Renegotiating the Bargain: An Analysis and Evaluation of Alternatives for Revising the Exclusive Remedy Provision in Maryland's Workers' Compensation Act

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RENegotiating the bargain: An analysis and evaluation of alternatives for revising the exclusive remedy provision in Maryland's workers' compensation act

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Legal challenges to the exclusive remedy provision1 of Maryland's Workers' Compensation Act² have burgeoned in recent years.³ These challenges are not surprising given the increasing tension between the workers' compensation and tort systems.⁴ Additionally, the employer-employee bargain upon which the original statutes were based is outdated.⁵ Workers' compensation statutes were created to provide workers with the certainty of some recovery for injuries suffered incidental to an increasingly industrialized workplace.⁶ In exchange,

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1. See infra notes 36-38 and accompanying text.
4. When legislators originally enacted workers' compensation statutes, they did so in the context of a legal environment that made it difficult for plaintiffs to prevail under tort law. Today, it is easier for plaintiffs to prevail under tort law. It is both easier for plaintiffs to prove negligence and more difficult for defendants to prove common law defenses to liability. See Note, Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes, 96 HARV. L. REV. 1641, 1644-45 (1983) [hereinafter Exceptions].
5. See Exceptions, supra note 4, at 1644-45; see also Roger Snell, Comment, The Exclusive Remedy Provision of Michigan's Workers' Disability Compensation Act 63 U. DET. L. REV. 453 (1986). The author states that [i]ronically, the shift in tort law has caused the employer and employee to alter their positions. The employers who once felt that the act was unfair are presently its strongest advocates, while workers, who at first hailed the act as a blessing, today attempt to circumvent it in order to maximize their recoveries.
employees gave up the right to pursue common law recovery against their employers.\textsuperscript{7}

A variety of factors have triggered doubts about the judiciousness of the workers' compensation exclusive remedy rule. The failure of federal\textsuperscript{8} and state\textsuperscript{9} agencies to effectively regulate workplace safety, the shift in our society from industrial to service oriented jobs,\textsuperscript{10} and the decline of unionism and its consequence of fewer safety watchdogs in the workplace\textsuperscript{11} have all contributed to the current climate questioning the exclusive remedy rule.

Employees have questioned the exclusive remedy rule after seeing courts twist the rule to encompass causes of action under the workers' compensation system that most would not consider normal incidents of employment. Employees raped by their supervisors,\textsuperscript{12} rendered sterile or impotent as a result of poor workplace safety,\textsuperscript{13} grossly disfigured as a result of workplace accidents,\textsuperscript{14} or working, with their employers knowledge, in manifestly unsafe working environments\textsuperscript{15} are encountering courts which refuse to stray from the original bargain upon which workers' compensation statutes were created. Workers in these, and many more situations, are being held to their end of the bargain, thus denying them the possibility of common law recovery.\textsuperscript{16}

\textsuperscript{7} RICHARD P. GILBERT & ROBERT L. HUMPHREYS, JR., MARYLAND WORKERS' COMPENSATION HANDBOOK 282 (1988) [hereinafter MARYLAND HANDBOOK].
\textsuperscript{8} See generally Holly Metz, Death by Oversight, 17 STUDENT LAW. 12 (1988) ("Because OSHA fails to protect workers, local D.A.'s are hauling employers into criminal court.").
\textsuperscript{9} See generally WORK INJURIES AND ILLNESSES IN MARYLAND (H. Epstein ed. 1977) [hereinafter WORK INJURIES IN MARYLAND].
\textsuperscript{11} Id.
\textsuperscript{14} Nine states do not allow benefits for disfigurement. Twenty-eight other states limit benefits to injuries that affect employability. Exceptions, supra note 4, at 1643 n.12. Maryland does allow compensation for disfigurement even when earning capacity has not been affected. The Court of Appeals of Maryland has stated that "a disfigurement may constitute an economic loss in the sense of diminished power to produce, and it may be as much a part of the workman's loss as the loss of a limb." Bethlehem-Sparrows Point Shipyard, Inc. v. Damasiewicz, 187 Md. 474, 480, 50 A.2d 799, 802 (1947).
\textsuperscript{15} See, e.g., Johnson v. Mountaire Farms of Delmarva, Inc., 305 Md. 246, 503 A.2d 708 (1986); see supra notes 64-75 and accompanying text.
\textsuperscript{16} Some commentators see the broad sweep of the exclusivity rule as distressing.
So dissatisfied is one state, California, that it has considered abolishing its traditional system in favor of an innovative new approach. Most states, however, are considering only incremental rather than fundamental changes to their systems. Some courts, including Maryland’s, are reconsidering the exclusive remedy provisions of their state’s workers’ compensation statutes. Recently, in *Federated Department Stores v. Le*, the Court of Appeals of Maryland held that an exception to Maryland’s exclusivity provision permitted an employee to pursue a common law tort remedy against his employer for an intentional tort committed upon him by a fellow employee.

