id.* at Art. 2.

<sup>184</sup> *Id.* at 2; see Nienke M. Nota et al., *Evaluation and Treatment of Gender-Dysphoric/Gender Incongruent Adults*, NCBI BOOKSHELF (July 21, 2019), <https://www.ncbi.nlm.nih.gov/sites/books/NBK544426/?report=printable> (discussing side-effects of somatic gender-affirming treatments).

<sup>185</sup> See Richard A. Carrol, *Outcomes of Treatment for Gender Dysphoria*, *Journal of Sex Education and Therapy*, 24 J. SEX EDUC. & THERAPY 128-136 (1999); Jack L. Turban, Dana King, Julia Kobe, Sari L. Reisner, & Alex S. Keuroghlian, *Access to Gender Affirming Hormones During Adolescence and Mental Health Outcomes Among Transgender Adults*, 17 PLOS ONE (2022).

<sup>186</sup> See Carrol, *supra* note 185, at 128.

parental liberty interests where a child's physical, emotional, and mental welfare is at stake.<sup>187</sup>

### iii. Gender Dysphoria as a Potentially Life-Threatening Condition

Parental acknowledgment of a trans child's gender can alleviate symptoms of gender dysphoria.<sup>188</sup> However, shame and harassment, such as that brought on by unaccepting parents, can exacerbate gender dysphoria to the point where a child may attempt suicide.<sup>189</sup> Given that gender dysphoria has the potential to become a life-threatening condition, it would be imperative to treat it with equal gravity as any other condition that has the potential to become life-threatening, even if it is not immediate.<sup>190</sup> In a case where severe consequences are likely to result from an untreated condition, such as where the most basic qualities of life are endangered, there is not a significant difference in magnitude from an immediate threat to life.<sup>191</sup> Nevertheless, courts do not wait for a child's condition to become dangerous; the Court of Appeals of Maryland has held that "[t]he purpose of [the CINA statute] is to protect children — not wait for their injury."<sup>192</sup> Because of the consensus among the medical community that treatment for gender dysphoria can be medically necessary to save lives, based on precedent, courts have the power to prioritize these treatments without infringing on parental rights or religious beliefs.<sup>193</sup>

### iv. Potential Problems and Concerns

Maryland law broadly defines child abuse and negligence, with the common thread that "the child's health or welfare is harmed or placed at substantial risk of harm."<sup>194</sup> This broadness may be by design--allowing

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<sup>187</sup> See *supra* Parts II.A.ii, II.B, III.A.ii.

<sup>188</sup> See Lisa Simons, Sheree M Schrage, Leslie F Clark, Marvin Belzer, & Johanna Olson, *Parental Support and Mental Health Among Transgender Adolescents*, 53 J. ADOLESCENT HEALTH 791 (2013) ("Parental support was significantly associated with higher life satisfaction, lower perceived burden of being transgender, and fewer depressive symptoms.").

<sup>189</sup> Narang et al., *supra* note 107

<sup>190</sup> See *id.*

<sup>191</sup> Zitter, *supra* note 65, at Art. 2-5.

<sup>192</sup> *In re William B.*, 73 Md. App. 68, 77-78, 533 A.2d 16, 21 (1987).

<sup>193</sup> See World Professional Association for Transgender Health, *Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.* (Dec. 21, 2016); see, e.g., *Jehovah's Witnesses in Wash. v. King Cnty. Hosp. Unit No. 1*, 278 F. Supp. 488, 495, 498 (1967), *aff'd*, 390 U.S. 598 (1968).

<sup>194</sup> MD. CODE ANN., CTS. & JUD. PROC. §§ 3-801(b), (s) (LexisNexis 2022).

## 2022] Addressing Parental Denial of Gender Dysphoria Treatment 89

”community norms and standards” to interject and fill in the gaps.<sup>195</sup> For much of U.S. history, the dominant societal norm has been treating sex assigned at birth as sacrosanct and immutable.<sup>196</sup> This value carries on today, particularly in conservative communities, which may explain why it was not a judge but a jury of Churchill’s peers that found she abused her son by forcing a female gender identity onto him.<sup>197</sup>

However, the medical profession has acknowledged the validity and seriousness of gender dysphoria as well as the necessity of treatment.<sup>198</sup> Additionally, courts defer to the judgment of medical professionals when the issue of treatment arises, rather than community or parental value, including when “medical treatment is necessary for the protection of [a child’s] life or limb.”<sup>199</sup> Therefore, there is no basis to treat severe gender dysphoria with any less gravity than any other serious threat to a child’s health.

While this solution cannot force parents to accept their child’s transgender identity, it will nonetheless mitigate other risk factors that are associated with the effects of untreated gender dysphoria and provide a child the opportunity for their gender identity to be recognized in wider society.<sup>200</sup> Moreover, classifying denial of treatment as neglect would minimize the likelihood that courts will punish parents who enable their children to explore their gender identity, especially with the rationale that parental support is “significantly associated with higher life satisfaction, lower perceived burden of being transgender, and fewer depressive symptoms.”<sup>201</sup>

Requiring a diagnosis also poses an issue since “one-third of transgender people reported having a negative experience with physicians, including having to educate them about transgender care and ‘being refused treatment.’”<sup>202</sup> Physicians are often uncomfortable with assessing a

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<sup>195</sup> Asgarian, *supra* note 117.

<sup>196</sup> CHARLIE MCNABB, NONBINARY GENDER IDENTITIES: HISTORY, CULTURE, RESOURCES at 3 (2018).

<sup>197</sup> Asgarian, *supra* note 117.

<sup>198</sup> See Transgender Legal Def. Fund, *Medical Organization Statements*, TLDEF’S TRANS HEALTH PROJECT, <https://transhealthproject.org/resources/medical-organization-statements> (last visited Aug. 25, 2022).

<sup>199</sup> Yvette K. W. Bourcicot & Daniel Hirotsu Woofter, *Prudent Policy: Accommodating Prisoners with Gender Dysphoria*, 12 STAN. J.C.R. & C.L. 283, 293 (2016) (“Courts show significant deference to medical professionals in diagnosing conditions and developing treatment plans and refuse to second-guess professional medical opinions unless they are clearly unreasonable or reckless.”); Zitter, *supra* note 65, at Art. 2.

<sup>200</sup> Cf. WPATH SOC, *supra* note 103, at 21 (noting that refusing treatment can “prolong gender dysphoria and contribute to an appearance that could provoke abuse and stigmatization.”); Narang, *supra* note 107.

<sup>201</sup> Simons, *supra* note 188.

<sup>202</sup> Strand, *supra* note 157, at 558.

transgender person's subjective experience of their gender identity.<sup>203</sup> This is especially so for children, whose gender dysphoria may not persist past puberty.<sup>204</sup> Receiving certain treatments for gender dysphoria may also require surmounting barriers such as verification of diagnoses from additional clinicians.<sup>205</sup> When these additional requirements are not fully evidence-based, such an experience can be overly burdensome or stigmatizing.<sup>206</sup>

The classification of the parental denial of treatment for gender dysphoric children as child neglect does not account for barriers or stigma held by individual medical providers, nor lack of access to professionals that are qualified and willing to diagnose gender dysphoria in a minor. However, because courts are rarely willing to question a medical professional's judgment, a diagnosis by a medical professional can be crucial to a child's gender dysphoria being legally treated as a medically significant issue.<sup>207</sup> Moreover, CINA investigations can include psychological evaluations, where a minor at least may have the opportunity to voice their concerns.<sup>208</sup>

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

<sup>204</sup> Past longitudinal studies have shown that the majority of children diagnosed with gender dysphoria settle into the gender identity of their sex assigned at birth by puberty. However, these studies have faced criticism, as some of them diagnosed participants based on outdated definitions of gender dysphoria, resulting in the inclusion of gender-nonconforming children without gender dysphoria being in the studies. Julia Temple-Newhook, Jake Pyne, Kelley Winters, Stephen Feder, Cindy Holmes, Jemma Tosh, Mari-Lyne Sinnott, Alley Jamieson & Sarah Pickett, *A Critical Commentary on Follow-Up Studies And "Desistance" Theories About Transgender and Gender-Nonconforming Children*, 19 INT'L J. TRANSGENDERISM 212, 215 (2018). More recent studies show "[a]mong prepubertal transgender patients, 100% of patients with a complete social transition, 60.1% with a partial transition, and 25.6% of patients who had not socially transitioned reported a transgender identity 7 years later," and, as more children are identifying themselves as transgender upon wider societal recognition of transgender people, fewer are likely to retransition. Christina Roberts, *Persistence of Transgender Gender Identity Among Children and Adolescents*, 150 PEDIATRICS 2 (July 13, 2022), <https://doi.org/10.1542/peds.2022-057693>. A study on 37 three-to-twelve-year-old children who completed a binary social transition found that 97.5% of them still identified as transgender 5 years later. Kristina R. Olson, Lily Durwood, Rachel Horton, Natalie M. Gallagher & Aaron Devor, *Gender Identity 5 Years After Social Transition*, 150 PEDIATRICS 2 (July 13, 2022), <https://publications.aap.org/pediatrics/article/150/2/e2021056082/186992/Gender-Identity-5-Years-After-Social-Transition>.

<sup>205</sup> Strand, *supra* note 157, at 558-59.

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

<sup>207</sup> Bourcicot, *supra* note 199, at 293.

<sup>208</sup> MD. CODE ANN., CTS. & JUD. PROC. § 3-816 (LexisNexis 2022).

## 2022] Addressing Parental Denial of Gender Dysphoria Treatment 91

Another issue is that abuse and neglect law disproportionately impacts low-income families and families of color.<sup>209</sup> The U.S. child welfare system disproportionately targets low-income families and families of color for child removal.<sup>210</sup> Even though parents are not supposed to be found neglectful for failing to provide necessities such as food and treatment to their children out of lack of affordability, it nonetheless happens regularly.<sup>211</sup> Systems that discriminate by race and income also tend to discriminate against transgender individuals.<sup>212</sup> In an alternative to the child welfare system, parents that deny or interfere with treatment to gender dysphoric children may be required to take sensitivity classes before the child welfare system interferes.<sup>213</sup> However, outside of entirely reforming the system, legal visibility may be the only way some transgender children can receive treatment for a potentially life-threatening condition. With some states forcibly using the child welfare system to detransition transgender children, it becomes imperative to at least refocus the system on protecting children, however possible.

Opponents of gender dysphoria treatment for children are concerned that children might be pushed into irrevocably altering their bodies even though their gender identity does not solidify until their teenage years.<sup>214</sup> However, detransition, the process of ceasing or reversing gender transition, occurs infrequently.<sup>215</sup> More severely, Texas AG Paxton cited sterilization as

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<sup>209</sup> See Karen Zilberstein, *Parenting in Families of Low Socioeconomic Status: A Review With Implications for Child Welfare Practice*, 54 FAM. CT. R. 221 (2016); Charlotte Baughman, Tehra Cole, Jennifer Feinburg & Hope Newton, *The Surveillance Tentacles of the Child Welfare System*, 11 COLUM. J. RACE & L. 501 (2021).

<sup>210</sup> See Zilberstein, *supra* note 209; Baughman, *supra*, note 209.

<sup>211</sup> Trivedi, *supra* note 82.

<sup>212</sup> See, e.g., Polletta, *supra* note 136 (discussing how the child welfare system targets supportive parents of transgender children); *Transgender Parents*, LAMBDA LEGAL, <https://www.lambdalegal.org/know-your-rights/article/trans-parents> (last visited Mar. 16, 2022) (“judges and adoption agencies sometimes try to stop transgender adults from bringing children into their lives and even try to remove them from their homes.”).

<sup>213</sup> Trivedi, *supra* note 82.

<sup>214</sup> Megan Munce, *Gender-Affirming Medical Treatment for Transgender Kids Would Be Considered Child Abuse Under Texas Senate Bill*, TEX. TRIBUNE (Apr. 28, 2021, 7:52 AM), <https://www.texastribune.org/2021/04/27/texas-senate-transgender-child-abuse/>; see Jiska Ristori & Thomas D. Steensma, *Gender Dysphoria in Childhood*, 28 INT’L R. PSYCHIATRY 13, 15 (2016).

<sup>215</sup> Jack L. Turban, Stephanie S. Loo, Anthony N. Almazan & Alex S. Keuroghlian, *Factors Leading to “Detransition” Among Transgender and Gender Diverse People in the United States: A Mixed-Methods Analysis*, 8 LGBT HEALTH 273, 276 (2021). One study found that of the transgender people who pursued gender affirmation surgery, 13.1% detransitioned, and 82.5% of that group did so for external factors such as family pressure and social stigma. *Id.* at 276, 279 (“Many of those identified as having ‘surgical regret’ noted that they did not regret the physical effects of the surgery itself but rather the stigma

one of his reasons for pushing gender-affirming procedures to be considered child abuse, comparing these treatments to the involuntary eugenic sterilization of minorities.<sup>216</sup> This argument is grounded in the fear that a child who asks for surgery will receive it without question or even be forced into it.<sup>217</sup> However, the criteria for medical treatments are designed to prevent medical treatment that lacks basis in evidence.<sup>218</sup>

The World Professional Association for Transgender Health (WPATH) Standards of Care (SOC) do not recommend genital surgery for children and cautions that adolescents should be given sufficient time in their gender role before receiving surgery.<sup>219</sup> Accordingly, physicians typically do not perform gender affirmation surgery on minors, with rare exceptions where the minor, their family, and medical providers agree that there is unusual benefit in receiving surgery and everyone understands the risks involved.<sup>220</sup> The WPATH SOC require “persistent, well-documented gender

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they faced from their families and communities as a result of their surgical affirmation.”). Only 2.4% attributed their detransition to doubts about their gender identity. *Id.* at 277. Moreover, of those who received gender-affirmation surgeries, only 1% expressed regret about the procedure. Valeria P. Bustos, Samyd S. Bustos, Andres Mascaró, Gabriel Del Corral, Antonio J. Forte, Pedro Ciudad, Esther A. Kim, Howard N. Langstein, & Oscar J. Manrique, *Regret after Gender-affirmation Surgery: A Systematic Review and Meta-analysis of Prevalence*, 9 PLASTIC & RECONSTRUCTIVE SURGERY GLOB. OPEN 11 (Mar. 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8099405/pdf/gox-9-e3477.pdf>. Compare this with a regret prevalence of 14.4% across all surgical patients; about 1 in 7 patients. Ana Wilson, Sean M. Ronnekleiv-Kelly & Timothy M. Pawlik, *Regret in Surgical Decision Making: A Systematic Review of Patient and Physician Perspectives*, 40 WORLD J. SURGERY 1454, 1454 (June 27, 2017).

<sup>216</sup> Paxton, *supra* note 118, at 3. This false equivalency not only demonstrates a lack of understanding as to the nature of gender dysphoria and its lifesaving treatment but also insensitivity to the systematic extermination of minority populations. See Alexandra Stern, *Forced Sterilization Policies in the US Targeted Minorities and Those with Disabilities – and Lasted Into the 21st Century*, UNIV. MICH. INST. HEALTHCARE POL’Y & INNOVATION (Sept. 23, 2020), <https://ihpi.umich.edu/news/forced-sterilization-policies-us-targeted-minorities-and-those-disabilities-and-lasting-21st>.

<sup>217</sup> See Karen Brooks Harper, *His Public Custody Battle Helped Ignite a Movement Against Transgender Health Care for Kids. Will it Carry Him to the Texas House?*, TEX. TRIB. (Mar. 14, 2022, 5:00 AM), <https://www.texastribune.org/2022/03/14/jeff-younger-transgender-care-house/>.

<sup>218</sup> See WPATH SOC, *supra* note 103, at 17-21.

<sup>219</sup> *Id.* “[H]owever current WPATH SOC guidelines recognize that care must reflect individual needs and not arbitrary age limits.” Frances Grimstad, Elizabeth R. Boskey, Amir Taghnia, & Oren Ganor, *Gender-Affirming Surgeries in Transgender and Gender Diverse Adolescent and Young Adults: A Pediatric and Adolescent Gynecology Primer*, 34 J. PEDIATRIC & ADOLESCENT GYNECOLOGY 442, 444 (2021).

<sup>220</sup> See Grimstad, *supra* note 219 (“[minor] patients and their families may seek out clinicians willing to consider performing a sterilizing procedure prior to the age of majority for person-specific reasons, such as prior to going to college. Consideration of this may



## 2022] Addressing Parental Denial of Gender Dysphoria Treatment 93

dysphoria” and for a patient to have reached the age of majority to receive hormonal or surgical treatments.<sup>221</sup> Even for puberty blockers, which have reversible effects and are prescribed to gender dysphoric children to provide them with more time to explore their identity, the SOC require an adolescent to have reached puberty for gender dysphoria to have worsened with its onset, and for parents to support the adolescent throughout the treatment process.<sup>222</sup>

Physicians prescribe puberty-suppressing hormones to gender dysphoric children and children that experience early puberty to halt puberty, which causes irreversible changes to children’s bodies and can be traumatizing to children experiencing gender dysphoria.<sup>223</sup> Such treatments can often be lifesaving for youths, especially since late medical transition is often more difficult to accomplish.<sup>224</sup> Alcorn, for example, feared that she will never “transition successfully.”<sup>225</sup>

Moreover, treatment for gender dysphoria does not have to include medical transition.<sup>226</sup> Treatments are highly personalized and provided on a case-by-case basis with the patient’s informed consent.<sup>227</sup> Additionally, medical providers consider parental preferences when prescribing treatment plans.<sup>228</sup> Therefore, medical providers can limit treatment to what they deem medically necessary to sustain the child’s quality of life.<sup>229</sup>

The notion that medical professionals will wantonly or even maliciously alter a child’s body to conform to a nebulous gender identity does not reflect reality.<sup>230</sup> Rather, it reflects a broader fear of society pressuring cis children to identify as transgender and medical institutions succumbing to

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require involvement of an ethics committee or legal representatives, and [pediatric and adolescent gynecology] clinicians as reproductive and sexual health experts may be asked to weigh in.”)

<sup>221</sup> WPATH SOC, *supra* note 103, at 34.

<sup>222</sup> *Id.* at 19.

<sup>223</sup> Jaime Stevens, Veronica Gomez-Lobo, & Elyse Pine-Twaddell, *Insurance Coverage of Puberty Blocker Therapies for Transgender Youth*, 136 PEDIATRICS 1029, 1029 (2015); see generally Simone Mahfouda, Julia K. Moore, Aris Sifarikas, Florian D. Zepf, & Ashleigh Lin, *Puberty Suppression in Transgender Children and Adolescents*, 5 LANCET: DIABETES & ENDOCRINOLOGY 816 (Oct. 1, 2017).

<sup>224</sup> Samantha Schmidt, *FAQ: What You Need to Know About Transgender Children*, WASH. POST (Feb. 25, 2022), <https://www.washingtonpost.com/dc-md-va/2021/04/22/transgender-child-sports-treatments/>; Mahfouda et. al., *supra* note 223.

<sup>225</sup> Leelah Alcorn, *Suicide Note*, TUMBLR (Dec. 28, 2014).

<sup>226</sup> Emanuella Grinberg, *What Is Medically Necessary Treatment for Gender-Affirming Health Care?*, CNN, <https://www.cnn.com/2018/05/31/health/transgender-medically-necessary-procedures/index.html>, (June 20, 2018).

<sup>227</sup> See WPATH SOC, *supra* note 103, at 10-21.

<sup>228</sup> *Id.* at 19-20.

<sup>229</sup> *Gender Dysphoria*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/diagnosis-treatment/drc-20475262> (last visited Feb. 16, 2022).

<sup>230</sup> See *supra* notes 212-22 and accompanying text.

“political correctness.”<sup>231</sup> With constant societal pressure to be cisgender, the fear that cis children are forced to be trans is, in the words of the ACLU’s deputy director of transgender justice, “absurd”:

Most of the time, what you have are parents who reject their children in one way or another for a significant period of time or take a long time to come around. You have the child resisting it internally, you have the parents resisting it, and then eventually the family comes together and says, ‘Okay, we have to support our child or the child is gonna die.’<sup>232</sup>

## V. CONCLUSION

A parent who prioritizes their own religious or otherwise personal feelings over the mental, emotional, and physical well-being of the child to the point of refusing necessary medical treatment is an abusive or neglectful parent.<sup>233</sup> Studies show that interventions for LGBTQ+ youth are urgently needed to mitigate the experiences of discrimination and marginalization they face.<sup>234</sup> The law can provide a remedy for children seeking the medical care they require and potentially provide safer homes for those children in instances of repeated harm.<sup>235</sup> The reality of such children is that “civil courts take weeks to try a commercial dispute between wealthy businesses but give less than five minutes to decide the future of an abused or neglected child.”<sup>236</sup> Gender dysphoria is a heavily misunderstood diagnosis, with transgender children, as a doubly vulnerable population, suffering from widespread public misperception and purposeful fearmongering.<sup>237</sup> With Texas leading conservative states to ban the treatment gender dysphoric children require, Maryland can be the progressive counterweight that leads liberal states to protect transgender children.<sup>238</sup> Abuse and neglect laws should consistently follow evidence-based scientific and medical developments over parental feelings or community values. To children like Alcorn, the five minutes a

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<sup>231</sup> See Asgarian, *supra* note 117.

<sup>232</sup> *Id.*

<sup>233</sup> See *Prince*, 321 U.S. at 170.

<sup>234</sup> Caroline M. Parker, Jennifer Hirsch, Morgan M. Philbin & Richard G. Parker, *The Urgent Need for Research and Interventions to Address Family-Based Stigma and Discrimination Against Lesbian, Gay, Bisexual, Transgender, and Queer Youth*, 63 J. ADOLESCENT HEALTH 383, 383, 392 (2018).

<sup>235</sup> See *In re R.S.*, 470 Md. 380, 235 A.3d 914 (2020).

<sup>236</sup> Deborah Rhode, *Access to Justice*, 69 Fordham L. Rev. 1785, 1793 (2001).

<sup>237</sup> See *supra* Part III.A-B.

<sup>238</sup> Today, Explained, *supra* note 124, at 22:16.

**2022] Addressing Parental Denial of Gender Dysphoria Treatment 95**

judge might spare would at least give hope for a future beyond the grip of gender dysphoria.

## COMMENT

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### TIME TO DEFINE THE OBJECTIVELY REASONABLE OFFICER: HOW MARYLAND'S USE OF FORCE STATUTE SUPPLIES MEASURABLE STANDARDS TO PROTECT FOURTH AMENDMENT RIGHTS

*By: Chelsea Roberts\**

#### I. INTRODUCTION

Law enforcement officers are entrusted with the authority to use force when arresting individuals suspected of illegal activity.<sup>1</sup> The use of such force, including the use of deadly force, is only privileged, however, to the extent the force is constitutional.<sup>2</sup> Unconstitutional use of force by an officer permits individuals to bring a civil cause of action<sup>3</sup> against the officer for excessive (or unreasonable) use of force.<sup>4</sup> Determining whether an officer's use of force is reasonable—and therefore, permissible—is a complicated and arduous analysis.<sup>5</sup>

The decision of whether force is reasonable largely yields to supposing what another officer in the accused's position would believe is

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<sup>1</sup> *Richardson v. McGriff*, 361 Md. 437, 484, 762 A.2d 48, 73 (2000) (citing *Okwa v. Harper*, 360 Md. 161, 199 (2000)).

<sup>2</sup> *Richardson*, 361 Md. at 484, 762 A.2d at 73 (citing *Tennessee v. Garner*, 471 U.S. 1, 7 (1985)); see discussion *infra* Section II.A.

<sup>3</sup> While this comment often discusses excessive force analyses in civil causes of action (see discussion *infra* Section II.A.i.), determining whether force is reasonable is equally relevant to criminal causes of actions brought against officers. See *Koushall v. State*, 479 Md. 124, 150-51, 277 A.3d 403, 418 (2022) (explaining that in a claim where the officer was accused of assault and battery, the determination of the lawfulness of police use of force “is analyzed under the Fourth Amendment’s objective reasonableness standard.”); see also *Wilson v. State*, 87 Md. App. 512, 519-21, 590 A.2d 562, 565-66 (1991); see also *Cagle v. State*, 235 Md. App. 593, 604-05, 607, 178 A.3d 674, 680 (2018).

<sup>4</sup> See *Widgeon v. E. Shore Hosp. Ctr.*, 300 Md. 520, 535, 479 A.2d 921, 928 (1984); see also *Barnes v. Montgomery Cnty.*, 798 F. Supp. 2d 688, 700 (D. Md. 2011).

<sup>5</sup> See *Graham v. Connor*, 490 U.S. 386, 396 (1989).

reasonable.<sup>6</sup> As the public and legislatures become increasingly aware of many police officers' "warrior mindset,"<sup>7</sup> deference to a "reasonable" officer's discretion seems more and more intolerable.<sup>8</sup> This recent awareness demands legislators define use of force statutes in a way that guarantees individuals' constitutional rights are protected.<sup>9</sup>

In the 2021 legislative session, the Maryland General Assembly ("MGA") passed a bill to enact a new use of force statute ("Statute") for the State.<sup>10</sup> While the Statute stops short of defining controlling terms "necessary" and "proportional" force and explicitly omits the term "reasonable," the Statute, read as a whole, allows officers, the public, and courts to ascertain what is required of a reasonable officer.<sup>11</sup> This comment will discuss: (1) the history of police use of force standards federally and in the state of Maryland;<sup>12</sup> (2) the impact of police use of force and current instances of excessive force that necessitated change;<sup>13</sup> (3) changes made to use of force standards throughout the country;<sup>14</sup> (4) the creation of the Maryland Use of Force Statute;<sup>15</sup> (5) the issues surrounding the Statute;<sup>16</sup> and

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<sup>6</sup> *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968)).

<sup>7</sup> See Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. F. 225, 228 (2015) [hereinafter *Law Enforcement's "Warrior" Problem*] ("Officers are trained to cultivate a "warrior mindset," the virtues of which are extolled in books, articles, interviews, and seminars intended for a law enforcement audience."); see also Kevin Cyr, *Police Use of Force: Assessing Necessity and Proportionality*, ALBERTA L. REV. 675 (2016) ("[T]he objectively reasonable standard can . . . be problematic [because] use of force is inextricably linked to officer safety, which introduces cognitive biases due to threat of interpersonal violence."); see also discussion *infra* Sections III.A., IV.

<sup>8</sup> See Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder>; Jennifer Hassan & Rick Noack, *How George Floyd's Killing Sparked a Global Reckoning*, WASH. POST (May 25, 2021, 1:32 PM), <https://www.washingtonpost.com/world/2021/05/25/george-floyd-anniversary-global-change/>.

<sup>9</sup> See Subramanian & Arzy, *supra* note 8; see also Hassan & Noack, *supra* note 8.

<sup>10</sup> S. 71, 2021 Leg., 442nd Sess. (Md. 2021); MD. CODE ANN., PUB. SAFETY § 3-524 (LexisNexis 2021).

<sup>11</sup> S. 71, 2021 Leg., 442nd Sess. (Md. 2021); MD. CODE ANN., PUB. SAFETY § 3-524 (LexisNexis 2021); see also discussions *infra* Sections III. B., IV. Although the Statute is silent on "reasonableness" and an officer's civil liability for excessive force, in clarifying what force is permitted, the Statute is essential to an analysis concerning what force is reasonable in civil actions for constitutional violations.

<sup>12</sup> See *infra* Section II.A.

<sup>13</sup> See *infra* Section II.B.

<sup>14</sup> See *infra* Section II.C.

<sup>15</sup> See *infra* Section II.D.

<sup>16</sup> See *infra* Section III.B

lastly (6) a proposal on how to resolve the issues with the Statute consistent with legislative intent, and Fourth Amendment Jurisprudence.<sup>17</sup>

## II. BACKGROUND

### A. *Police Use of Force Legal Standards Before Enactment of the Maryland Use of Force Statute*

#### i. Federal Use of Force Standard as Prescribed by the Supreme Court

Under the Fourth Amendment of the United States Constitution, citizens of the U.S. have the right to be “secure in their persons. . . against unreasonable searches and seizures.”<sup>18</sup> This Fourth Amendment protection prohibits officers from using excessive force to effectuate an arrest.<sup>19</sup> When an individual alleges an officer has used excessive force, the officer may be liable for the constitutional violation under 42. U.S.C. § 1983 (“§ 1983”).<sup>20</sup>

In 1989, the Supreme Court in *Graham v. Connor* held that when a citizen brings a claim under § 1983, alleging an officer used excessive force (in either a stop, arrest, or “other ‘seizure’”), the Fourth Amendment governs, and courts must apply a “reasonableness standard.”<sup>21</sup> The *Graham* court further held: “[d]etermining whether the force . . . is ‘reasonable’ under the Fourth Amendment requires a careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake.”<sup>22</sup>

This balancing test weighs the facts and circumstances of each case; “the test of reasonableness” is incapable of “precise definition or mechanical application.”<sup>23</sup> Moreover, the “reasonableness” of force used is an objective standard, considered from the perspective of a “reasonable police officer.”<sup>24</sup> The Court in *Graham* reasoned the “reasonableness” of police use of force

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<sup>17</sup> See *infra* Section IV.

<sup>18</sup> U.S. CONST. amend. IV; see *Garner*, 471 U.S. at 7 (“Whenever an officer restrains the freedom of a person to walk away, he has seized that person.”).

<sup>19</sup> See *Graham*, 490 U.S. at 393-94.

<sup>20</sup> See *Richardson v. McKnight*, 521 U.S. 399, 403 (1997). While officer excessive force in criminal actions also implicates the Fourth Amendment, *Koushall*, 479 Md. at 150-51, 277 A.3d at 417-18, this comment discusses excessive force analyses generally to address when force is reasonable, and thus justified, in both civil and criminal actions.

<sup>21</sup> *Richardson*, 361 Md. at 484, 762 A.2d at 73 (citing *Garner*, 471 U.S. at 7); see discussion *infra* Section II.A.

<sup>22</sup> *McKnight*, 521 U.S. at 396 (quoting *Terry*, 392 U.S. at 24 (1968)).

<sup>23</sup> *Graham*, 490 U.S. at 396 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

<sup>24</sup> *Graham*, 490 U.S. at 396-97.

“must embody allowance for the fact that police officers are often forced to make split-second judgments.”<sup>25</sup> The Court did not expound how “split-second judgments” should be analyzed in the calculus of reasonableness, but courts since *Graham* routinely cite this proposition when paying deference to an officer’s judgment.<sup>26</sup>

Law enforcement officials accused of violating § 1983 are entitled to the complete defense of “qualified immunity” if the officer reasonably would not have known he or she violated a clearly established federal right.<sup>27</sup> While the Statute may fit within Maryland precedent as a clearly established law that protects a federal constitutional right (extinguishing the qualified immunity defense), this implication of qualified immunity on the Statute is outside the scope of this comment.<sup>28</sup>

## ii. Use of Force Under Maryland Common Law

### a. *Maryland Courts’ Interpretation and Application of Graham v. Connor Under the Maryland Declaration of Rights*

In Maryland, when an individual is allegedly the victim of police use of excessive force, he or she may bring a federal § 1983 claim and a separate civil cause of action under the Maryland Declaration of Rights.<sup>29</sup> Article 26 of the Maryland Declaration of Rights is the analog to the Fourth Amendment and protects the same right “to be free from unreasonable search and seizure.”<sup>30</sup> The provisions under the Maryland Declaration of Rights are

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<sup>25</sup> *See id.*

<sup>26</sup> *See id.*; *see also* Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 864–65 (2014) [hereinafter *Policing Facts*].

<sup>27</sup> *Shoemaker v. Smith*, 353 Md. 143, 159, 725 A.2d 549, 558 (1999) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

<sup>28</sup> *See Branch v. McGeeney*, 123 Md. App. 330, 354, 359, 718 A.2d 631, 643, 645 (1998) (explaining where a state law protects a federal right, and the law mandates an officer’s compliance, violation of that state law may destroy an officer’s immunity); *see also* S. 71, 2021 Leg., 442nd Sess. (Md. 2021); MD. CODE ANN., PUB. SAFETY § 3-524 (h)(2) (LexisNexis 2021) (requiring officer’s sign a document affirming they understand and will comply with the Statute which arguably protects a federal right under the Fourth Amendment due to its mandate on officers to use only necessary force).

<sup>29</sup> *See e.g., Widgeon*, 300 Md. at 535, 479 A.2d at 928 (1984); *see also Barnes*, 798 F. Supp. 2d at 700.

<sup>30</sup> *Barnes*, 798 F. Supp. 2d at 700; MD. CONST. art. 26.

construed *in pari materia*<sup>31</sup> with related U.S. Constitutional Amendments, meaning Article 26 must be interpreted in the same way the Supreme Court of the United States interprets the Fourth Amendment.<sup>32</sup>

Consequently, the Court of Appeals of Maryland applies the same objective “reasonableness” standard to assessing Article 26 violations as the Supreme Court applies to § 1983 claims of Fourth Amendment violations.<sup>33</sup> In applying the reasonableness standard to excessive force claims, the Supreme Court held claims of excessive force are only proper under the Fourth Amendment (rejecting a Fourteenth Amendment substantive due process analysis).<sup>34</sup> The standard set out by the Supreme Court in *Graham*—that claims of excessive force are judged under an objective standard from the perspective of a reasonable officer—has been applied consistently throughout Maryland for the last twenty years.<sup>35</sup> In applying *Graham*, however, Maryland courts have needed to go beyond the nebulous Supreme Court standard to conduct analysis into the “totality of circumstances,”<sup>36</sup> and precisely what circumstances are included in the calculus of reasonableness.<sup>37</sup>

### ***b. Maryland Precedent Surrounding Antecedent Events and Police Procedures in the Reasonable Force Analysis***

Maryland jurisprudence on admissibility of antecedent events (events that occurred before an officer’s use of force) lean strongly toward

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<sup>31</sup> Latin term meaning “in the same matter,” *in pari materia* is “a canon of construction” that statutes are interpreted the same as another statute on a related subject matter. *In pari materia*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>32</sup> See *Park v. Miller*, No. CIV. JFM-03-3257, 2004 WL 2415062, at \*12 (D. Md. Oct. 28, 2004) (citing *DiPino v. Davis*, 354 Md. 18, 43, 729 A.2d 354, 367 (Md. 1999)); see also *Barnes*, 798 F. Supp. 2d at 700 (citing *Hayes v. City of Seat Pleasant*, No. DKC 08–2548, 2010 WL 3703291, at \*4 (D. Md. Sept. 16, 2010)); see also *Richardson*, 361 Md. at 452–53, 762 A.2d at 56 (citation omitted).

<sup>33</sup> See *Richardson*, 361 Md. at 452–53, 762 A.2d at 56 (citations omitted).