*Federated* demonstrates the court’s willingness to adjust the employer-employee bargain. This Article analyzes and evaluates alternatives, including the alternative presented in *Federated*, for revising Maryland’s exclusive remedy provision. Also considered are alternatives other jurisdictions have utilized in order to renegotiate the bargain underlying the exclusive remedy rule.

Part I explains the theoretical underpinnings of workers’ compensation statutes and their exclusive remedy provisions. Part II examines the primary exceptions to the exclusive remedy rule in Maryland prior to *Federated*. This section focuses on the intentional tort exception in Maryland and the new interpretation of this excep-

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See generally Exceptions, supra note 4, at 1656 (implying that workers are being “increasingly disadvantaged by a deal originally designed for their benefit”).

Other commentators see this broad application of the exclusive remedy rule as necessary. See Joseph H. King, Jr., *The Exclusiveness of an Employee’s Workers’ Compensation Remedy Against His Employer*, 55 Tenn. L. Rev. 405, 411-16 (1988). King stresses several reasons that support a broadly based exclusive remedy principle. “First, subjecting employers to an increased threat of tort liability would undermine the carefully crafted compromise represented by the workers’ compensation system.” *Id.* at 411. “Second, the transaction costs of resolving workers’ compensation cases are much less than for their tort counterparts.” *Id.* at 412. Third, it would be oppressive to subject employers to both workers’ compensation and tort liability claims. *Id.* at 412-13. “Fourth, erosion of the exclusive remedy rule undermines the predictability of the workers’ compensation system.” *Id.* at 413. Fifth, the author is concerned about additional costs of litigating the threshold issue whether the exclusive remedy rule applies. *Id.* at 413.

17. See infra notes 208-20 and accompanying text.

18. Courts’ present willingness to reconsider the exclusive remedy provisions of workers’ compensation statutes is consistent with an earlier willingness to extend strict products liability theory beyond consumer products to workplace products, thereby allowing workers to sue third party manufacturers of defective products. *Exceptions, supra* note 4, at 1652.

19. 324 Md. 71, 595 A.2d 1067 (1991). This decision affirmed the court of special appeals’ decision, but used different reasoning.

20. *Id.*
tion articulated by the court of appeals in *Federated*. Also explored are the meaning of "intent," the theory of alter ego in Maryland, and the common law concept of vicarious liability.

Part III considers why courts and some state legislatures seem increasingly sympathetic to employee’s arguments aimed at limiting the effects of the exclusive remedy rule. This section then explores *Federated Department Stores v. Le* in detail, including a comparison of the method by which the Court of Appeals of Maryland carved an exception to the exclusive remedy provision to methods other courts have utilized. This section clarifies the judicial alternatives for renegotiating the workers’ compensation bargain. Finally, Part III considers legislative action that might be appropriate, summarizing the possible approaches Maryland could adopt in revising its workers’ compensation law.

Part IV outlines and evaluates the five major alternatives available to Maryland. This section also assesses the feasibility of each alternative in the context of a state legislature that is less than enthusiastic about renegotiating a bargain that would in any way provide more benefits to employees thereby raising employers’ costs. The Article concludes that Maryland should move toward protecting employees from unsafe work environments by adjusting the delicate balance between employer and employee rights. Maryland’s courts and legislature should make this adjustment, but with full understanding of the implications of each of several alternatives.

I. BACKGROUND

In the nineteenth century, employees injured on the job could sue their employers at common law, but they typically lost. Courts required employees to prove fault on the employer’s part, which was difficult. Those employees who were able to prove their employer’s

21. The issue of whether the legislature or the courts should renegotiate the bargain is important. Some courts believe that since the bargain was designed by the legislature, that they should not tamper with it. *Exceptions, supra* note 4, at 1654 (citing, *e.g.*, Kofron v. Amoco Chems. Corp., 441 A.2d 226, 231 (Del. 1982)). Other courts believe they have an essential role in interpreting the limits of the exclusive remedy rule. See *Le v. Federated Dep’t Stores*, 80 Md. App. 89, 560 A.2d 42 (1989), *aff’d*, 324 Md. 71, 595 A.2d 1067 (1991). Judicial action is important because legislatures tend to be slow. Additionally, politicians may be reluctant to make decisions that would benefit employees and thereby drive employers to other states.