<sup>34</sup> *Graham*, 490 U.S. at 395 (citing *Garner*, 471 U.S. at 5); cf. *Barnes*, 798 F. Supp. 2d at 700 (holding Article 26 and not Article 24 of the Maryland Declaration of Rights is the cause of action for claims of excessive force since article 24 “protects the same rights as the *Fourteenth Amendment*”) (emphasis added).

<sup>35</sup> See *Estate of Blair v. Austin*, 469 Md. 1, 22, 228 A.3d 1094, 1106 (2020); see also *Randall v. Peaco*, 175 Md. App. 320, 333, 927 A.2d 83, 91 (2007) (citing *Schulz v. Long*, 44 F.3d 649 (8th Cir. 1995)); see also *Richardson*, 361 Md. at 452–53, 762 A.2d at 56.

<sup>36</sup> See *Estate of Blair*, 469 Md. at 23, 228 A.3d at 1106–07 (quoting *Graham*, 490 U.S. at 396–97) (“totality of the circumstances[] includ[es] ‘the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, whether he is actively resisting arrest or attempting to evade arrest by flight[.]’”); see also *Richardson*, 361 Md. at 464, 762 A.2d at 63 (explaining the totality of the circumstances includes facts known to the officer at the moment force was used and does not allow for “20/20 hindsight guessing.”).

<sup>37</sup> See *supra* note 36 and accompanying text.



exclusion,<sup>38</sup> although cautiously.<sup>39</sup> Officer compliance with discretionary police policy, and whether an officer took unnecessary action which then led to necessary force are two separate but related categories of antecedent events.<sup>40</sup> Almost indisputably, however, admission of evidence showing a clear violation of *non-discretionary* police guidelines may be relevant to the reasonableness inquiry.<sup>41</sup> Definitively, analysis of the “totality of circumstances,” encompasses what the officer *knew* at the moment force was used.<sup>42</sup>

In 2000, the Court of Appeals of Maryland in *Richardson v. McGriff* found no error in excluding evidence of “antecedent events” where an officer’s pre-seizure conduct may have violated police guidelines.<sup>43</sup> The *Richardson* court reasoned that events and facts known to the officer leading up to the use of force are relevant only where the events are *contemporaneous* with the use of force.<sup>44</sup> The reasonableness of the officer’s actions *before* the officer’s use of force were irrelevant to assessing whether the use of force was reasonable.<sup>45</sup> Maryland courts since *Richardson* have held antecedent events are not relevant in determining reasonable force.<sup>46</sup>

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<sup>38</sup> See *Richardson*, 361 Md. at 458-59, 762 A.2d at 59-60 (finding pre-seizure actions of the officer that were potentially violative of discretionary police policies were not relevant and thus not admissible); see also *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (recognizing Supreme Court precedent and the necessity for officers to make “split-second judgments,” the court held there was no abuse of discretion in the exclusion of evidence concerning the officer’s actions leading up to use of force).

<sup>39</sup> See *Richardson*, 361 Md. at 501–03, 762 A.2d at 83–84 (Harrell, J., concurring) (contending pre-seizure conduct is relevant to reasonableness, “[w]ithout reference to and consideration of pre-seizure events, no context for reasonableness evaluation of the totality of the circumstances can be illustrated.”).

<sup>40</sup> Compare *Richardson*, 361 Md. at 458-59, 461, 762 A.2d at 59-61 (explaining that the officer’s antecedent actions related to discretionary police guidelines which were irrelevant to whether the officer’s use of force was reasonable), with *Richardson*, 361 Md. at 458–59, 762 A.2d at 59–60 (analyzing whether the officer’s decision to search for a suspect in the dark and not turn on the lights, was an irrelevant antecedent event).

<sup>41</sup> See *id.* at 458-59, 461, 762 A.2d at 59-61 (noting an absence of evidence there was a clear violation of police guidelines in officer’s decision to not turn lights on in a dark room when conducting a search); see also *id.* at 509-10, 762 A.2d at 87 (Harrell, J., concurring).

<sup>42</sup> See *id.* at 464-65, 762 A.2d at 62-63; see also *Koushall*, 249 Md. App. at 732-32, 246 A.3d at 733 (citing *Wilson v. State*, 87 Md. App. 512, 521, 590 A.2d 562, 566 (1991)).

<sup>43</sup> See *Richardson*, 361 Md. at 441, 762 A.2d at 50.

<sup>44</sup> See *id.* at 452, 456-57, 462, 464-65, 762 A.2d at 56, 58, 62-63.

<sup>45</sup> See *id.* at 458, 762 A.2d at 59.

<sup>46</sup> E.g., *Randall*, 175 Md. App. at 329, 927 A.2d at 89 (“The law in Maryland, and in a number of federal courts and our sister states, is that events that are antecedent to the conduct of the officer at issue do not bear on the objective reasonableness of that conduct.”).

The concurring opinion in *Richardson* proposed, however, that the totality of circumstances considered in the reasonableness inquiry cannot be confined with such rigidity.<sup>47</sup> The concurrence observed an inconsistency in the federal circuits' interpretation of "totality of circumstances" under *Graham*.<sup>48</sup> To be sure, in some circuits (as the Majority reasoned), the totality of circumstances in the use of force is limited to only those circumstances "immediately prior to and at the moment" of the use of force.<sup>49</sup>

In the Seventh Circuit, however, the totality of circumstances encompasses all information an officer had at the moment force was used, excluding only "information uncovered later."<sup>50</sup> Relevant to the reasonableness of "the officer's perspective" and the time force was used are the "knowledge, facts and circumstances known to the officer at the time he exercised his split-second judgment."<sup>51</sup> The concurrence in *Richardson* went on further to cite many federal and Maryland state cases where police procedures were admitted and considered in determining the reasonableness of the officer's use of force.<sup>52</sup> Despite extensive Maryland precedent excluding evidence of antecedent events (*supra*), admission of police guidelines has generally been relevant to excessive force analyses in Maryland and federal courts.<sup>53</sup>

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<sup>47</sup> See *Richardson*, 361 Md. at 484-85, 762 A.2d at 73-74 (Harrell, J., concurring) ("In *Graham*, the Supreme Court expressly rejected a rigid formulation in defining the Fourth Amendment standard of reasonableness[.]").

<sup>48</sup> *Id.* at 486-87, 762 A.2d at 74-75 (Harrell, J., concurring).

<sup>49</sup> *Id.* at 486-87, 762 A.2d at 74-75 (Harrell, J., concurring) (quoting *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996)).

<sup>50</sup> *Richardson*, 361 Md. at 488-89, 762 A.2d at 75-76 (Harrell, J., concurring) (quoting *Deering v. Reich*, 183 F.3d 645, 649-50 (7th Cir. 1999)).

<sup>51</sup> *Id.* at 489, 762 A.2d at 76 (Harrell, J., concurring) (quoting *Deering*, 183 F.3d at 650).

<sup>52</sup> See *Richardson*, 361 Md. at 504-05, 762 A.2d at 84-85 (Harrell, J., concurring) (first citing *Williams v. Mayor & City Council of Balt.*, 359 Md. 101, 139-40, 753 A.2d 41, 61-62 (2000); then citing *State v. Albrecht*, 336 Md. 475, 502-03, 649 A.2d 336, 349-50 (1994); then citing *Boyer v. State*, 323 Md. 558, 591, 594 A.2d 121, 137 (1991); then citing *Garner*, 471 U.S. at 18; then citing *Ludwig v. Anderson*, 54 F.3d 465, 472 (8th Cir. 1995); then citing *Samples v. Atlanta*, 916 F.2d 1548, 1551 (11th Cir. 1990); then citing *Kladis v. Brezek*, 823 F.2d 1014, 1019 (7th Cir. 1987); and then citing *Peraza v. Delameter*, 722 F.2d 1455, 1456 (9th Cir. 1984)).

<sup>53</sup> *Richardson*, 361 Md. at 504, 762 A.2d at 84 (2000) (Harrell, J., concurring).

***B. The Tipping Point for U.S. Enduring Police Brutality Sparks Global Furor and Legislative Action.***

**i. Police Brutality and Use of Force in the U.S.**

Use of excessive force by police officers has been a part of U.S. history since the first officers were deployed.<sup>54</sup> In recent history, with the evolving use of video cameras, documented instances of police excessive force have brought attention to how, when, and why police exert force.<sup>55</sup> This attention is particularly focused on police use of force against Black people,<sup>56</sup> as a recent report<sup>57</sup> has illustrated: Black people are three times more likely to be killed by police.<sup>58</sup> Ordinarily Black victims of excessive force (and their estates), have failed to find justice in the U.S. legal system.<sup>59</sup> From Rodney King<sup>60</sup> to George Floyd,<sup>61</sup> protests and riots have spurred calls for justice.<sup>62</sup>

In Maryland, the unexplained death of Freddie Gray<sup>63</sup> while in police custody prompted an eruption of protests, riots, and a federal investigation of the Baltimore Police Department (“BPD”) by the Department of Justice (“DOJ”) in 2015.<sup>64</sup> In 2016, the DOJ found that the BPD engaged in a

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<sup>54</sup> ANGELA DAVIS, *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT*, at xii (2017).

<sup>55</sup> *See id.* at xii-xiii.

<sup>56</sup> *E.g.*, Subramanian & Arzy, *supra* note 8.

<sup>57</sup> Harvard T.H. Chan School of Public Health Study examining 5,494 police involved deaths between 2013 and 2017.

<sup>58</sup> *See* HARVARD T.H. CHAN SCH. OF PUBLIC HEALTH, *BLACK PEOPLE MORE THAN THREE TIMES AS LIKELY AS WHITE PEOPLE TO BE KILLED DURING A POLICE ENCOUNTER*, <https://www.hsph.harvard.edu/news/hsph-in-the-news/blacks-whites-police-deaths-disparity/> (last visited Oct. 24, 2022).

<sup>59</sup> *See* DAVIS, *supra* note 54, at xii-xiii; *see also* JIN HEE LEE & SHERRILYN IFILL, *Do Black Lives Matter to the Courts?*, in *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* 256-58 (Angela Davis ed., 2017).

<sup>60</sup> *See* HEE LEE & IFILL, *supra* note 59, at 257 (“The 1991 videotaped beating of Rodney King by Los Angeles Police Department officers unleashed a brewing outrage among communities of color across the country [and riots] ensued after the officers involved in the King beating were acquitted of all criminal charges.”).

<sup>61</sup> George Floyd was a Black Minnesotan who died in police custody (discussed *infra* Section II.B.ii).

<sup>62</sup> *See* Subramanian & Arzy, *supra* note 8.

<sup>63</sup> Freddie Gray was a twenty-five-year-old Black man who ran upon seeing Baltimore Police officers. He was pursued and then arrested—sustaining fatal injuries while in police transport. *Timeline of the Events Following the Arrest of Freddie Gray*, ASSOCIATED PRESS (May 23, 2016), <https://apnews.com/article/sports-baseball-freddie-gray-arrests-archive-1b229abb271a45a2ab2d03878c1e9dfb>.

<sup>64</sup> *See* HEE LEE & IFILL, *supra* note 59, at 258-60.

“pattern or practice” of conducting unlawful “stops, searches, and arrests” and used excessive force unlawfully against Black people at disproportionate rates.<sup>65</sup> In 2017, Baltimore City and the DOJ entered into a consent decree, implementing “comprehensive reforms.”<sup>66</sup> Such reforms included the development of “policies and training” to ensure officers abide by constitutional requirements when conducting searches and seizures.<sup>67</sup>

## ii. George Floyd, Global Protests, and the Legislative Response

In May 2020, a bystander video captured Minnesota police officer Derek Chauvin kneeling on the neck of George Floyd for over nine minutes, while Floyd (a Black man), repeated the words “I can’t breathe.”<sup>68</sup> While pinned in prone position by four male officers, Floyd’s calls for help ultimately ceased, as he visibly lost consciousness.<sup>69</sup> Bystanders pleaded for Chauvin to remove his knee or to check Floyd’s pulse, but Chauvin’s demeanor remained apathetic as he continued to kneel on Floyd’s neck.<sup>70</sup> An Emergency Medical Technician arrived, directed Chauvin to remove his knee from Floyd’s limp body, and transported Floyd to a hospital where he was pronounced dead.<sup>71</sup> Later, the judge presiding over Chauvin’s trial deemed his actions an abuse of power in which Chauvin “treated Floyd with particular cruelty.”<sup>72</sup>

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<sup>65</sup> THE U.S. DEP’T OF JUST., OFF. OF PUB. AFF., *Justice Department Reaches Agreement with City of Baltimore to Reform Police Department’s Unconstitutional Practices* (Jan. 12, 2017), <https://www.justice.gov/opa/pr/justice-department-reaches-agreement-city-baltimore-reform-police-department-s>.

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

<sup>67</sup> Consent Decree Appendix A at 24-28, *United States v. Police Department of Baltimore City*, No. 17-cv-00099-JKB (D. Md. Jan. 12, 2017), ECF No. 39.

<sup>68</sup> See Subramanian & Arzy, *supra* note 8; see also Hassan & Noack, *supra* note 8.

<sup>69</sup> See Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>.

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

<sup>71</sup> See *Derek Chauvin Trial: Paramedics Say Floyd Had No Pulse When They Arrived*, BBC NEWS, (Apr. 2, 2021), <https://www.bbc.com/news/world-us-canada-56606418>; see also Nicholas Bogel-Burroughs, *George Floyd Was Dead by the Time Medical Help Arrived, a Paramedic Testified*, N.Y. TIMES (Apr. 1, 2021), <https://www.nytimes.com/2021/04/01/us/george-floyd-emt-paramedics.html>.

<sup>72</sup> Laurel Wamsley, *Judge Finds Aggravating Factors in Chauvin Case, Paving Way For Longer Sentence*, NPR (May 12, 2021, 11:12 AM), <https://www.npr.org/2021/05/12/996158514/judge-finds-aggravating-factors-in-chauvin-case-opening-path-for-longer-sentence>.

With the public witnessing yet another Black person die in police custody, a visceral response boomed throughout the nation and the world.<sup>73</sup> “I can’t breathe,” reverberated throughout the protests; the chant repeated the last words of Floyd, and many other Black people in police custody who died before him.<sup>74</sup> Activists and public figures demanded legislators act.<sup>75</sup> Between May 2020 and May 2021, twenty states enacted legislation restricting or clarifying statewide police use of force standards.<sup>76</sup> Among these, Maryland legislators enacted the Maryland Police Accountability Act of 2021, establishing a statewide use of force standard.<sup>77</sup>

### C. Recent Use of Force Legislation Throughout the U.S.

Of the twenty states to enact new use of force legislation, more than ten states (including Maryland), clarified or redefined the state use of force

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<sup>73</sup> See Subramanian & Arzy, *supra* note 8; see also Hassan & Noack, *supra* note 8 (following countless other deaths of Black people in police custody, “George Floyd’s death served as a catalyst for one of the largest social movements in U.S. history.”).

<sup>74</sup> Katie Wedell, Cara Kelly, Camille McManus & Christine Fernando, *George Floyd is Not Alone. ‘I Can’t Breathe’ Uttered By Dozens in Fatal Police Holds Across U.S.*, USA TODAY (June 13, 2020, 6:00 AM), <https://www.usatoday.com/in-depth/news/investigations/2020/06/13/george-floyd-not-alone-dozens-said-cant-breathe-police-holds/3137373001/> (last updated June 25, 2020, 9:58 AM) (stating dozens have died in police custody uttering “I can’t breathe” and the majority listed in the article are Black men); Mike Baker, Jennifer Valentino-DeVries, Manny Fernandez & Michael LaForgia, *Three Words. 70 Cases. The Tragic History of ‘I Can’t Breathe.’* N.Y. TIMES (June 29, 2020), <https://www.nytimes.com/interactive/2020/06/28/us/i-cant-breathe-police-arrest.html> (in seventy instances the phrase was said, and in more than half of the instances Black people uttered the phrase).

<sup>75</sup> See Jacqueline Alemany & Tobi Rali, *Power Up: Celebrities Descend on the Hill to Push Police Reform*, WASH. POST (May 13, 2021, 6:52 AM), <https://www.washingtonpost.com/politics/2021/05/13/power-up-celebrities-descend-hill-push-police-reform/>; see also Hassan & Noack, *supra* note 8.

<sup>76</sup> Subramanian & Arzy, *supra* note 8.

<sup>77</sup> See Brian Witte, *Racial Protests Reckoning: Maryland Police Reform Laws Begin*, ASSOCIATED PRESS NEWS (Sept. 30, 2021), <https://apnews.com/article/police-laws-larry-hogan-maryland-police-reform-6829b0cf32106008566bae49049400a3> (describing the series of laws collectively called “The Maryland Police Accountability Act”); see also *State Legislature Passes Maryland Police Accountability Act of 2021*, OFF. OF THE STATE’S ATT’Y FOR BALT. CITY (Apr. 15, 2021), <https://www.stattorney.org/media-center/press-releases/2249-state-legislature-passes-maryland-police-accountability-act-of-2021>.

standard.<sup>78</sup> Nearly all the legislation explicitly specified that the reasonability of the use of force is measured by an objectively reasonable *police officer*.<sup>79</sup>

In 2021, Congress made efforts to enact a use of force standard for federal officers under the George Floyd Justice in Policing Act of 2021 (“Act”).<sup>80</sup> While the legislation did not pass, the Act sought to prohibit police use of force, unless the force was “necessary and proportional.”<sup>81</sup> Additionally, Congress included a number of instructive definitions.<sup>82</sup> For example, “necessary” was defined as what another reasonable federal officer would objectively believe was necessary, under the totality of circumstances and where there were no reasonable alternatives to the use of force; and “totality of circumstances” was further defined to include all the facts known to the officer “leading up to and at the time” the force is used.<sup>83</sup> These terms are identical to terms in the Maryland Statute, where they are undefined.<sup>84</sup>

#### ***D. Maryland General Assembly Redefines Police Use of Force: Language and Legislative History***

The MGA clarified the state police use of force standard in Senate Bill 71 (“S.B. 71”), codified in section 3-524 of the Maryland Public Safety Code.<sup>85</sup> The section of the code titled, “Maryland Use of Force Statute,” (referenced in this comment as “the Statute”) provides: “(d)(1) A police officer may not use force against a person unless, under the totality of the circumstances, the force is necessary and proportional to: (i) prevent an imminent threat of physical injury to a person; or (ii) effectuate a legitimate law enforcement objective.”<sup>86</sup> While the Statute itself does not define the terms found in section 3-524(d)(1), some notable points of legislative history provide greater insight.<sup>87</sup>

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<sup>78</sup> Subramanian & Arzy, *supra* note 8 (Colorado, Connecticut, Illinois, Minnesota, Utah, Virginia, DC, Massachusetts, Nevada, Oregon, Vermont, Washington, and Maryland revised or clarified use of force standards).

<sup>79</sup> COLO. REV. STAT. § 18-1-707 (Lexis Advance through all 2021 Regular Session legislation, as compiled and edited by the Colorado Office of Legislative Legal Services); 2020 Ct. ALS 1, 2020 Ct. P.A. 1, 2020 Ct. HB 6004; 2019 ILL. ALS 652, 2019 Ill. Laws 652, 2019 ILL. P.A. 652, 2019 Ill. HB 3653; 2019 Bill Text MN H.B. 1C; 2021 Ut. HB 237, 2021 Utah Laws 150, 2021 Ut. Ch. 150, 2021 Ut. ALS 150; 2020 Va. ALS 37, 2020 Va. Acts 37, 2020 Va. Ch. 37, 2020 Va. SB 5030; 2019 Bill Text DC B. 907.

<sup>80</sup> George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021).

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

<sup>82</sup> *Id.*

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

<sup>84</sup> Compare *id.*, with MD. CODE ANN., PUB. SAFETY § 3-524 (LexisNexis 2022).

<sup>85</sup> See S. 71, 2021 Leg., 442nd Sess. (Md. 2021); see also MD. CODE ANN., PUB. SAFETY § 3-524 (LexisNexis 2022).

<sup>86</sup> PUB. SAFETY § 3-524(d)(1).

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

**i. Report from the Maryland General Assembly Workgroup on Police Reform**

The month after the killing of George Floyd, the House Speaker of the MGA assembled a bipartisan group of Maryland legislators, forming the “Workgroup to Address Police Reform and Accountability in Maryland” (“Workgroup”).<sup>88</sup> The goal of the Workgroup was to provide the Speaker with a police reform bill for the 2021 legislative session.<sup>89</sup> Over five months, the Workgroup held eight public meetings and listened to testimony from approximately ninety citizens, and twenty-seven expert witnesses.<sup>90</sup>

The Workgroup then provided its recommendations for a police reform bill to include establishing a statewide use of force standard.<sup>91</sup> The Workgroup recommended police only use force when “objectively reasonable and appears to be necessary under the circumstances,” in tandem with several police training provisions.<sup>92</sup> The House Speaker then introduced House Bill 670 (“H.B. 670”), which incorporated the Workgroup’s use of force recommendations, stating the bill was “the product of the Workgroup.”<sup>93</sup>

**ii. The Origin and Evolution of The Statute Under H.B. 670**

**a. H.B. 670 Introduction**

The Statute first appeared in H.B. 670 in section 3-524.<sup>94</sup> Like the Workgroup’s recommendations, the bill required Maryland officers undergo training (to include training on de-escalation, and alternatives to lethal force), as well as sign a document certifying he or she underwent the training and

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<sup>88</sup> See *Final Report of the Workgroup to Address Police Reform and Accountability in Maryland*, DEP’T. OF LEGIS. SERVS. 1 (Dec. 1, 2020), <https://mgaleg.maryland.gov/pubs-current/Final-Report-Police-Reform-Workgroup.pdf>.

<sup>89</sup> See *id.* at iii, 1.

<sup>90</sup> See *id.* at iii, 1, 7 (expert testimony was heard from Maryland State’s Attorneys, Public Defenders, professors, a policy and data analyst, law enforcement officers in Maryland police and sheriff’s offices, the Executive Director of the Maryland Police Training and Standards Commission, and the President of the Maryland Fraternal Order of Police).

<sup>91</sup> See *id.* at iii, 1-7.

<sup>92</sup> See *id.* at 3-5.

<sup>93</sup> *Police Reform and Accountability Act of 2021: Hearing on H.D. 670 Before the Judiciary Comm.*, 2021 Leg., 442nd Sess. (Md. 2021) (statement of Speaker Adrienne Jones).

<sup>94</sup> H.D. 670, 2021 Leg., 442nd Sess. (Md. 2021).

will comply with the Statute.<sup>95</sup> While “proportionality” and “totality of circumstances” were not included in the first version of the bill, the original section 3-524 of the legislation contained substantially the same provisions that were later enacted into law under S.B. 71.<sup>96</sup> Like the Workgroup recommendation, however, H.B. 670 section 3-524 (c)(2) stated: “a police officer may only use the force that is objectively reasonable and appears to be necessary under the circumstances in response to the threat or resistance by another person.”<sup>97</sup> This provision was the subject of a later amendment<sup>98</sup> and extensive discussion in the House.<sup>99</sup>

***b. H.B. 670 Amendment 992612 and Subsequent House Floor Discussion***

Amendment 992612 was the first amendment to H.B. 670 and struck section 3-524 (c)(2) in its entirety.<sup>100</sup> In its place the following was added: “a police officer may not use force against a person unless the force is necessary and proportional to [prevent a threat or effectuate an arrest].”<sup>101</sup> The amendment still did not define “necessary” but did define “totality of the circumstances” to include “all facts known to the officer. . . leading up to and at the time of the use of force. . .” and “proportional” as “not excessive in relation to a . . . legitimate law enforcement objective.”<sup>102</sup>

After the amendment was adopted, an extensive debate occurred on the House floor regarding many conservative delegates’ proposed amendments to section 3-524.<sup>103</sup> Conservatives criticized the proposed statute as a threat to officer safety; where officers are faced with dangerous split-second decisions, second-guessing their use of force could cost the officer their life.<sup>104</sup> Democratic Delegate, C.T. Wilson responded to many of

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<sup>95</sup> Compare, *Final Report of the Workgroup to Address Police Reform and Accountability in Maryland*, DEP’T. OF LEGIS. SERVS., 1, 3-5 (Dec. 1, 2020), <https://mgaleg.maryland.gov/pubs-current/Final-Report-Police-Reform-Workgroup.pdf>, with H.D. 670, 2021 Leg., 442nd Sess. (Md. 2021).

<sup>96</sup> Compare H.D. 670, 2021 Leg., 442nd Sess. (Md. 2021), with S. 71, 2021 Leg., 442nd Sess. (Md. 2021).

<sup>97</sup> H.D. 670, 2021 Leg., 442nd Sess. (Md. 2021) (terms including “necessary” not defined).

<sup>98</sup> See *infra* p.18-19 and notes 100-08.

<sup>99</sup> See House Floor Proceedings No. 21 A, 2021 Leg., Reg. Sess., at 3:12:00-4:13:00 (Mar. 10, 2021).

<sup>100</sup> H.D. 670, 2021 Leg., 442nd Sess. (Md. 2021) (amendment 992612) (significantly, “force that is *objectively reasonable*” was stricken) (emphasis added).

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

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

<sup>103</sup> See House Floor Proceedings No. 21 A, 2021 Leg., Reg. Sess., at 2:20:00-4:13:00 (Mar. 10, 2021).

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



the conservative amendments with one central theme: the use of force standard pays deference to officers' split-second decisions but requires officers act as the "well-trained professionals they are."<sup>105</sup>

Delegate Wilson criticized the conservative amendments as treating officers as ordinary citizens that decided to wake up that morning and "put on a badge and a gun."<sup>106</sup> The new standard, Delegate Wilson argued, shouldn't regard officers as ordinary citizens.<sup>107</sup> In endowing in officers "every right imaginable," society and the law must raise them to a higher standard, a standard that requires officers defer to their police training when making split-second decisions.<sup>108</sup> None of the conservative amendments passed, and section 3-524 remained unchanged.<sup>109</sup>

The entire use of force provision was then removed from H.B. 670<sup>110</sup> and added under the Senate's police reform bill, S.B. 71.<sup>111</sup> While the exact language from Amendment 992612 was not carried over to S.B. 71,<sup>112</sup> the Senate later adopted its own amendment similar to Amendment 992612,<sup>113</sup> and this original deviation from Amendment 992612 is believed to be unintentional.<sup>114</sup>

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<sup>105</sup> See House Floor Proceedings No. 21 A, 2021 Leg., Reg. Sess., at 2:36:00-3:11:00 (Mar. 10, 2021) (statement of Del. C. T. Wilson),

<https://mgaleg.maryland.gov/mgaweb/Committees/Media/house-21-A?year=2021RS>.

<sup>106</sup> See *id.* at 3:07:00-3:11:00 (Mar. 10, 2021) (statement of Del. C. T. Wilson).

<sup>107</sup> See *id.* at 2:36:00-3:11:00 (Mar. 10, 2021) (statement of Del. C. T. Wilson).

<sup>108</sup> See *id.* at 3:00:00-3:11:00 (Mar. 10, 2021) (statement of Del. C. T. Wilson) ("I don't want [officers] to react how I would react, I want [officers] to react as a trained police officer would act . . . this bill asks [officers] to be a well-trained professional in dealing with [their] law enforcement responsibilities. . . this bill gives [officers] the latitude to be police officers; its what's *reasonable*, it's what's *proportional*. I hope that they're trained enough to make that decision . . . this bill asks us to treat [officers] like the professionals they are and raise them to a standard I know that they can meet.").

<sup>109</sup> Compare H.D. 670, 2021 Leg., 442nd Sess. (Md. 2021) (first reader), with H.D. 670, 2021 Leg., 442nd Sess. (Md. 2021) (third reader).

<sup>110</sup> Compare H.D. 670, 2021 Leg., 442nd Sess. (Md. 2021) (third reader), with H.D. 670, 2021 Leg., 442nd Sess. (Md. 2021) (enacted).

<sup>111</sup> Compare S. 71, 2021 Leg., 442nd Sess. (Md. 2021) (third reader), with S. 71, 2021 Leg., 442nd Sess. (Md. 2021) (enacted); see S. 71, 2021 Leg., 442nd Sess. (Md. 2021) (amendment 952415).

<sup>112</sup> Compare S. 71, 2021 Leg., 442nd Sess. (Md. 2021) (amendment 952415), with H.D. 670, 2021 Leg., 442nd Sess. (Md. 2021) (amendment 992612).

<sup>113</sup> S. 71, 2021 Leg., 442nd Sess. (Md. 2021) (amendment 213228).

<sup>114</sup> See *Hearing on S. 71 Amendment 213228 Before the Judiciary Comm.*, 2021 Leg., 442nd Sess. (Md. 2021)

[https://mgaleg.maryland.gov/mgaweb/Committees/Media/false?cmte=jud&clip=JUD\\_4\\_2\\_2021\\_meeting\\_2&ys=2021rs](https://mgaleg.maryland.gov/mgaweb/Committees/Media/false?cmte=jud&clip=JUD_4_2_2021_meeting_2&ys=2021rs), (statement of Del. Luke Clippinger) (suggesting there

iii. **Transfer of the Statute from H.B. 670 to S.B. 71 and the Senate’s Revisions**

When adopted in the Senate by way of Amendment 952415, the use of force statute read: “a police officer may not use force against a person *unless a police officer under similar circumstances would believe* that the force is necessary and proportional to [prevent a threat or effectuate an arrest].”<sup>115</sup> Several days later Amendment 213228 was adopted, striking “a police officer under similar circumstances would believe that,” and replacing it with “under the totality of the circumstances.”<sup>116</sup> Read in full with the proposed Amendment, the Statute read: “[a] police officer may not use force against a person unless, under the totality of circumstances, the force is necessary and proportional. . . .”<sup>117</sup>

Then, Amendment 213228 went to the House Judiciary Committee, where it was discussed.<sup>118</sup> A committee member questioned the interpretation of “totality of the circumstances,” and expressed concern that an officer’s actions would be judged in hindsight rather than what the officer knew at the time force was used.<sup>119</sup> Committee Chair, Delegate Clippinger, responded it was his belief the phrase simply required an officer on the scene to consider the circumstances known to the officer *in light of his or her training*.<sup>120</sup> After its adoption, Amendment 213228 produced the language contained in the final version of the use of force statute, later enacted into law.<sup>121</sup> None of these terms were defined in either the enacted statute, nor any version of S.B. 71.<sup>122</sup>

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may have been an administrative error in the Senate’s original incorporation of the House bill’s use of force standard into S. 71; House amendment 992612 was possibly overlooked).

<sup>115</sup> S. 71, 2021 Leg., 442nd Sess. (Md. 2021) (amendment 952415) (emphasis added).

<sup>116</sup> S. 71, 2021 Leg., 442nd Sess. (Md. 2021) (amendment 213228) (potential administrative error in transferring the use of force statute by reverting the provision language to that which was used in H.D. 670 before the successful passage of Amendment 99612. Thus, Amendment 213228 to S. 71 likely reflects an intention to correct this error).

<sup>117</sup> S. 71, 2021 Leg., 442nd Sess. (Md. 2021) (enrolled).

<sup>118</sup> *Hearing on S. 71 Amendment 213228 Before the Judiciary Comm.*, 2021 Leg., 442nd Sess. (Md. 2021).

<sup>119</sup> *Id.* (statement of Del. Michael Griffith).

<sup>120</sup> *Id.* (statement of Del. Luke Clippinger).

<sup>121</sup> MD. CODE ANN., PUB. SAFETY § 3-524 (LexisNexis 2022).

<sup>122</sup> *See id.*; *see also* S. 71, 2021 Leg., 442nd Sess. (Md. 2021).

### *E. BPD Use of Force Policy*

The 2019 BPD Use of Force Policy (“BPD Policy”) largely resembles the Statute,<sup>123</sup> and legislative history suggests this was intentional.<sup>124</sup> The BPD Policy contains the following instruction:

Reasonable, Necessary, and Proportional — The review of every Use of Force shall be to determine whether it was reasonable, necessary, and proportional *in light of the Totality of the Circumstances that were known, or should have been known, to the member, and in light of the mandates of BPD Policies.*<sup>125</sup>

In a floor proceeding, S.B. 71 sponsor, Senator Jill Carter, cited the absence of definitional guidance on use of force provided by the Supreme Court and went on to discuss how the BPD Policy provides guidance for the same controlling terms for use of force found in both the BPD Policy and the Statute.<sup>126</sup>

## III. ISSUE

### *A. Existing Federal Issues with Use of Force Standards*

Under federal precedent, a police officer’s use of force is not excessive if an objectively reasonable police officer “on the scene” would have acted in the same way as the officer charged.<sup>127</sup> Governing terms “necessary” and “proportional” are vaguely defined (if at all).<sup>128</sup> These terms

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<sup>123</sup> Compare BALT. POLICE DEP’T, POLICY 1115: USE OF FORCE (2019) (requiring de-escalation, use of reasonable alternatives to force, and containing the “core principle” that “[m]embers shall use only the force Reasonable, Necessary, and Proportional to respond to the threat or resistance to effectively and safely resolve an incident, and will immediately reduce the level of force as the threat or resistance diminishes.”), with MD. CODE ANN., PUB. SAFETY § 3-524 (LexisNexis 2021).

<sup>124</sup> See Senate Floor Proceedings No. 42, 2021 Leg., Reg. Sess., at 5:39:14-5:41:00 (Apr. 7, 2021) (statement of Sen. Jill Carter).

<sup>125</sup> BALT. POLICE DEP’T, POLICY 1115: USE OF FORCE (2019) (emphasis added).

<sup>126</sup> See Senate Floor Proceedings No. 42, 2021 Leg., Reg. Sess., at 5:39:14-5:41:00 (Apr. 7, 2021) (statement of Sen. Jill Carter).

<sup>127</sup> *Graham*, 490 U.S. at 396 (citing *Terry*, 392 U.S. at 20-22).

<sup>128</sup> See, e.g., *Graham*, 490 U.S. at 397; see also Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 644 (2018).

are typically construed in light of what an objectively reasonable officer would do.<sup>129</sup> This construction poses two distinct but related concerns under the Fourth Amendment.

First, because of an officer's profession, and training emphasizing hostile encounters, an objectively reasonable police officer is conditioned to see possible threats and risks in every situation.<sup>130</sup> Legal scholar and former Canadian officer, Kevin Cyr suggests (and U.S. statistics support<sup>131</sup>), officers' actions are often dictated by *possibility* rather than *probability*.<sup>132</sup> To illustrate: many officers believe the threat of ambush while in their vehicle is greater than the risk of dying by vehicle accident.<sup>133</sup> The data, however, demonstrates officers are six times more likely to die by vehicle accident than by ambush.<sup>134</sup> This flawed focus on the possibility of harm versus probability of harm, undermines unqualified reliance on an objectionably reasonable officer's belief. For this reason, the meaning of terms "necessary," and "proportional" to a reasonable officer may prove inadequate to, or incompatible with, the standard which the public believes the Fourth Amendment requires.<sup>135</sup>

Second, where "reasonable," "necessary," and "proportional," lack tangible explanation, courts routinely pay great, arguably absolute, deference

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<sup>129</sup> See, e.g., *Terry*, 392 U.S. at 30; e.g., *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 787 (4th Cir. 1998) (citing *Graham*, 490 U.S. at 396).