22. Before states adopted workers’ compensation laws, approximately eighty percent of injured employees lost their cases against the employer for work-related injuries. See *Snell, supra* note 5, at 453 (citing S. Horovitz, *Current Trends in Basic Principles of Workmen’s Compensation* 469 (1947)).

23. See *Snell, supra* note 5, at 453.
negligence still frequently lost because the employers were able to prove one of three available defenses — assumption of risk, contributory negligence and the fellow-servant rule.24 Employees who prevailed in spite of the obstacles often enjoyed sparse awards because medical bills, attorney fees and other expenses were deducted therefrom.25

The industrial revolution brought with it an increased number of workers injured or killed on the job.26 Faced with workers who could not work to full capacity, and dependents of those workers needing financial support,27 states began to consider adopting workers' compensation laws.28

States considering workers' compensation laws keenly examined approaches adopted by European legislatures in the late nineteenth century. American lawmakers paid particular attention to British and German approaches to workers' compensation, determining that the statutes adopted by those countries effectively promoted safety without compromising industrial progress.29

Maryland became the first state in the nation to adopt a workers' compensation program when, in 1902, its legislature established an "Employers and Employees Cooperative Insurance Fund."30 The fund benefitted employees, but it was both complicated and limited in coverage.31 By 1911, twenty-five states had enacted workers' compensation statutes,32 offering employees an alternative to the problematic avenue of pursuing common law remedies for injuries.

Today, workers' compensation laws throughout the United States vary regarding specific provisions,33 but consistently promote two
primary goals. First, workers' compensation statutes aim to benefit employees accidently injured on the job by providing immediate compensation for lost wages, medical expenses, and rehabilitation services without requiring employees to prove employer fault.\textsuperscript{34} Second, the statutes aim to benefit employers by providing them with immunity from negligence-based civil lawsuits.\textsuperscript{35} This delicate balance between employer and employee rights is reflected in a key provision in every workers' compensation statute — the exclusive remedy provision.

The exclusive remedy principle in workers' compensation legislation provides that an employee's only remedy for injuries suffered on the job is through the workers' compensation system.\textsuperscript{36} Injured employees may not pursue civil claims against their employers.\textsuperscript{37}


(a) \textit{In general}.—Except as otherwise provided, each employer of a covered employee shall provide compensation in accordance with this title to:

(1) the covered employee for an accidental personal injury sustained by the covered employee; or

(2) the dependents of the covered employee for death of the covered employee:

(i) resulting from an accidental personal injury sustained by the covered employee; and

(ii) occurring within 7 years after the date of the accidental personal injury.

(b) \textit{Employer liable regardless of fault}.—An employer is liable to provide compensation in accordance with subsection (a) of this section, regardless of fault as to a cause of the accidental personal injury.

\textit{Id.} § 9-501.

Section 9-509 sets out the exclusiveness of remedy:

(a) \textit{Employers}.—Except as otherwise provided in this title, the liability of an employer under this title is exclusive.

(b) \textit{Covered employees and dependents}.—Except as otherwise provided in this title, the compensation provided under this title to a covered employee or the dependents of a covered employee is in place of any right of action against any person.

\textit{Id.} § 9-509(a).

Several courts, including Maryland's, have interpreted this exclusive remedy provision broadly. As a result, workers have foregone the right to sue at common law for nearly all claims, even those claims for which no remedy is available under the workers' compensation system. Some limited exceptions to the exclusive remedy rule do exist. The next section outlines Maryland's exceptions.

II. EXCEPTIONS TO THE EXCLUSIVE REMEDY RULE IN MARYLAND PRIOR TO FEDERATED DEPARTMENT STORES v. LE

State statutes vary in the manner in which they outline exceptions to the exclusivity principle. In Maryland, the legislature has outlined


39. As in Maryland, some states allow employees to sue under common law when the employer engages in intentional, willful, or deliberate employer misconduct. Md. Code Ann., Lab. & Emp. § 9-509(d) (1991) provides that:
   (d) If a covered employee is injured or killed as the result of the deliberate intent of the employer to injure or kill the covered employee, the covered employee, or, in the case of death, a surviving spouse, child, or dependent of the covered employee may:
      (1) bring a claim for compensation under this title; or
      (2) bring an action for damages against the employer.


Finally, some states impose additional penalties on the employer in the form of a specified percentage increase in the employee's compensation award when the employer's misconduct was serious or willful, or when the employer violated safety statutes or orders. See Ohio Const. art. II, § 35 (15-50% penalty); Cal. Lab. Code § 4553 (West 1989) (50% penalty); Ky. Rev. Stat.
two exceptions to this principle, and the courts, in turn, have interpreted these exceptions. This section focuses on how Maryland courts interpreted the exceptions prior to *Federated Department Stores v. Le.*

A. Failure to Provide Insurance

The Maryland Workers' Compensation Act states that liability under the Act is exclusive unless an employer should fail to secure the payment of compensation for injured employees and their dependents as required by the statute, in which case the employees or their legal representatives may opt to pursue a common law remedy.