<sup>130</sup> See *Law Enforcement's "Warrior" Problem*, *supra* note 7, at 228; see also Seth Stoughton, *How Police Training Contributes to Avoidable Deaths*, THE ATL. (Dec. 12, 2014), <https://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/> [hereinafter *How Police Training Contributes to Avoidable Deaths*].

<sup>131</sup> Compare NAT'L INST. OF JUST., *Survey of Officers on the Use and Care of Body Armor* (2012), <https://nij.ojp.gov/topics/articles/survey-officers-use-and-care-body-armor> (ninety percent of 1,378 officers surveyed reported wearing body armor), with Ashley Halsey III, *For Police, Not Wearing Seat Belts Can be Fatal Mistake*, WASH. POST (Oct. 14, 2012), [https://www.washingtonpost.com/local/trafficandcommuting/for-police-not-wearing-seat-belts-can-be-fatal-mistake/2012/10/14/78a8dd10-f207-11e1-892d-bc92fee603a7\\_story.html](https://www.washingtonpost.com/local/trafficandcommuting/for-police-not-wearing-seat-belts-can-be-fatal-mistake/2012/10/14/78a8dd10-f207-11e1-892d-bc92fee603a7_story.html) (National Highway Traffic Administration reports finding of 733 officer fatalities by vehicle accident, forty-five percent of officers were wearing seatbelts).

<sup>132</sup> See Cyr, *supra* note 7, at 675-76 (explaining certain officer safety practices are motivated by possible threats of interpersonal violence (i.e., ambush) rather than being motivated by probable threats).

<sup>133</sup> Compare NAT'L INST. OF JUST., *supra* note 130, with Halsey, *supra* note 130 (statistics suggest officers are more likely to wear body armor than seatbelts); see also Cyr, *supra* note 7, at 675 n.63.

<sup>134</sup> See FEDERAL BUREAU OF INVESTIGATION, *Crime Data Explorer* (2021), <https://crime-data-explorer.app.cloud.gov/pages/le/leoka> (listing FBI Crime Data monthly reports from 2021 show officers in the United States are on average six times more likely to die from a vehicle accident than by ambush).

<sup>135</sup> See *How Police Training Contributes to Avoidable Deaths*, *supra* note 129; see also Cyr, *supra* note 7, at 674-75.

to the accused officer’s “split-second judgment.”<sup>136</sup> As in the first concern above, this deference provides a hurdle many plaintiffs cannot overcome.<sup>137</sup>

***B. Issues Pertaining to the Maryland Use of Force Statute***

**i. Lack of Definitional Guidance from the Statute on Terms “Necessary,” “Proportional,” and the “Totality of Circumstances” May Subjugate Reform Efforts, Allowing for Continued Deference to an Officer’s Judgment.**

Because the MGA did not define the above controlling terms, a court, applying the new standard under the Statute, must determine how to define the terms.<sup>138</sup> With an absence of definitional guidance in the Statute (and an absence of definitional precedent as discussed *supra*), applying the Statute consistent with legislative intent to reform policing is uncertain.<sup>139</sup>

While a recent opinion issued by the Attorney General of Maryland suggests the legislature did not intend for the Statute to affect civil actions

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<sup>136</sup> See *Policing Facts*, *supra* note 26, at 865 (discussing *Graham*’s reasonableness analysis and consideration of “split-second judgments” has been cited by federal courts on more than 2,300 occasions); see also *Saucier v. Katz*, 533 U.S. 194, 205–08 (2001) (describing the test laid out in *Graham* favors “deference to the judgment of reasonable officers on the scene.”); see also *Jones v. City of Cincinnati*, 736 F.3d 688, 694–95 (6th Cir. 2012) (quoting *Burchett v. Kiefer*, 310 F.3d 937, 944 (6th Cir. 2002)) (“This [reasonableness] standard encompasses ‘a built-in measure of deference to the officer’s on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case.’”); see also *Hinds v. Mohr*, 56 F. App’x 591, 593 (4th Cir. 2003) (first quoting *Saucier*, 533 U.S. at 205; and then quoting *Graham*, 490 U.S. at 386) (because police are forced to make split-second decisions, “courts must afford them a measure of deference in their on-the-scene assessments about the application of force to subdue a fleeing or resisting suspect.”).

<sup>137</sup> Cf. Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 234–36 (2017) (discussing the Supreme Court’s failure to consider evidence an officer used a form of deadly force he was not trained on, despite policy that such force was only authorized “after receiving forty-five hours of training.”); cf. Eliana Machevsky, *The California Act to Save [Black] Lives? Race, Policing, and the Interest-Convergence Dilemma in the State of California*, 109 CALIF. L. REV. 1959, 1972 (2021) (various legal scholars regard courts’ reliance on police officers’ determination of what is reasonable as flawed, rendering “reasonableness” to a “mere symbolic regulation of police use of force.”).

<sup>138</sup> MD. CODE ANN., PUB. SAFETY § 3-524 (LexisNexis 2021).

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

(i.e., § 1983 claims),<sup>140</sup> the Statute inarguably redefines when use of force is necessary.<sup>141</sup> Issues of police use of necessary force in criminal and civil cases both encompass inquiries of reasonableness under the Fourth Amendment.<sup>142</sup> Thus, the Statute’s application to civil actions is likely inevitable but unclear due to an absence of explicit intent for the Statute to impact civil actions.

Also unclear from explicit statutory language is whether the MGA intended to provide clarification on *Graham’s* definition of “reasonableness.”<sup>143</sup> The Statute, in defining what is “necessary and proportional” “under the totality of circumstances,” unavoidably implicates “reasonableness.”<sup>144</sup> Without direct instruction in the Statute on what is reasonable, the interpretation of “necessary and proportional” under the Statute is uncertain and unpredictable.

Lastly, because the Statute includes several training provisions,<sup>145</sup> it follows the MGA may have intended for inclusion of officer training as a significant factor in use of force analyses.<sup>146</sup> If the MGA intended the Statute to consider an officer’s training (in what is necessary under the totality of circumstances), this intention may not materialize due to varied Maryland precedent concerning antecedent events<sup>147</sup> and the Statute’s silence on antecedent events.<sup>148</sup>

**ii. If the Statute Rejects the Reasonable Officer Standard, Courts Must Apply a Novel Reasonableness Standard Without Definitional Guidance from the Statute or Supreme Court and Maryland Precedent.**

Because the MGA amended S.B. 71 (which later became the Statute), striking the language “a police officer under similar circumstances would

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<sup>140</sup> See Att’y General of Md., Police officers – Use of Force Statute – Meaning of the Requirement that Force Used by Officers Must Be “Necessary” and “Proportional,” Opinion Letter (Feb. 25, 2022).

<sup>141</sup> PUB. SAFETY § 3-524.

<sup>142</sup> See *supra* note 3.

<sup>143</sup> PUB. SAFETY § 3-524 (term “reasonableness” absent from statute).

<sup>144</sup> See RESTATEMENT (SECOND) OF TORTS, § 132 (AM. L. INST. 1965) (police use of force “is not privileged if the means employed are in excess of those which the actor reasonably believes is *necessary*.”) (emphasis added).

<sup>145</sup> PUB. SAFETY § 3-524.

<sup>146</sup> See, e.g., *Maguire v. State*, 192 Md. 615, 623, 65 A.2d 299, 302 (1949) (“[I]t is the most natural and general exposition of a statute to construe one part of the statute by another part of the same statute.”).

<sup>147</sup> See *supra* Section II.A.ii.

<sup>148</sup> PUB. SAFETY § 3-524.

believe,”<sup>149</sup> a logical interpretation could provide that the legislature intended to eliminate an objectively reasonable officer’s belief from the calculus of reasonableness in cases of excessive force. Such an interpretation would mean the Statute intends to apply a reasonable person (or civilian) standard. This standard would abandon Supreme Court and Court of Appeals of Maryland precedent,<sup>150</sup> further complicating the already multifaceted field of excessive force and Fourth Amendment violations.

Alternatively, the MGA could have intended to table providing a definition for “reasonable.” But, because reasonableness is inextricably linked with what is a necessary use of force,<sup>151</sup> courts must still engage in a reasonableness analysis in excessive force claims. Courts then must construe possibly the most central mechanism of use of force (i.e., reasonableness) without any guidance from the Statute.

#### IV. SOLUTION

##### *A. Under The Statute, Reasonableness is Still Judged from the Perspective of the Objectively Reasonable Police Officer.*

Despite Maryland lawmakers removing “a police officer under similar circumstances” from S.B. 71, legislative history<sup>152</sup> and plain language interpretation does not provide that use of force be judged by any person *other than* a reasonable officer.<sup>153</sup> Thus, the Statute does not require or propose a deviation from decades long federal and state precedent, and Maryland courts will not be tasked with application of a novel reasonableness standard.<sup>154</sup>

<sup>149</sup> See *supra* note 116 and accompanying text.

<sup>150</sup> See, e.g., *Graham*, 490 U.S. at 396-97; see, e.g., *McGriff*, 361 Md. at 452, 456, 462, 464-65, 762 A.2d at 56, 58, 62-63.

<sup>151</sup> See RESTATEMENT (SECOND) OF TORTS, § 132 (AM. L. INST. 1965) (police use of force “is not privileged if the means employed are in excess of those which the actor reasonably believes is necessary.”); see also *Cyr*, *supra* note 7, at 665.

<sup>152</sup> Legislative history evinces an intent to demand that an objectively reasonable police officer is an officer who applied their training in deciding to use force. See discussion *supra* Sections II.D.i., II.D.ii.

<sup>153</sup> H. Judiciary Comm., 442nd Sess., Third Reading SB0071/952415/1 at 6 (Md. 2021); MD. CODE ANN., PUB. SAFETY § 3-524 (LexisNexis 2021).

<sup>154</sup> PUB. SAFETY § 3-524; see *Graham*, 490 U.S. at 396-97; see also *Richardson*, 361 Md. at 452, 762 A.2d at 56 (citing *Graham*, 490 U.S. at 396-97).

***B. The Statute Provides Greater Definitions for Use of Force, Consistent with Supreme Court Precedent.***

**i. The “Totality of Circumstances” Should Include an Officer’s Knowledge of Their Training.**

Furthermore, while the Statute does not supplant the “objectively reasonable” police officer standard, the Statute does require an officer meet a higher threshold of reasonableness than previously required.<sup>155</sup> Officers under the Statute, must undergo de-escalation training and be trained in the use of reasonable alternatives (force less likely to cause death or serious injury).<sup>156</sup> These training requirements are contained *within* the Statute that provides officers “may not use force against a person unless, under the totality of the circumstances, the force is necessary and proportional to [prevent threat of harm or effectuate a law enforcement objective].”<sup>157</sup> Now, the use of force standard makes clear, the objectively reasonable officer considered their training the moment he or she decided what force was *necessary*.<sup>158</sup> While inarguably, these use of force trainings have always been conducted with the expectation officers will apply their training, now, with the weight of the Statute behind it, officers must be able to demonstrate their training was used in making the decision to use force.

Precedent in Maryland requires the “totality of circumstances” include what the officer *knew* at the moment force was used.<sup>159</sup> Judge Harrell’s concurrence in *Richardson* provides a workable solution for reconciling the Statute and contrary Maryland precedent.<sup>160</sup> First, like Judge Harrell, I propose the training requirements contained within the Statute should be relevant under the totality of circumstances, although not dispositive, to the reasonableness inquiry.<sup>161</sup>

By making the officer’s training relevant to considering the “objectively reasonable officer,” a jury may consider the fact the officer was trained in (or knew of) de-escalation tactics and reasonable alternatives to force at the moment force was used. Such a proposal is consistent with the

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<sup>155</sup> PUB. SAFETY § 3-524; *see Richardson*, 361 Md. at 437, 451-52, 762 A.2d at 56.

<sup>156</sup> PUB. SAFETY § 3-524(h).

<sup>157</sup> PUB. SAFETY § 3-524(d)(1).

<sup>158</sup> *See id.*; *see also infra* note 160.

<sup>159</sup> *See Richardson*, 361 Md. at 464-65, 762 A.2d at 62-63 (emphasis added).

<sup>160</sup> *See supra* text accompanying notes 47-53.

<sup>161</sup> *Richardson*, 361 Md. at 510, 762 A.2d at 87 (“[C]onsideration of police guidelines and procedures is . . . some of the many factors to be considered and should not alone be deemed dispositive of the question of reasonableness.”).



2022 Court of Appeals of Maryland decision in *Koushall v. State*.<sup>162</sup> There, the reasonableness of an officer's use of force encompassed what a reasonable officer *with the same training as the accused*, would have done under the same circumstances.<sup>163</sup> Support for this proposal is further found in the analogous use of force standard set by the BPD Policy.<sup>164</sup> The BPD Policy explicitly provides that use of force must be determined "in light of the [t]otality of [c]ircumstances . . . known [or should be known to the officer], and in light of the mandates of BPD Policies."<sup>165</sup>

Second, I suggest, (and discuss *infra*), the *Richardson* concurrence is the better approach to consideration of an officer's pre-seizure actions and antecedent events.<sup>166</sup> Relating to a circumstance under the totality of circumstances, the officer's *pre-seizure conduct* must be reasonable for the resulting force to truly be necessary. Such an approach is already followed by many federal courts throughout the country<sup>167</sup> and resolves the issue of "officer-created jeopardy."<sup>168</sup>

**ii. Unnecessary Actions by an Officer and the Officer's Training Should be Included in Determining Whether Use of Force was "Necessary."**

Construction of the controlling term "necessary" should be informed by the realities of the law enforcement profession, but the term must be construed and defined to allow for more universal and predictable application. Kevin Cyr's recommendations<sup>169</sup> for defining controlling terms is consistent with legislative intent for a higher use of force standard<sup>170</sup> and is compatible with Supreme Court precedent.<sup>171</sup> As an officer, Cyr's definitional recommendations pay deference to the objectively reasonable officer but provides for an ascertainable and measurable application.<sup>172</sup>

<sup>162</sup> See *Koushall*, 479 Md. at 150, 277 A.3d at 418 (citing *Graham*, 490 U.S. at 388) (where officer charged criminally for use of excessive force, the court conducted a Fourth Amendment reasonableness analysis).

<sup>163</sup> *Id.*

<sup>164</sup> See *supra* text accompanying notes 122-25.

<sup>165</sup> See *supra* text accompanying note 124 (emphasis added).

<sup>166</sup> See *Richardson*, 361 Md. at 501-03, 762 A.2d at 83-84 (Harrell, J., concurring).

<sup>167</sup> See *id.* at 486-87, 762 A.2d at 74-75 (Harrell, J., concurring).

<sup>168</sup> See Cyr, *supra* note 7, at 668 ("Officer-created jeopardy [occurs] where an officer takes unnecessary action which then creates a situation that requires force to resolve.").

<sup>169</sup> See Cyr, *supra* note 7, at 663-64.

<sup>170</sup> See *supra* Section II.D.

<sup>171</sup> See *supra* Section II.A.i.

<sup>172</sup> See Cyr, *supra* note 7, at 665-66, 673-74.

In recognition of his own experiences as an officer, Cyr embraces the need (and allowance) for officers to make split-second decisions while challenging vague definitions.<sup>173</sup> “Necessary,” Cyr proposes should begin with a broad inquiry into whether an arrest was reasonable in the first place, and if the force used became necessary only after the officer’s unnecessary action.<sup>174</sup>

Additionally, while the training provisions in the Statute are largely already required of officers, under the Statute, a reasonable officer *implements* their training in deciding what force—if any—is necessary. Citing a University of Alberta study of a particular Canadian police agency, Cyr reveals an intersection between training and necessity.<sup>175</sup> Researchers studying the agency found, where officers underwent training to deal with individuals with mental health issues (to include training on communication, de-escalation, and mental health awareness), the agency experienced a forty percent decrease in instances of force when engaging with those who were mentally ill.<sup>176</sup> Seemingly, mental health training (knowledge thereof), makes force “necessary” less often.<sup>177</sup> In construing “necessary” within the Statute, I propose what is “necessary” requires a reasonable officer: (1) acted reasonably leading up to the moment force was used; and (2) implemented their training when making the judgment to use force.<sup>178</sup> This proposal, again, is consistent with the analogous BPD policy.<sup>179</sup>

**iii. “Proportional” Force Should Require the Officer Made an Assessment of a Suspect’s Resistance and Implemented the Minimum Level of Force Required to Overcome the Suspect.**

I propose the term “proportional” in the Statute be defined separately, and consistent with Cyr’s recommendations. Further grounded in his experience as an officer, Cyr proposes that the proportionality of an officer’s force relates to the level of force an officer needs to *overcome* resistance.<sup>180</sup>

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<sup>173</sup> *See id.* at 666.

<sup>174</sup> *See id.* (necessary force may be unreasonable where officer unnecessarily places his or herself in front of a fleeing vehicle).

<sup>175</sup> *See id.* at 667-68.

<sup>176</sup> *See id.* (other internal police initiatives were launched in tandem with the training and may have also contributed to this reduction in use of force).

<sup>177</sup> *See id.*

<sup>178</sup> *See supra* discussion IV.B.i. (under the totality of circumstances, an officer’s knowledge of their training is a relevant circumstance. I further propose, a reasonable officer must *make a determination* about what force is “necessary” informed by their knowledge of training).

<sup>179</sup> *See supra* note 163 and accompanying text.

<sup>180</sup> *See Cyr, supra* note 7, at 670.

Resistance “exist[s] on a spectrum of severity, from merely refusing to cooperate, to pushing the officer away, assaulting. . . to facilitate escape, assaulting. . . with the goal of injuring the officer, or. . . trying to kill the officer.”<sup>181</sup> Cyr elucidates the force which an officer must meet a suspect’s resistance must be that which “overwhelms the suspect’s will to fight, or their ability to fight.”<sup>182</sup>

Cyr argues that overwhelming a suspect’s ability to fight is a dangerous and unpredictable endeavor.<sup>183</sup> Assessing the appropriate level of force to overcome a suspect’s ability to resist can lead to an officer using less force, failing to overcome the suspect’s resistance, and possibly fuel the suspect’s will to fight in the window of time the officer failed to gain control.<sup>184</sup>

In interpreting the term “proportional,” I propose Cyr’s recommendations on application of proportionality be adopted. The two considerations by an officer regarding proportionality can be condensed into: (1) “determining the difficulty of defeating an adversary’s ability or will to fight” (officer considered factors like relative size of suspect and officer, and whether the suspect is under the influence); and (2) “assessing the severity of repercussions” if the officer attempts to use the “least amount of force which might” overcome resistance (if doing so would result in “unnecessary danger to themselves or others”).<sup>185</sup>

## V. CONCLUSION

While the Statute provides little guidance on its application to cases of police officer use of force, a straightforward interpretation, and review of legislative history, provides the Statute elevates, but does not deviate from, the *Graham* standard. Under the Statute, use of force is still judged through the lens of an objectively reasonable officer, but a reasonable officer is expected to apply their training when deciding what force is necessary. Statutory construction and legislative history evidence an intent to create this higher standard. Moreover, given an absence of definitional precedent federally and within Maryland, “necessary” and “proportional” can and

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<sup>181</sup> *See id.*

<sup>182</sup> *See id.* (explaining a suspect’s *ability to fight* is overcome when they are placed in handcuffs, and their *will to fight* is overcome when they are convinced to voluntarily surrender).

<sup>183</sup> *See id.* at 670-72.

<sup>184</sup> *See id.* at 670-73.

<sup>185</sup> *See Cyr, supra* note 7, at 673.

should finally be tangibly defined as consistent with this comment's proposals.

## RECENT DEVELOPMENT

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***ATTORNEY GRIEVANCE COMMISSION OF MARYLAND V. DAWN R. JACKSON: A NON-MARYLAND LICENSED ATTORNEY WHO ESTABLISHES A PHYSICAL OFFICE IN MARYLAND ENGAGES IN THE UNAUTHORIZED PRACTICE OF LAW. ADDITIONALLY, THE FEDERAL PRACTICE EXCEPTION IS INAPPLICABLE TO SUCH ATTORNEYS SIMPLY LICENSED IN THE DISTRICT OF COLUMBIA.***

***By: Victoria Garner***

The Court of Appeals of Maryland held that a non-Maryland attorney, who established a law office in Maryland, violated Rule 5.5 of the Maryland Code of Professional Conduct, which prohibits the unauthorized practice of law. *Att'y Grievance Comm'n of Md. v. Jackson*, 477 Md. 174, 209, 269 A.3d 252, 273 (2022). The court also held that the federal practice exception for physical presence in Rule 5.5 does not apply to attorneys licensed to practice law in the District of Columbia but are not in Maryland. *Jackson*, 477 Md. at 207, 209, 269 A.3d at 272-73.

From 2001 through 2011, attorney Dawn Jackson (“Jackson”), who was licensed to practice law in the District of Columbia, was a partner in a law firm with Maryland-licensed attorney Brynee Baylor (“Baylor”) and other Maryland-licensed attorneys. Jackson's practice within the firm focused solely on clients and legal matters arising in the District of Columbia. In 2011, after Bar Counsel began investigating Baylor for fraud, Jackson formed a new law firm with the same attorneys, save Baylor, in the District of Columbia. In 2014, she relocated the office to Prince George’s County, Maryland. Jackson continued to solely handle cases arising in the District of Columbia, while the firm’s Maryland lawyers focused on Maryland cases.

In 2015, in preparation for a disciplinary case against Baylor, Senior Assistant Bar Counsel visited Jackson and recommended procedures for Jackson to follow in order to maintain her Maryland office, including: (1) always having a Maryland attorney on staff and (2) having letterhead and business cards reflecting her jurisdictional limitations. Subsequently, Jackson placed a disclaimer on her firm’s website, letterhead, email signature, and business cards.

After receiving an anonymous complaint in 2018, Bar Counsel opened an investigation into Jackson for the unauthorized practice of law under Maryland Rules of Professional Conduct 5.5 and other rules. Ultimately, Bar Counsel determined Jackson violated Maryland Rule 5.5 and Rule 8.4 by signing two lines requesting a re-issuance of a summons in a Maryland divorce case that the Maryland attorneys in her firm handled.

In the proceedings against Jackson, Judge Lawrence V. Hill, Jr. of the Circuit Court for Prince George's County (the "hearing judge") found that Jackson only violated Rule 5.5(a) by signing the requests for a reissuance of a summons. Both parties appealed the hearing judge's ruling.

Bar Counsel contended that the hearing judge erred by failing to find more general violations of Rule 5.5. They argued that Jackson violated Rules 5.5(a) and (b) by preparing settlement sheets, determining fees for Maryland cases, and by not having a disclaimer on her office sign, in the lobby, or on her suite door. Lastly, they contended that the mere physical presence of Jackson's office in Maryland as a non-Maryland attorney violated Rules 5.5 and 8.4. In response, Jackson argued that she had not violated Rule 5.5 or 8.4 because the federal practice exception in Rule 5.5(d) authorized her to have an office in Maryland.

The Court of Appeals of Maryland reviewed the hearing judge's ruling *de novo* to determine whether Jackson violated more Rule 5.5 provisions. The court also examined whether attorneys licensed to practice in the District of Columbia are permitted to establish an office in Maryland under the federal practice exception.

Maryland Rule 8.4 prohibits misconduct generally. *Jackson*, 477 Md. at 182, 269 A.3d at 256. Maryland Rule 5.5, which prohibits the unauthorized practice of law, has four fundamental parts, three of which are relevant to the current case. *Id.* at 195-96, 269 A.3d at 264-65. Rule 5.5(a) and (b) prohibits attorneys who are not licensed in Maryland from engaging in or assisting with the unauthorized practice of law, representing themselves to the public as Maryland-barred attorneys, or establishing offices in Maryland. *Id.* at 195-96, 269 A.3d at 264-65. Rule 5.5(d)(2) provides an exception allowing an attorney licensed in another U.S. jurisdiction to provide legal services in Maryland, provided that the attorney is permitted to practice in federal court. *Id.* at 196, 269 A.3d at 265. This is the "federal practice exception." *Id.*

The Court of Appeals of Maryland first determined that Jackson did not violate Rule 5.5(a) by preparing settlement sheets and determining fees for Maryland cases. *Jackson*, 477 Md. at 201, 269 A.3d at 268. The court acknowledged the inherent difficulty in defining acts that constituted the "practice of law." *Id.* at 200-01, 269 A.3d at 267-68. However, the court concluded that performing such administrative functions did not amount to the "practice of law" because they did not involve providing legal advice or applying legal skills, principles, or knowledge. *Id.* at 202-03, 269 A.3d at 268-69.

Next, the court determined that Jackson violated Rule 5.5(b)(2) by presenting herself to the public as a Maryland attorney before she met with the Senior Assistant Bar Counsel when she had no disclaimers of her jurisdictional limitations on her letterhead, email, business cards, or website.

*Jackson*, 477 Md. at 205, 269 A.3d at 270. However, the court refused to find that Jackson violated Rule 5.5(b)(2) after she implemented the recommended changes. *Id.* The court acknowledged that because Jackson’s firm employed other Maryland-licensed attorneys, whom clients could meet with for Maryland legal matters, Jackson did not need to add disclaimers to her office signs or in the lobby. *Id.* at 205, 269 A.3d at 271.

Finally, the court determined whether Jackson’s conduct of establishing a physical presence in Maryland violated Rule 5.5(b)(1) and Rule 8.4. *Jackson*, 477 Md. at 206, 269 A.3d at 271. Jackson argued that because she limited her practice exclusively to matters arising in the District of Columbia, her practice fell within the Rule 5.5(d)(2) federal practice exception. *Id.* at 206-07, 269 A.3d at 271.

The court rejected Jackson’s argument and declined to go beyond the “plain language” of the statute and apply the exception to attorneys licensed in the District of Columbia practicing in Maryland. *Jackson*, 477 Md. at 207, 269 A.3d at 271-72. The court reasoned that the federal practice exception was adopted to recognize that federal law may preempt a state’s power to control practice inside its “geographic borders” for those whose practice is limited to federal law. *Id.* at 207-08, 269 A.3d at 272 (citing *Sperry v. Fla.* 373 U.S. 379 (1963)). The court noted that District of Columbia courts are courts of general jurisdiction, geographically located within the borders of the District of Columbia and not Maryland. *Jackson*, 477 Md. at 209, 269 A.3d at 272. Because Jackson practiced in District of Columbia courts and did not limit her practice to federal law, the federal preemption concerns were not applicable in this case. *Id.* at 209, 269 A.3d at 272-73. Therefore, the court determined that Jackson establishing her office in Maryland did not fall under the federal practice exception and violated Rule 5.5(b)(1). *Id.*

However, the court ultimately dismissed the case, ruling that because Jackson relied upon Bar Counsel’s recommendations for maintaining her office in Maryland, she would not be sanctioned. *Jackson*, 477 Md. at 225, 269 A.3d at 282. In balancing the need to protect the legal profession and the changes to the modern practice of law, the court commented that Rule 5.5 did not “reflect the reality of a modern, portable profession.” *Id.* at 212-13, 269 A.3d at 274-75. The court observed a growing trend of allowing out-of-state attorneys to establish in-state offices. *Id.* at 210, 269 A.3d at 273. The court also recognized the benefits of “professional portability” in light of the COVID-19 pandemic and technological advances allowing for remote work and instructed the Standing Committee on Rules of Practice and Procedure to consider amending Rule 5.5. *Id.* at 212-13, 269 A.3d at 275-76.

The *Jackson* decision emphasizes the difficulties raised by equating “unauthorized practice of law” solely with physical presence. The increasing possibility for attorneys to practice law and represent clients from virtually

any location due to new technology provides a solid justification for relaxing the physical presence limitations to allow for increased flexibility in the profession moving forward.



## RECENT DEVELOPMENT

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***HARRIS V. STATE: THE MANSLAUGHTER BY VEHICLE STATUTE DOES NOT PREEMPT FELONY MURDER, AND A LIFE SENTENCE WITH THE POSSIBILITY OF PAROLE FOR JUVENILE FELONY HOMICIDE OFFENDERS IS CONSTITUTIONAL AND NOT GROSSLY DISPROPORTIONATE TO THE CRIME COMMITTED.***

***By: Kaitlyn Lyons***

The Court of Appeals of Maryland held that felony murder is not an unintentional crime. *Harris v. State*, 479 Md. 84, 108, 276 A.3d 1071, 1085 (2022). Therefore, Maryland’s manslaughter by vehicle statute, which applies to unintended homicides committed with a vehicle, does not preempt felony murder perpetrated with a vehicle. *Id.* at 109, 276 A.3d at 1086. The court also held that it is constitutional to sentence juvenile homicide offenders to life imprisonment with the possibility of parole. *Id.* at 116, 276 A.3d at 1089-90. Finally, the court held that sentencing a defendant to life imprisonment is not a grossly disproportionate punishment for the commission of a felony resulting in another person’s death. *Id.* at 122-23, 276 A.3d at 1093.

On May 21, 2018, sixteen-year-old Dawnta Harris (“Harris”) skipped school with three teenagers and committed multiple burglaries in a stolen Jeep Wrangler. During one of the burglaries, Harris remained in the Jeep while the other teenagers canvassed a home. When Baltimore County Police Officer Amy Caprio (“Officer Caprio”) arrived at the home, Harris fled the scene in the Jeep with Officer Caprio in pursuit. Upon entering a cul-de-sac, Officer Caprio exited her patrol car and ordered Harris out of the Jeep. Harris stopped the Jeep in front of Officer Caprio and started to get out of his car. However, he shut the door and accelerated, hitting Officer Caprio before speeding off. Officer Caprio died from her injuries.

Harris was charged and convicted of first-degree felony murder in the Circuit Court of Baltimore City. At his sentencing hearing, Harris’s counsel presented mitigating evidence and a pre-sentence investigation that included information such as Harris’s age and personal history. After considering the evidence, the court sentenced Harris to life imprisonment with the possibility of parole. Harris appealed the circuit court’s ruling to the Court of Special Appeals of Maryland, which upheld his conviction and sentence. Harris then filed a petition for *certiorari*, which the Court of Appeals of Maryland granted.

Two issues came before the court: (1) is felony murder an unintended crime that, if committed with a vehicle, is preempted by Maryland's manslaughter by vehicle statute; and (2) is a life sentence with the possibility of parole for a juvenile homicide conviction unconstitutional under the Eighth Amendment? *Harris*, 479 Md. at 92, 276 A.3d at 1075-76.

The Court of Appeals of Maryland began its analysis with an overview of statutory preemption, explaining that the General Assembly may preempt the common law by statutory enactments. *Harris*, 479 Md. at 101, 276 A.3d at 1081. The court next discussed the General Assembly's intent behind the manslaughter by vehicle statute. *Id.* at 110-11, 276 A.3d at 1086. The General Assembly strived to homogenize competing theories of criminal responsibility that were implicated when unintentional homicides occurred as a result of driving in violation of public safety vehicle regulations. *Id.*

The court then examined whether the manslaughter by vehicle statute preempts felony murder when committed with a vehicle. *Harris*, 479 Md. at 103, 276 A.3d at 1082. Felony murder is not an unintended crime because the intent to commit the underlying felony transfers to the intent necessary for first-degree murder. *Id.* at 108, 276 A.3d at 1085. Manslaughter by vehicle occurs when a person acts with gross negligence in causing the death of another while operating a vehicle. *Id.* at 103, 276 A.3d at 1082 (citing Md. Code Ann., Crim. Law § 2-209(b) (West, Westlaw through 2022 Reg. Sess. of Gen. Assemb.)). In enacting this statute, the General Assembly implicitly preempted all unintentional homicides that occur while operating a vehicle. *Harris*, 479 Md. at 106, 276 A.3d at 1084 (citing *Blackwell v. State*, 34 Md. App. 547, 554-55, 369 A.2d. 153, 158-59 (1977)). Therefore, the Court of Appeals of Maryland held that because felony murder is not an unintended crime, the manslaughter by vehicle statute does not preempt it. *Harris*, 479 Md. at 109, 276 A.3d at 1086.

*Harris* did not contest that he committed felony burglary or that his actions killed Officer Caprio while committing this crime. *Harris*, 479 Md. at 111, 276 A.3d at 1087. Therefore, *Harris*'s intent to commit felony burglary satisfied the requisite intent to find him guilty of felony murder. *Id.* This holding is harmonious with the rationale supporting the felony murder rule, which is to deter dangerous conduct by treating all killings resulting from the commission of a felony as murder due to the severity of these offenses. *Id.* at 109-10, 276 A.3d at 1086. Allowing the manslaughter by vehicle statute to preempt specific instances of felony murder would contradict its rationale, and *Harris* failed to provide a convincing reason to hold otherwise. *Id.* at 110, 276 A.3d at 1086.

The court next addressed the constitutionality of sentencing juvenile homicide offenders to life in prison. *Harris*, 479 Md. at 113, 276 A.3d at 1088. *Harris* argued that his sentence was unconstitutional under the Eighth

Amendment of the U.S. Constitution because he did not receive an individualized sentencing hearing in which the sentencer considered his youth and attendant characteristics. *Id.* at 114, 276 A.3d at 1088. The court explained that mandatory life sentences without the possibility of parole for juveniles are unconstitutional because they present a substantial risk of disproportionate punishment. *Id.* at 115, 276 A.3d at 1089 (citing *Miller v. Alabama*, 567 U.S. 460, 465 (2012)). Courts must consider “an offender’s youth and attendant characteristics” before sentencing a juvenile to life imprisonment without parole. *Harris*, 479 Md. at 115, 276 A.3d at 1089 (quoting *Miller*, 567 U.S. at 483). These procedural requirements are satisfied if the juvenile offender receives an individualized sentencing proceeding in which the sentencer has discretion to impose a lesser punishment than life imprisonment without parole. *Harris*, 479 Md. at 117, 276 A.3d at 1090 (citing *Jones v. Mississippi*, 141 U.S. 1307, 1311 (2021)).

In the instant case, the court explained that these requirements did not apply to Harris’s sentence because he was given the possibility of parole. *Harris*, 479 Md. at 116, 276 A.3d at 1090. The court further held that even if they did apply, Harris’s sentence would not violate the Eighth Amendment because he received an individualized sentencing proceeding and the sentencing court expressly considered Harris’s youth and attendant characteristics. *Id.* at 119-20, 276 A.3d at 1092.