B. The Intentional Tort Exception

The Act states that employees can elect to pursue common law remedies or receive compensation under the workers' compensation system when the employee's injury or death results from the employer's intentional act. This provision of the Act has been the focus of extensive judicial interpretation.

In Maryland, as in most states, the issue of whether an employee's injury arose out of intentional actions in the workplace is significant. Most employees would prefer to sue in tort rather than presenting a workers' compensation claim because of the possibility of a greater monetary award. Under workers' compensation, recovery is based on the goal of keeping workers from becoming burdens on the community, as compared to the goal of tort law, which is to restore plaintiffs to their former positions. The only injuries usually compensated under workers' compensation are those that produce

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40. *MD. CODE ANN., LAB. & EMP. § 9-509(c), (d) (1991).* Section 9-509(d) provides an exception for intentionally inflicted injuries. Section 9-509(c) allows employees the option to accept workers' compensation or to sue under the common law when the "employer fails to secure compensation in accordance with this title," *Id.* § 9-509(c).

41. *See id.* § 9-509(c); *see also* Kramer v. Globe Brewing Co., 175 Md. 461, 470, 2 A.2d 634, 638 (1938) (explaining that "the right to sue the employer at common law is only inherent . . . in those cases in which the employer has failed to comply with [the Workmen's Compensation Act], in which latter case the employee . . . has the option of either claiming compensation under the Act, or maintaining an action at common law").

42. *See MD. CODE ANN., LAB. & EMP. § 9-509(d) (1991).*

disability and thus affect earning power. Workers' compensation statutes typically grant the worker only one-half to two-thirds of his or her previous salary, with a maximum weekly recovery outlined by the state legislature. The issues of what is or is not intentional behavior, and whether the employer engaged in such behavior, are thus important mediating factors affecting the injured employee's potential recovery.

Some states workers' compensation statutes, including Maryland's, specifically allow common law suits against employers who commit intentional torts against an employee. Courts in several other states have interpreted their state statutes to allow common law recovery for intentional acts of employers that result in injuries to workers. In the same vein, some states' statutes impose percentage penalties on the employer for employer misconduct resulting in additional compensation for injured employees.

The threshold issue of what constitutes an intentional act has been left to judicial interpretation. Specifically, courts in Maryland and throughout the country have focused on two major issues. First, courts have addressed the meaning of "intent." Second, courts have addressed the issue of whether an employer can be held responsible for an intentional act performed by someone other than the employer, such as a supervisor or co-employee.

1. The Meaning of "Intent"

Justice Oliver Wendell Holmes once noted that "[e]ven a dog distinguishes between being stumbled over and being kicked." Similarly, in the workers' compensation context, courts consider whether employees were "stumbled over" or "kicked" by their employers. Most courts agree that employers who engage in assault and battery upon their employees should not benefit from the limited liability provided under workers' compensation. Courts usually provide one of two rationales for this conclusion.

44. Id.
45. Id. Additionally, workers can get lump sum payments for permanent partial disabilities, medical expenses, rehabilitation expenses, and death benefits when necessary. The amounts required to be paid to employees and dependents are provided in various sections of the Workers' Compensation Act. See, e.g., Md. Code Ann., Lab. & Emp. § 9-678 to 9-686 (1991) (death benefit provisions); id. §§ 9-625 to 9-632 (permanent disability provisions).
46. See supra note 39.
47. Id.
48. Id.
49. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (1881).
50. A third, less common rationale is that an assault does not constitute a risk of the employment. Thus, this behavior falls outside the workers' compensation
The first rationale is based upon ethical considerations. Courts and commentators have provided numerous assertions similar to the following: "[A]n employer cannot correct and punish with whips the mistakes of his employees committed in the course of their employment, and protect himself against civil liability for the results of his assaults under the coverage of our Workmen's Compensation Act."

The second rationale for excluding intentional acts from workers' compensation coverage is that accidents, unlike intentional acts, are either unavoidable or occur through the employer's negligence. Intentional acts, however, do not happen without foresight or expectation and are not accidents. Because of this distinction, intentional torts should not be brought under the umbrella of a workers' compensation system that was created to deal specifically with negligent injuries.