Finally, the court examined whether Harris’s sentence was grossly disproportionate to the crime committed. *Harris*, 479 Md. at 121, 276 A.3d at 1093. Whether a sentence is disproportionate is determined by evaluating considerations such as the seriousness of the crime and deference to the General Assembly. *Id.* at 122, 276 A.3d at 1093. The court explained that Harris’s commission of felony burglary that resulted in the death of Officer Caprio was extraordinarily serious. *Id.* Further, the court deferred to the General Assembly’s recognition of the severity of murder by noting that the Assembly decided to punish offenders convicted of first-degree murder, including felony murder, with life imprisonment. *Id.* at 123, 276 A.3d at 1093. Therefore, Harris’s sentence was not grossly disproportionate and did not violate the Constitution. *Id.* at 122, 276 A.3d at 1093.

The Court of Appeals of Maryland held that felony murder is an intentional crime and therefore is not preempted by the manslaughter by vehicle statute if committed with a vehicle. Although the goal of the felony murder doctrine is to deter dangerous conduct, the question remains whether it will be effective for juveniles. Juveniles have underdeveloped brains and thus lack the capacity to fully appreciate the risks associated with their conduct. In advocating for a sentence less than life imprisonment for a felony murder conviction, criminal defense attorneys should emphasize that

imposing the same sentences on juveniles and adults contradicts courts' long-standing recognition that children are different.

## RECENT DEVELOPMENT

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### ***IN RE D.D.: THE ODOR OF MARIJUANA ALONE CREATES SUFFICIENT REASONABLE SUSPICION FOR LAW ENFORCEMENT OFFICERS TO DETAIN INDIVIDUALS FOR A BRIEF INVESTIGATIVE STOP.***

***By: Donald Waldron***

The Court of Appeals of Maryland held that the odor of marijuana alone created reasonable suspicion of criminal activity to justify an investigative stop. *In re D.D.*, 479 Md. 206, 240, 277 A.3d 949, 969 (2022). If based on the totality of the circumstances, an officer then develops an additional reasonable suspicion that a defendant is armed and dangerous, the officer is justified in conducting a weapons pat-down. *Id.* at 249, 277 A.3d at 974.

On November 15, 2019, two Prince George’s County police officers responded to a call for service to investigate a complaint of “loud music and the smell of marijuana” coming from the basement of an apartment building. Upon arrival, officers entered the apartment building and encountered a group of five juvenile males walking up the stairs from the basement. The officers “smelled a strong odor of marijuana” coming from the group. One of the officers stopped the group and instructed them to “have a seat” on the stairs.

Once the officers detained the young men, they questioned the group about where they lived and why they were inside the apartment building. The group refused to identify themselves or answer the officers’ inquiries. Officers observed an individual in the group, later identified as D.D., wearing baggy clothing, turning away from officers, keeping his hands out of the officers’ sight, and positioning himself apart from the rest of the group near an exit. In response to these observations, officers conducted a weapons pat-down on the five detained juveniles. Officers first conducted a weapons pat-down on “J,” one of the young men with D.D., and recovered a handgun from his waistband. After placing “J” under arrest, officers continued to conduct weapons pat-downs on the remaining members of the group. When officers conducted a weapons pat-down on D.D. they recovered a nine-millimeter handgun from his waistband. Officers subsequently arrested D.D.

The State filed a delinquency petition in the Circuit Court for Prince George’s County, charging D.D. with possession of a regulated handgun by a person under the age of 21. Counsel for D.D. moved to suppress the handgun. The circuit court denied the motion to suppress, and at trial, the juvenile court found D.D. involved in all counts.

On appeal, the Court of Special Appeals of Maryland reversed the denial of the suppression motion, holding that the odor of marijuana alone did not create reasonable suspicion of criminal activity. The Court of Special Appeals of Maryland did not address any legal issues beyond D.D.'s initial detention. The State filed a petition asking the court to review whether the scent of marijuana created reasonable suspicion of criminal activity. D.D. filed a conditional cross-petition asking that if the court granted the State's petition, the court review whether police had reasonable suspicion that D.D. was armed and dangerous. The Court of Appeals of Maryland granted both petitions.

The court began its analysis with the Fourth Amendment, which protects people from unreasonable searches and seizures. *In re D.D.*, 479 Md. at 223, 277 A.3d at 959 (citing *Grant v. State*, 449 Md. 1, 141 A.3d 138 (2016)). In most instances, probable cause is needed to seize an individual. *Id.* (citing *Crosby v. State*, 408 Md. 490, 505, 970 A.2d 894 (2009)). However, a law enforcement officer may conduct a brief investigative stop if the officer has reasonable suspicion that criminal activity is ongoing or imminent. *Id.* (citing *In re David S.*, 367 Md. 523, 533, 789 A.2d 607 (2002)).

In 2014, the Maryland General Assembly partially decriminalized possession of marijuana. *In re D.D.*, 479 Md. at 224, 277 A.3d at 959. Presently, "the use or possession of less than 10 grams of marijuana" is a civil infraction punishable only by a fine. *Id.* at 225, 277 A.3d at 959-60 (citing Md. Code Ann., Crim. Law ("CR") § 5-601(c)(2)(ii)). The use or possession of more than 10 grams of marijuana is a misdemeanor criminal offense. *Id.* at 225, 277 A.3d at 960 (citing CR 5-602(c)(2)). After decriminalization, the Court of Special Appeals of Maryland and the Court of Appeals of Maryland grappled with defining if and when the odor of marijuana created a sufficient level of suspicion for warrantless searches and seizures. *Id.*

In reaching its conclusion, the court relied on several prior decisions regarding what police could do when they detect the odor of marijuana. *In re D.D.*, 479 Md. at 225-30, 277 A.3d at 960-63. In the instant case, the court was tasked with filling in a gap left by previous case law. *See id.* at 235-36, 277 A.3d at 966. The court, in its analysis, pointed to the different levels of suspicion needed for search and arrest as opposed to a brief investigative stop. *See id.* An investigative stop requires reasonable suspicion that criminal activity is imminent or occurring. *Id.* at 230, 277 A.3d at 963 (citing *Crosby*, 408 Md. at 505-06, 970 A.2d at 902-03). Reasonable suspicion may be satisfied by a set of facts that is lesser than probable cause but greater than mere suspicion. *Id.* (citing *Sizer v. State*, 456 Md. 350, 364, 174 A.3d 326 (2017)). The court emphasized that marijuana was still contraband and held that the odor of marijuana alone created reasonable suspicion of criminal

activity sufficient to justify an investigative stop. *See id.* at 240-41, 277 A.3d at 969.

The court next discussed whether there was reasonable suspicion that D.D. was armed and dangerous before officers frisked him. *In re D.D.*, 479 Md. at 241-42, 277 A.3d at 969-70. To conduct a weapons pat-down, officers must make articulable observations that, under the totality of the circumstances, a reasonable officer would believe an individual is armed and dangerous. *Id.* at 242-43, 277 A.3d at 970 (citing *Norman v. State*, 452 Md. 373, 387, 156 A.3d 940, 948 (2017)). These facts must be particularized and not mere hunches. *Id.* at 243, 277 A.3d at 970 (citing *Sellman v. State*, 449 Md. 526, 543, 144 A.3d 771, 781 (2016)). The court pointed to the arresting officer's testimony about D.D.'s evasiveness, the handgun recovered off another individual in the group, officers being outnumbered five to two, D.D.'s baggy clothing, and how D.D. positioned himself away from the rest of the group near an exit. *Id.* at 244-49, 277 A.3d at 971-74. The court held that, based on the totality of the circumstances, officers had reasonable suspicion that D.D. was armed and dangerous and the weapons pat-down of D.D. was reasonable under the Fourth Amendment. *Id.* at 249, 277 A.3d at 974.

In a concurring opinion, Judge Watts argued that while the majority came to the correct conclusion, it did so for the wrong reason. *In re D.D.*, 479 Md. at 250, 277 A.3d at 975. Judge Watts argued that the odor of marijuana alone was not reasonable suspicion of criminal activity. *Id.* at 258, 277 A.3d at 979-80 (citing *Crosby*, 408 Md. at 507-08, 970 A.2d at 904). Rather, the odor of marijuana coupled with additional facts such as the exact address given, the number of people in the group, and the duration of time the group was in the building amounted to reasonable suspicion of criminal activity. *Id.*

In the dissenting opinion, Judge Hotten argued that neither the initial stop of D.D. nor the frisk of D.D. was supported by reasonable suspicion. *In re D.D.*, 479 Md. at 259, 277 A.3d at 980. The dissent argued that the odor of marijuana is a factor in determining criminal activity, but that factor alone does not create reasonable suspicion. *Id.* at 266, 277 A.3d at 984 (citing *Crosby*, 408 Md. at 507, 970 A.2d at 904). The dissent also argued that the officers lacked reasonable suspicion to frisk D.D. *Id.* at 269, 277 A.3d at 986. Judge Hotten also argued that it was department protocol to frisk individuals when outnumbered. *Id.* at 268, A.3d at 985 (citing *Thornton v. State*, 465 Md. 122, 143, 214 A.3d 34, 46 (2019)). A blanket policy of frisking individuals simply because police are outnumbered would be a violation of the Fourth Amendment. *Id.* at 268, A.3d at 986.

The holding in *In re D.D.* marks a further clarification regarding how the odor of marijuana intersects with Fourth Amendment searches and seizures. In November of 2022, Maryland voters overwhelmingly approved a

referendum to legalize marijuana for adult use. Although the General Assembly will need to craft regulations on the distribution and taxation of marijuana, those regulations will likely include limitations on the amount of marijuana that can be possessed. Under the reasoning of *In re D.D.*, even after legalization, the odor of marijuana may continue to be reasonable suspicion of criminal activity that justifies an investigative stop. It is possible, however, that Judge Watts' concurring opinion may become the new standard: the odor of marijuana must be coupled with additional articulable facts to give rise to reasonable suspicion of a criminal activity. Regardless, the odor of marijuana remains an investigative tool that law enforcement may use to further the important governmental interest of investigating and prosecuting crimes. To do so effectively, police departments and law practitioners throughout Maryland must familiarize themselves with the legal complexity the odor of marijuana presents and remain abreast of this ever-changing legal landscape. Failure to do so will result in lost cases and bad arrests.



## RECENT DEVELOPMENT

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### ***MURPHY V. LIBERTY MUT. INS. CO.: THE CHIEF JUDGE OF THE COURT OF APPEALS OF MARYLAND ACTED WITHIN HER CONSTITUTIONAL AND STATUTORY AUTHORITY IN ISSUING AN ORDER TOLLING THE STATUTE OF LIMITATIONS IN RESPONSE TO THE PANDEMIC.***

***By: Alexandra Mitchell***

The Court of Appeals of Maryland held that the Chief Judge's administrative tolling order was within the Maryland Judiciary Branch's state constitutional and statutory authority. *Murphy v. Liberty Mut. Ins. Co.*, 478 Md. 333, 381, 274 A.3d 412, 440 (2022). Specifically, the court held that the tolling order did not usurp the functions of another branch of government. *Id.* at 380, 274 A.3d at 439. Instead, the order operated in conjunction with the Governor's directives and fulfilled the statute of limitation's statutory purposes, harmonizing with the functions of the Executive and Legislative branches. *Id.* Therefore, the Chief Judge was within her authority in issuing the tolling order under the pandemic's emergency circumstances. *Id.* at 381, 274 A.3d at 440.

On March 5, 2020, to avoid the spread of COVID-19, the Governor of Maryland declared a state of emergency. On March 12th, the Governor restricted the use of government buildings and authorized leaders of state government to suspend procedural deadlines. On March 13th, the Chief Judge of the Court of Appeals of Maryland issued an order closing all Maryland courthouses. That same day, the Court of Appeals of Maryland's Standing Committee on Rules of Practice and Procedure ("Rules Committee") considered a set of proposed rules regarding the Chief Judge's authority during emergencies. The proposed rules permitted the Chief Judge to suspend deadlines consistent with the Governor's directives. On March 16th, the proposed rules were adopted and codified by the Court of Appeals of Maryland.

Subsequently, on April 24, 2020, the Chief Judge issued an administrative order. The order recognized that the Governor's statewide closures hindered the functionality of the judicial system, which made obeying certain deadlines an insurmountable task and thus restricted the administration of justice. Consequently, the Chief Judge's order tolled the statute of limitations in civil actions while the courts remained closed.

Just over two months after the tolling order was issued, on July 2, 2020, Liberty Mutual Insurance Company ("Liberty Mutual") sued Murphy Enterprises ("Murphy") for breach of contract in the United States District

Court for the District of Maryland. Murphy moved to dismiss, arguing that several of the claims Liberty Mutual aggregated accrued outside the statute of limitations. Further, those claims should be barred from the computed damages, thus reducing the amount in controversy below the federal jurisdiction threshold. Liberty Mutual contended that its claims could be aggregated because of the April 24, 2020, administrative order that tolled the statute of limitations.

The district court found the April 24, 2020, tolling order was substantive law and, therefore, applicable to the claims Liberty Mutual aggregated to fulfill the amount in controversy and obtain federal jurisdiction. Nevertheless, Liberty Mutual's ability to secure federal jurisdiction was dependent on the Chief Judge's authority to issue a tolling order and the validity of the tolling order itself. Consequently, the district court delivered its certified question of law to the Court of Appeals of Maryland. The certified question inquired whether the Chief Judge of the Court of Appeals of Maryland acted within her power when she issued administrative tolling orders in response to the COVID-19 pandemic. The court answered the certified question with two steps: (1) whether the Chief Judge had the authority to issue the tolling order, and (2) whether the tolling order violated the separation of powers under the Maryland Declaration of Rights.

Resolving the first step to the certified question, the court answered affirmatively for two reasons. *See Murphy*, 478 Md. at 369, 274 A.3d at 433. First, the court concluded that the Maryland Rules permit the Chief Judge to toll statutorily imposed deadlines after the Governor declares a state of emergency. *Id.* at 368, 274 A.3d at 432 (citing Md. Rule 16-1001 et seq.). Additionally, the rules require that the Chief Judges' authoritative acts harmonize with the Governor's emergency directives. *Id.* at 348-349, 274 A.3d at 421 (citing Md. Rule 16-1001(c)). In March 2020, when the Governor declared a state of emergency, he also authorized the leaders of the state government to suspend procedural deadlines. *Id.* at 353-54, 274 A.3d at 424. As a result, the Chief Judge was permitted to issue the tolling order under the Maryland Rules and in compliance with the Governor's directives. *Id.* at 368, 274 A.3d at 432. Therefore, the rules gave the Chief Judge express authority to issue the tolling order. *Id.* at 369, 274 A.3d at 433.

Second, the court concluded that Article IV, § 18 of the Maryland Constitution grants administrative authority to the Chief Judge, and rulemaking authority to the Court of Appeals of Maryland. *Murphy*, 478 Md. at 341, 274 A.3d at 416. The Chief Judge's administrative authority is governed by the rules and limitations implemented by the Court of Appeals of Maryland. *Id.* at 341, 274 A.3d at 416 (citing Md. Const. Art. IV § 18(b)(5)). The Court of Appeals of Maryland's rulemaking authority solely applies to the administration of the courts and its practices and procedures.

*Id.* at 342, 274 A.3d at 417 (defining practices and procedures as, *inter alia*, pleadings, motions, and trials).

In the April 24, 2020, tolling order, the Chief Judge expressly invoked Article IV, § 18(b)(1) of the Maryland Constitution—triggering her role as the administrative head of the judiciary system. *Murphy*, 478 Md. at 368, 274 A.3d at 432. Likewise, the Court of Appeals of Maryland asserted its constitutional rulemaking authority by adopting the proposed rules that granted the Chief Judge the authority to suspend deadlines consistent with the Governor’s directives. *Id.* at 357, 274 A.3d at 426. Therefore, the Chief Judge had authority to toll deadlines based on the Maryland Rules that the Court of Appeals of Maryland adopted pursuant to its constitutional rulemaking authority. *Id.* at 368, 274 A.3d at 432.

Resolving the second step to the certified question, the court answered whether the tolling order violated the separation of powers under the Maryland Declaration of Rights. *Murphy*, 478 Md. at 370, 274 A.3d at 433-34. The court held that the Chief Judge’s tolling order did not seize functions bestowed to another branch of government. *Id.* at 380, 274 A.3d at 439. Each branch has express functions conferred by the state constitution. *Id.* at 371-72, 274 A.3d at 434-35. However, the branches also have implied powers that allow elasticity regarding which branch governs certain issues. *Id.* (citing *Attorney General v. Waldron*, 289 Md. 683, 689, 426 A.2d 929, 933 (1981)).

The court held that the order tolling the statute of limitations did not seize legislative functions because the rules it was based on derived from the Court of Appeals of Maryland’s constitutional rulemaking authority regarding the court’s practices and procedures. *Murphy*, 478 Md. at 382, 274 A.3d at 440-41. The statute of limitations does not produce a legal claim or concern the merits of a legal claim. *Id.* at 375, 274 A.3d at 437 (citing *Park Plus, Inc. v. Palisades of Towson, LLC*, 478 Md. 35, 54, 272 A.3d 309, 320 (2022)). Therefore, the tolling of the statute of limitations is considered a procedural matter. *Id.* at 376, 274 A.3d at 437.

The COVID-19 pandemic forced unprecedented state-wide closures that hindered the functionality of the judicial system and the administration of justice. In holding that the Chief Judge was responsible for the judicial system’s function amid an emergency, the court reinforced an elastic interpretation of express and implied authority. Furthermore, the court hinted that the separation of powers contemplates implied authority equally as much as it considers express authority. As a result, the court gives deference to administrative leaders in making authoritative decisions pertaining to their branch of government, notwithstanding whether authority is express or implied.