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act. This rationale has been criticized as being incompatible with the view that "even the most unforeseeable injuries resulting from risks which could never have been reasonably contemplated may still be compensable if the employment . . . exposed the employee to those risks." Joseph A. Page, The Exclusivity of the Workmen's Compensation Remedy: The Employee's Right to Sue His Employer in Tort, 4 B.C. INDUS. & COM. L. REV. 555, 561 (1963).

51. Id. at 560.
53. See Kawaler, supra note 43, at 186. The author states that "[a] plaintiff should not be denied the amount of compensation which a court would find adequate simply because he was misfortunate enough to be employed by the one who intentionally caused his injury." Id.
54. Page, supra note 50, at 560 (citing Richardson v. The Fair, Inc., 124 S.W.2d 885, 886 (Tex. Civ. App. 1939); see also SAMUEL B. HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 336 (1944) ("It would be against sound reason to allow the employer deliberately to batter his helper, and then compel the worker to accept moderate workmen's compensation benefits . . . from his insurance carrier.").
56. Id. at 905.
57. See id. In Maryland, the issue of whether an injury arose from an "accident" has significance for a different reason. Maryland uses the term "accident" to limit employer liability. Maryland law provides recovery for the disability or death of an employee resulting from accidental personal injury sustained by the employee arising out of and in the course of his employment. MD. CODE ANN., LAB. & EMP. § 9-501(a) (1991). In other words, not all injuries arising out of and in the course of employment are compensable. Only accidental injuries are compensable. See, e.g., Rieger v. Washington Suburban Sanitation Comm'n, 211 Md. 214, 126 A.2d 598 (1956) (holding pipe fitter not entitled to compensation for injury resulting while pulling down on a wrench to tighten bolts since position was a normal incident of the work).
Despite strong reasons for refusing to allow employers to escape responsibility for intentional acts, courts are reluctant to declare acts other than direct assaults and batteries “intentional.” Thus, the plaintiff who asserts that the employer’s act was intentional, thereby exposing the employer to a common law tort suit, faces an extremely difficult task in proving intent unless he has suffered a direct assault or battery. Because the majority of plaintiffs who pursue this route lose, the plaintiff’s safest choice is to seek recovery under the workers’ compensation statute.58

Some cases, such as where an employee can prove that an employer had an actual or specific intent to injure the employee, are clear.59 In Maryland, for instance, it is clear that employees may pursue common law remedies against employers who commit assaults.60

Other cases are less clear. The threshold issue of what constitutes the “intent” necessary to bypass the exclusive remedy provision is the subject of intense debate. The minority position would allow common law recovery despite absence of actual intent by the employer

For an injury to be accidental it must result from some unusual exertion or strain or some unusual condition in the employment. See, e.g., Sargent v. Board of Educ., 49 Md. App. 577, 433 A.2d 1209 (1981) (holding the annual cleaning of a boiler to be an extreme departure from routine duties); Whiting-Turner Contracting Co. v. McLaughlin, 11 Md. App. 360, 274 A.2d 390 (1971) (holding that foreman’s argument with a supervisor did not constitute an unusual strain or exertion on foreman’s part); Commercial Transfer Co. v. Quasny, 245 Md. 572, 227 A.2d 20 (1967) (uprighting a 500 pound drum that tilted back onto truck driver found to be unusual exertion or strain); see also MARYLAND HANDBOOK, supra note 7, at 75.

58. See Kawaler, supra note 43, at 182.
59. See, e.g., Wade v. Johnson Controls, Inc., 693 F.2d 19 (2d Cir. 1982); Boek v. Wong Hing, 231 N.W. 233 (Minn. 1930). See generally 2A LARSON, supra note 38, § 68.11, at 13-14. Larson explains that courts have used different theories to allow common law recovery in this situation. Some courts state that assaults do not arise out of the employment relationship, thus they are not covered by workers’ compensation. Other courts state that assaults are intentional and not accidental. Finally, some courts believe that the employment relationship is severed momentarily when an employer assaults an employee. Thus, the assault falls outside of the scope of workers’ compensation.
60. See Md. Code Ann., Lab. & Emp. § 9-509(d) (1991); see also Johnson v. Mountaire Farms of Delmarva, Inc., 305 Md. 246, 255, 503 A.2d 708, 712 (1986) (holding that complaint should be “based on allegations of an intentional or deliberate act by the employer with a desire to bring about the consequences of the act” in order for employee to bypass the exclusivity provision of the workers’ compensation statute); see also Young v. Hartford Accident & Indem. Co., 303 Md. 182, 492 A.2d 1270 (1985) (extending intentional tort exception to common law claims against workers’ compensation insurer for the tort of intentional infliction of emotional distress committed on a claimant when the complaint alleges an injury resulting from the deliberate intention of the insurer to produce such injury).
to injure the employee if the "employer proceeded with a certain course of action even though it knew, or should have known, that harm to its employees was substantially certain to occur."61 This standard allows employees to pursue common law actions against the grossly negligent or reckless employer.62

The majority of states are more cautious and unwilling to narrow the scope of workers' compensation.63 Thus, most courts find an intentional tort only when the employer had a specific or actual intent to injure an employee. Following the majority rule, the Court of Appeals of Maryland held in Johnson v. Mountaire Farms of Delmarva, Inc.,64 that the exclusivity rule of Maryland's Workers' Compensation Act does not permit an employee to pursue a common law action against an employer for accidental injuries caused by gross, wanton, willful, or reckless negligence of the employer, except when such injury is intentional.65 The case, a wrongful death and survivorship action against an employer, focused on the claim of the mother of a deceased sixteen year old who died by electrocution while using a sump pump to remove liquid chicken fat and water from a ground depression.66

The suit alleged that the employer's failure to warn of dangerous electrical lines or to provide safe conditions effectively placed the employee in a deliberately dangerous position.67 Additionally, the suit alleged that the employer had willfully violated government regulations.68 Approximately two months before the electrocution, the Maryland Occupational Safety and Health Administration (MOSHA) had cited the company for a "serious violation,"69 focusing on several defective and dangerous parts of the sump pump's electrical connec-

61. Ballam, supra note 6, at 112.
62. See id. Most jurisdictions have rejected this approach because they fear that the exclusive remedy provision would become easier to avoid, thus jeopardizing the workers' compensation system. See generally 2A LARSON, supra note 38, § 68.15, at 13-58.
63. See Schroeder, supra note 55, at 897.
64. 305 Md. 246, 503 A.2d 708 (1986).
65. Id. at 253, 503 A.2d at 711-12. This position is inconsistent with the following assertion by a workers' compensation scholar:
   An employer who knows for a fact that if certain conditions are allowed to exist or if certain changes are put into effect, harm will befall a particular employee or any one of a group of employees, is certainly not far removed, in terms of moral blameworthiness, from the boss who "clobbers" a worker with a baseball bat.
   Page, supra note 50, at 564.
66. Johnson, 305 Md. at 248, 503 A.2d at 709.
67. Id. at 255, 503 A.2d at 712.
68. Id.
69. Id. at 248, 503 A.2d at 709.
After the citations were issued, Mountaire informed MOSHA that it had corrected the violation when in fact it had not.

In Johnson, the court of appeals rejected a minority rule that broadened the "intent" definition and held that the employer's behavior did not constitute an intentional tort for the purposes of overcoming the exclusivity provisions of the Workers' Compensation Act. The court stated that to bypass the exclusivity provided by the workmen's compensation statute, the complaint must allege an intentional or deliberate act by the employer with a desire to bring about the consequences of the act. The court further stated that "[a]n employer has acted with 'deliberate intention' only when the employer has determined to injure an employee or employees within the same class and used some means to accomplish this goal."

In sum, the meaning of "intent" in Maryland is reserved for specific and rare situations. It is difficult to find a scenario outside actual assault and battery by the employer that would qualify as "intentional," and thus allow employees to pursue common law remedies rather than seek the remedy provided by the workers' compensation system. Thus, although the Act appears to give em-

70. Id.
71. Id.
72. The minority rule that broadened the intent definition was established by Ohio and West Virginia courts. In Blankenship v. Cincinnati Milacron Chems., Inc., 433 N.E.2d 572 (Ohio), cert. denied, 459 U.S. 857 (1982), the Supreme Court of Ohio ruled in favor of employees who sought to avoid the exclusivity principle when they alleged that their employer failed to warn them of the dangers associated with toxic chemicals. The employees were successful in their argument that this behavior was intentional, malicious, and in wanton disregard for their health and safety.

In Mandolidis v. Elkins Indus., Inc., 246 S.E.2d 907 (W. Va. 1978), the Supreme Court of West Virginia ruled in favor of an employee who lost a portion of his hand while operating a table saw. The employer had removed a safety shielding device after a safety inspector had "tagged" the equipment and prohibited the saw's use without the shield. The employer had allegedly required the plaintiff to operate the saw. The court held that employees may pursue common law actions when their employer's willful, wanton, or reckless misconduct results in death or injury.

The legislatures of both Ohio and West Virginia overruled their courts' decisions. See OHIO REV. CODE ANN. § 4121.80 (Baldwin 1990); W. VA. CODE § 23-4-2 (1992).
75. Johnson, 305 Md. at 258, 503 A.2d at 714.
ployees the option of electing to sue civilly in the intentional tort situation, it is rare that employees can successfully exercise this option.