## RECENT DEVELOPMENT

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***PABST BREWING CO. v. FREDERICK P. WINNER, LTD.: IN ORDER TO TERMINATE A CONTRACT WITH A DISTRIBUTER WITHOUT CAUSE, A “SUCCESSOR BEER MANUFACTURER” MUST REPLACE THE PREVIOUS BEER MANUFACTURER AS THE HOLDER OF THE STATE-ISSUED LICENSE TO SELL, DISTRIBUTE, OR IMPORT A BRAND OF BEER WITHIN MARYLAND.***

***By: Shiloh Shassian***

The Court of Appeals of Maryland held that successor beer manufacturers could not terminate distribution contracts without cause unless the successor holds its own distinct state-issued license to sell beer that replaces the original manufacturer’s license. *Pabst Brewing Co. v. Frederick P. Winner, Ltd.*, 478 Md. 61, 66-67, 272 A.3d 324, 327 (2022). The court emphasized that simply obtaining ownership over a subsidiary company that holds a license will not trigger the Successor Manufacturers Law (“SML”). *Id.* at 96, 272 A.3d at 345.

In 1994, Petitioner Pabst Brewing Company (“Pabst”) entered into a contract with Respondent, Frederick P. Winner, Ltd. (“Winner”). In 2014, Pabst and Winner began a new distribution contract that reaffirmed Winner’s right to sell Pabst brands within Maryland. At the formation of the 2014 agreement, Pabst was a wholly owned subsidiary of Pabst Holdings Inc. (“Pabst Holdings”), which was a wholly owned subsidiary of Pabst Corporate Holdings Inc. (“PCH”). Additionally, at this time, Pabst held a Maryland Nonresident Dealer Permit, which authorized Pabst to distribute the beverages throughout the state.

On November 13, 2014, PCH sold 100 percent of its ownership interest in Pabst Holdings to Blue Ribbon, LLC (“Blue Ribbon”). On March 9, 2015, Pabst terminated the 2014 Agreement with Winner. Winner argued that Pabst had no valid reason to terminate the contract. After Pabst refused to rescind the notice of termination, Winner filed a complaint in the Circuit Court for Baltimore County.

The Circuit Court for Baltimore County granted Pabst’s motion for summary judgment, concluding Blue Ribbon was a successor beer manufacturer under the Successor Manufacturers Law. Winner appealed, and the Court of Special Appeals of Maryland vacated and remanded the circuit court’s ruling, finding the circuit court abused its discretion in granting a motion to strike. Following remand, the Circuit Court for Baltimore County found that Blue Ribbon qualified as a successor beer manufacturer under the

SML. The circuit court entered summary judgment in favor of Pabst and denied Winner's motion for partial summary judgment.

Following Winner's second appeal, the Court of Special Appeals of Maryland reversed the circuit court's grant of summary judgment for Pabst, holding Pabst was not a successor beer manufacturer under the SML. The Court of Appeals of Maryland then granted Pabst's petition for writ of *certiorari* and affirmed the Court of Special Appeals' holding.

The court began its analysis by examining the plain language of the SML, codified in Md. Code Ann., Alco. Bev. § 5-201(a). *Pabst*, 478 Md. at 76, 272 A.3d at 333. Through a plain language reading of the SML, the Court of Appeals of Maryland explained how, generally, a successor beer manufacturer is not allowed to terminate or replace an agreement with a distributor without cause unless the successor beer manufacturer inherits a contract between a brand's previous manufacturer and distributor. *Id.* at 66, 272 A.3d at 327. The Court of Appeals of Maryland reasoned that the key phrases within § 5-201(a) were "replaces a beer manufacturer" and "with the right to sell, distribute, or impart a brand of beer." *Id.* at 76, 272 A.3d at 333.

The court determined that the statute's plain language requires a successor beer manufacturer to take the place of an existing beer manufacturer. *Pabst*, 478 Md. at 76, 272 A.3d at 333. The court reasoned that this requirement refers to the right given by a state-issued license to sell beer. *Id.* at 77, 272 A.3d at 334. Therefore, for a successor beer manufacturer to satisfy the exception, it must replace the existing beer manufacturer that has the right to sell, distribute, or import the beer brand. *Id.* at 77, 272 A.3d at 333. The court reasoned that it is not enough for a successor beer manufacturer to control the entity that holds the state-issued license; rather, the successor beer manufacturer must replace the previous manufacturer as the license holder. *Id.* at 82, 272 A.3d at 336.

The Court of Appeals of Maryland next reviewed the legislative history of the SML. *Pabst*, 478 Md. at 82, 272 A.3d at 337. Pabst contended the legislative history of the SML supported a control-based interpretation. *Id.* at 88, 272 A.3d at 340. Pabst argued that to constitute a successor beer manufacturer, the SML does not require the successor manufacturer to replace the entity which holds the license, rather, the manufacturer may just have control over the subsidiary's operation. *Id.* at 80, 272 A.3d at 335. Winner contended that the General Assembly enacted the SML to provide greater protections to distributors. *Id.* at 88, 272 A.3d at 340. Winner interpreted the SML to focus on the replacement of one beer manufacturer by another. *Id.*

While reviewing the legislative history, the Court of Appeals of Maryland explicated that in 1998 the General Assembly added the definition of "successor beer manufacturer" to the SML, clarifying the SML applies when

a licensed beer manufacturer is replaced by another entity as the holder of the state issued license. *Pabst*, 478 Md. at 89, 272 A.3d at 341. Additionally, the Court of Appeals of Maryland observed that the General Assembly significantly amended the SML in 2008. *Id.* at 87, 272 A.3d at 339. One of the main amendments was the addition of a remuneration to beer distributors for the fair market value of agreements terminated by a successor beer manufacturer. *Id.*

The Court of Appeals of Maryland determined that the General Assembly enacted these changes to create a balance between acquiring beer manufacturers and existing beer manufacturers, and to preserve and reinforce Maryland's multi-tier system for the sale of beer. *Pabst*, 478 Md. at 88, 272 A.3d at 340.

Before applying its interpretation to the case at hand, the Court of Appeals of Maryland analyzed the consequences of alternative readings of the SML. *Pabst*, 478 Md. at 90, 272 A.3d at 341. The court reasoned that if a change in license holders is not required by the SML, then there is no way to know what change in beer manufacturers' corporate structures would trigger the SML. *Id.* Following this reasoning, Pabst's interpretation, which focused on a change in control, would result in increased litigation. *Id.* Additionally, the court reasoned that a corporate control-based trigger would go against established principles of corporate law, which state a parent company does not own or "have legal title to the assets of a subsidiary" or "subsidiaries of the subsidiary" company. *Id.* at 92, 272 A.3d at 342.

When applying its interpretation to the case at hand, as majority owner, Blue Ribbon had no legal title over the subsidiary Pabst. *Pabst*, 478 Md. at 97, 272 A.3d at 345. Because Blue Ribbon had no title over Pabst, Blue Ribbon did not hold any right to sell or distribute Pabst beer. *Id.* The court held that Blue Ribbon cannot be a successor beer manufacturer because it never replaced Pabst as the state-issued license holder. *Id.* at 98, 272 A.3d at 346. Because Blue Ribbon did not constitute a successor beer manufacturer, the court held that Blue Ribbon lacked the right to terminate the agreement between Pabst and Winner under the SML. *Id.*

Through its ruling in *Pabst*, the Court of Appeals of Maryland reinforced the safeguards enacted by the General Assembly within the SML to protect beer distributors from monetary loss due to corporate acquisitions and mergers. The decision of *Pabst* continues to uphold the multi-tier system created by the General Assembly to regulate the sale of beer and alcoholic beverages within Maryland. Through the court's application and interpretation of the SML, Maryland's beer manufacturing and distribution system can continue to thrive without putting distributors at risk of unfair business dealings and coercion.

## RECENT DEVELOPMENT

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### ***PARK PLUS, INC. v. PALISADES OF TOWSON, LLC: THE STATUTORY LIMITATIONS PERIOD FOR CIVIL ACTIONS DOES NOT WAIVE THE RIGHT TO ARBITRATE OR COMPEL ARBITRATION WHEN THE ARBITRATION AGREEMENT OMITS A LIMITATIONS PERIOD.***

***By: Brandon Ewing***

The Court of Appeals of Maryland held that when arbitration agreements omit a statutory limitation period, the three-year statutory limitations period for civil actions does not waive a party's right to arbitration or petition to compel pursuant to the Maryland Uniform Arbitration Act ("MUAA"). *Park Plus, Inc. v. Palisades of Towson, LLC*, 478 Md. 35, 60, 272 A.3d 309, 323-24 (2022). The court explained the three-year statutory limitations period extinguishes a party's ability to seek a remedy through civil actions for damages, not the right to arbitrate as contractually agreed upon. *Id.* at 59, A.3d at 323. Additionally, the MUAA defines the courts' role in enforcing arbitrable agreements. *Id.* at 40, 51, 272 A.3d at 311, 318 (citing Md. Code Ann., Cts. & Jud. Proc. §§ 3-207, 3-208 (LexisNexis 2022)). One such role: determining whether an agreement exists. *Id.* (citing *Gold Coast Mall, Inc. v. Larmar Corp.*, 298 Md. 96, 104, 468 A.2d 91, 95 (1983)). If a court determines the agreement exists, it must provide equitable relief by enforcing the agreement. *Id.* at 51, 272 A.3d at 318 (first citing Md. Code Ann., Cts. & Jud. Proc. §§ 3-207, 3-208(c) (LexisNexis 2022); then citing *Holmes v. Coverall N. Am., Inc.*, 336 Md. 534, 546, 649 A.2d 365, 370 (1994)).

In 2009, Palisades of Towson, LLC and Encore Development Corp. ("Palisades"), and Park Plus, Inc. ("Park Plus"), entered into a contract ("the contract") obligating Park Plus to install an automated parking system in an apartment building in Towson, Maryland. The contract required any dispute relating to work progress or interpretation of the contract be submitted to the architect or engineer, then to arbitration upon demand within 30 days of the original decision. The contract omitted any deadline requiring a party to submit a demand for arbitration or petition to compel arbitration.

As tenants began using the parking lot, issues plagued the system, resulting in Park Plus and Palisades disputing maintenance responsibility. Pursuant to the contract, Palisades sent its claims to the project's architect and a written arbitration demand to Park Plus in 2014. The architect refused to review the claims, and Palisades submitted another written arbitration demand within 30 days of the refusal. Various difficulties, including Park Plus's refusal to arbitrate, delayed arbitration for over two years.

Palisades filed a petition to enforce the arbitration agreement in the Circuit Court for Baltimore County in 2016. The circuit court found Park Plus's refusal to arbitrate was a separate contractual breach that triggered the three-year statute of limitations period. As such, the court found the action was timely and granted the petition to compel arbitration. The Court of Special Appeals of Maryland affirmed the circuit court's ruling. Subsequently, the Court of Appeals of Maryland granted Park Plus's petition for a writ of *certiorari*.

The Court of Appeals of Maryland first reviewed the history of equitable relief and the MUAA in Maryland. *Park Plus, Inc.*, 478 Md. at 47-50, 272 A.3d at 316-18. The court observed that before 1984, courts in Maryland were separated into courts of law and courts of equity depending on the nature of the relief sought. *Id.* at 47, 272 A.3d at 316, 728 (first citing *Higgins v. Barnes*, 310 Md. 532, 540, 530 A.2d 724 (1987); then citing *Ver Brycke v. Ver Brycke*, 370 Md. 669, 697-98, 843 A.2d 758, 774-75 (2004)). In 1984 Maryland courts merged, and only one cause of action was recognized, however, the distinction between the types of relief remained important. *Park Plus, Inc.*, 478 Md. 48, 272 A.3d at 316 (citing *Taylor v. Taylor*, 306 Md. 290, 297 n.6, 508 A.2d 964, 967 (1986)).

The court observed that the MUAA was enacted before the merger of law and equity and promotes the public policy of favoring arbitration due to its perceived benefits to litigation. *Park Plus, Inc.*, 478 Md. at 49, 272 A.3d at 317 (citing *Allstate Ins. Co. v. Stinebaugh*, 374 Md. 631, 641, 824 A.2d 87, 93 (2003)). The MUAA confers to courts the jurisdiction to provide equitable relief through enforcing agreements and entering an arbitration award as a judgment. *Park Plus, Inc.*, 478 Md. at 49, 272 A.3d at 317 (citing Md. Code Ann., Cts. & Jud. Proc. § 3-202 (LexisNexis 2022)).

The court observed that parties seeking to either compel or stay arbitration may invoke their ability to enforce arbitration agreements. *Park Plus, Inc.*, 478 Md. at 51, 272 A.3d at 318 (citing Md. Code Ann., Cts. & Jud. Proc. §§ 3-207(a); 3-208(a)). In both scenarios, the court must determine if an arbitration agreement exists. *Park Plus, Inc.*, 478 Md. 51, 272 A.3d at 318 (first citing Md. Code Ann., Cts. & Jud. Proc. §§ 3-207, 3-208 (LexisNexis 2022); then citing *Gold Coast Mall, Inc.*, 298 Md. at 104, 468 A.2d 91, 95). If an arbitration agreement does exist, the court must enforce that agreement by compelling arbitration. *Park Plus, Inc.*, 478 Md. at 51, 272 A.3d at 318 (first citing Md. Code Ann., Cts. & Jud. Proc. §§ 3-207(c)§ 3-208(c) (LexisNexis 2022); then citing *Holmes*, 336 Md. at 546, 649 A.2d 365). Identifying the existence of an arbitration agreement includes determining whether arbitration applies to the issue at hand and whether the right to demand arbitration was waived. *Park Plus, Inc.*, 478 Md. at 52, 272 A.3d at 319 (citing *Stauffer Constr. Co v. Bd. of Educ.*, 54 Md. App. 658, 666, 460



A.2d 609, 613 (1983)). If the arbitration provision does not apply or the provision was waived, the right to arbitrate is deemed nonexistent, and petitions to compel arbitration are denied. *Park Plus, Inc.*, 478 Md. at 53, 272 A.3d at 319. Park Plus did not dispute that an arbitration agreement existed but rather that Palisades waived the right to arbitrate by failing to timely submit a claim. *Id.*

Waiver is “the intentional relinquishment of a known right.” *Park Plus, Inc.*, 478 Md. at 52, 272 A.3d at 319 (quoting *Charles J. Frank, Inc. v. Associated Jewish Charities of Balt., Inc.*, 294 Md. 443, 449, 450 A.2d 1304, 1306 (1982)). Waiver may occur in a variety of ways, including failing to make a timely arbitration demand. *Park Plus, Inc.*, 478 Md. at 53, 272 A.3d at 319. Timeliness is a decision for the court, solely to determine whether an agreement exists. *Id.* at 53, 272 A.3d at 319 (citing *The Redemptorists v. Coulthard Servs., Inc.*, 145 Md. App. 116, 141, 801 A.2d 1104, 1118 (2002); then citing *Chesapeake Beach v. Pessoa Constr. Co.*, 330 Md. 744, 748-49, 625 A.2d 1014, 1016 (1993); and then citing *Allstate Ins. Co. v. Stinebaugh*, 374 Md. 631, 646, 824 A.2d 87, 96 (2003)). To establish whether a party waived its right to arbitration, the court must undertake a fact-specific analysis. *Park Plus, Inc.*, 478 Md. at 52, 272 A.3d at 319 (citing *Charles J. Frank, Inc.*, 294 Md. at 449, 450 A.2d at 1306). Typically, timeliness becomes a waiver issue when the agreement specifically provides a limitations period. *Park Plus, Inc.*, 478 Md. at 53, 272 A.3d at 319. Here, the contract did not include such a period. *Id.* at 54, 272 A.3d at 320.

The court next analyzed the background and legislative history of the statutory limitations period for civil actions. *Park Plus, Inc.*, 478 Md. at 55-56, 272 A.3d at 320-21. Reviewing the language and typical application of the statute, the court found that the statutory limitation period applies to civil actions and not petitions seeking equitable relief. *Id.* at 56-57, 272 A.3d at 321. Generally, statutes of limitations are considered procedural defenses that defeat the remedy for enforcing the right, not the right itself. *Id.* at 54, 272 A.3d at 320 (citing *Frank v. Wareheim*, 177 Md. 43, 58-59, 7 A.2d 186, 193 (1939)). The court explained if the contract did not include an arbitration provision, Palisades would have been barred from seeking monetary damages because it was seeking to enforce its right to a working parking system after the statute of limitations. *Park Plus, Inc.*, 478 Md. at 54, 272 A.3d at 320.

Because the contract did in fact include an arbitration provision, Palisades sought to enforce its rights to arbitrate – an equitable remedy. *Id.* The three-year statute of limitations period is inapplicable to disputes seeking equitable relief; thus, Palisades’ right to arbitrate was not waived. *Id.* at 55, 272 A.3d at 320. Under the MUAA, when an agreement exists, the court must enforce the agreement by compelling arbitration. *Id.* Moreover, legislative history

confirmed the three-year statutory limitation period only applies to civil actions at law, not when a court sits in equity. *Id.*

The Court of Appeals of Maryland clarified that when a court sits in equity, such as when a party petitions to compel arbitration, the three-year statutory limitations period does not apply. Instead, the MUAA confers jurisdiction to the court to provide relief by enforcing the agreement. To avoid future issues, arbitration agreements should include a clear limitation period requiring the submission of a demand for arbitration. If a limitation period is not included in an agreement, the court will likely enforce the agreement by compelling the parties to arbitrate. Litigators should recognize the legislative policy favoring arbitration and prepare for the court's preference towards enforcing the agreement.