2. The Alter Ego Issue and the Employer’s Liability for Intentional Acts of Co-Workers

Where an employee incurs an injury as the result of an employers’ intentional act, Maryland’s Workers’ Compensation Act allows an employee to make an election as to pressing a claim under the Act or in a common law tort suit against the employer. The issue of an employers’ liability for a worker injured by the intentional act of a co-worker is far less clear. Prior to *Federated Department Stores v. Le,* Maryland courts interpreted the Act to allow employees to sue their employers under the common law for intentional torts only if the employer or someone acting as the “alter ego” of the employer was the actual tortfeasor.

The seminal case addressing intentional acts of co-employees is *Rice v. Revere Copper & Brass, Inc.*, a 1946 case in which a worker, Rice, was killed by a co-worker on the employer's premises for reasons unrelated to the workplace. The Court of Appeals of Maryland framed the inquiry in *Rice* as whether the assault “arose out of the course of employment.”

Based on the evidence, the court held that the death did not arise “out of” Rice’s employment and was therefore not compensable under workers’ compensation. The court identified three factors leading to its decision: (1) the fact that the attack was not due to a friction of personalities inseparable from the workplace; (2) the workplace did not enhance the opportunity for revenge; and (3) the bare fact that the workplace brought the parties together was not enough to show a nexus between the workplace and the injury.

In 1982 in *Schatz v. York Steak House Systems, Inc.*, the Court of Special Appeals of Maryland significantly departed from the *Rice* analysis. *Schatz* involved a waitress who was raped by her

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79. 186 Md. 561, 48 A.2d 166 (1946).
80. Id. at 566, 48 A.2d at 167.
81. Id. at 566-68, 48 A.2d at 167-69.
82. Id.
83. Id. at 568, 48 A.2d at 169.
supervisor, an assistant manager, while assisting with preparations for the nightly closing. The employee received compensation benefits, and filed a tort action against the employer for physical and psychological damages.

The court reasoned that an employer’s liability for an employee’s intentional misconduct was limited to circumstances in which the employee acted as the “alter ego” of the employer. Elaborating, the court stated that when the person who intentionally injures the employee is not “realistically the alter ego of the corporation, but merely a foreman, supervisor or manager,” the employee is barred from bringing a damage action against the employer. The court then found that the assistant manager was not the employer’s alter ego, effectively denying the injured employee the opportunity to bring a common law tort action against her employer under the workers’ compensation act’s intentional tort exception.

The court also rejected the employee’s argument that since the incident did not arise “out of and in the course of employment,” that it was therefore not addressed by the Workers’ Compensation Act. Specifically, the plaintiff argued that the provision for recovery under the Act by workers injured by third persons while in the course of employment does not include fellow employees as “third persons.” Without mentioning Rice, the court held that a fellow employee whose willful or negligent act caused injury to an employee in the course of his employment could be considered a “third person” under the Act. Thus because the Act provided a basis for recovery, the plaintiff did not have the option of pursuing a common law remedy.

In Continental Casualty Co. v. Mirabile, the court of special appeals clarified the Schatz decision, thereby shedding more light on the alter ego issue. Mirabile involved an employee who sued his supervisors and employer for negligence, defamation, assault, battery, intentional infliction of emotional distress, and conspiracy to interfere with contractual relations. These charges stemmed from “a series

85. Id. at 495, 444 A.2d at 1046.
86. Id.
87. Id. at 497, 444 A.2d at 1047.
88. Id. (quoting 2A A. Larson, The Law of Workmen’s Compensation, § 68.21, at 13:10-11 (1976)).
89. Id. at 497-98, 444 A.2d at 1048.
90. Id. at 497, 444 A.2d at 1047.
92. Schatz, 51 Md. App. at 499, 444 A.2d at 1048.
94. Id. at 388, 449 A.2d at 1178.
of petty humiliations inflicted upon an extremely sensitive young man" by his co-workers.95

Relying on Schatz, the court held that the Workers' Compensation Act provided the exclusive remedy as against the employer because the supervisors were not acting as the alter ego of the employer.96 Reaffirming that supervisors are not automatically the employer's alter ego, the court explained that it would consider an employee's rank, position, or status to determine whether the employee is the employer's alter ego.97 Specifically, the court stated that "[a]ttribution of employer liability for the actor's conduct should be based on identification rather than agency and is appropriate only where the actual tortfeasor is of such a rank or position that he may be deemed the alter ego of the employer."98

The court stated that it would also consider whether the employer directed or authorized the assault.99 Upon the evidence presented, the court decided that the tortfeasor, a claims manager, was not the employer's alter ego, thus the Act's exclusivity provision barred the assault and battery count against the employer.100 The court reasoned that allowing a tort action against the employer for the intentional torts of an employee who was not the employer's alter ego would allow plaintiffs to recover merely by showing that the assailant was "one notch higher on the totem-pole than the victim."101 Thus, prior to Federated Department Stores v. Le,102 it was extremely difficult for an employee in Maryland to avoid the exclusive remedy provision of the Workers' Compensation Act for intentional conduct exhibited by someone other than the employer.103

95. Id.
96. Id. at 395-98, 449 A.2d at 1181-83.
97. Id. at 396-97, 449 A.2d at 1182.
98. Id.
99. Id. at 398, 449 A.2d at 1183.
100. Id.
101. Id. (citing 2A A. Larson, The Law of Workmen's Compensation, § 68.21, at 13 (1976)). Some commentators have indicated that allowing recovery outside of workers' compensation by showing that the supervisory employee is "one notch higher on the totem pole" would be problematic. In complex organizational structures, a foreman at the bottom of the hierarchy could subject the employer to liability without employer awareness. Liability would be determined by whether the tortfeasor outranks the injured employee, rather than by whether the injury was work-related. Schroeder, supra note 55, at 899 (citing 2A A. Larson, The Law of Workmen's Compensation, § 68.21, at 13-34 (1976)). However, this position insulates corporate employers from intentional actions brought by employees. Page, supra note 50, at 564.
102. 324 Md. 71, 595 A.2d 1067 (1991); see supra notes 143-180 and accompanying text.
103. Plaintiffs elsewhere have, on occasion, been successful. See, e.g., Garcia v. Gusmack Restaurant Corp., 150 N.Y.S.2d 232 (City Ct. 1954) (denying defen-
3. Vicarious Liability

An employee able to persuade the court that the tortfeasor was the employer's alter ego, so as to permit the employee to pursue a common law remedy, might nonetheless have great difficulty prevailing. Once the employee removes his claim from the Workers' Compensation Act pursuant to the intentional tort exception, then conventional tort law, including the doctrine of respondeat superior, applies. Under the doctrine of respondeat superior, an employer is held, regardless of fault, vicariously liable for an employee's tortious conduct committed within the scope of the employee's job.

Maryland courts have outlined the showing required to prevail in a suit sounding in respondeat superior. In Cox v. Prince George's County, the court of appeals noted first that "the tortious actor must be the servant or agent of the one sought to be held liable, that is, a master-servant or principal-agent relationship must exist." Once this is established, the plaintiff must "show that the offending conduct occurred within the scope of employment, or under the express or implied authorization of the master."
Courts have stated that a tort is committed in the scope of employment if the underlying action is necessary to achieve the purpose of the employment, occurs substantially within the authorized time and space limits of the workplace, and is intended to serve the purposes of the employer. Courts have also clarified the authority issue. A master's liability extends to intentional torts committed by a servant, whether or not the servant's act is authorized, if the act is done in connection with the servant's employment and is not unexpected in view of the servant's duties.

An employee who could successfully prove the wrongful employee was the employer's "alter ego," therefore allowing a common law suit, would still face obstacles. For example, even if the tortfeasor was the employer's "alter ego" and acted within the scope of employment, the act of intentionally injuring a fellow employee would seldom serve the purposes of the employer or constitute expected conduct in view of the duties of the servant.

Thus, for example, even if the employee who was raped by her supervisor in Schatz had managed to avoid the exclusive remedy rule, she may have nonetheless lost at common law because the tortfeasor was clearly neither serving his employer's purposes nor acting in an expected manner. The same may have been true of the plaintiff in Continental Casualty Co. v. Mirabile. In sum, the intentional tort exception in Maryland has historically been narrowly interpreted. Even if an employee managed to overcome the difficulty of avoiding the exclusive remedy provision, he or she still faced tremendous obstacles prevailing at common law.

III. RENEGOTIATING THE BARGAIN

Employees believing their injuries to be undercompensated, coupled with employers concerned over skyrocketing insurance prem-
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have fueled discussions about changing the workers' compensation system. The judicial system and some state legislatures have increasingly faced the difficult task of addressing employee demands for relief, while maintaining the integrity of the workers' compensation system. This section examines some indicators that show the need to reassess the status of the workers' compensation system in light of its purpose and intent, and explores strategies to maintain the integrity of this system.

A. Why Courts and Legislatures Are Reconsidering the Bargain

Courts have dealt cautiously with the workers' compensation system because of the belief that any major readjustment should come from the legislature. Despite this caution, or perhaps because of it, judicial intervention has drawn into the workers' compensation system some types of claims that developed in other areas of the law. For example, some courts require state discrimination claims that allege physical injuries to be brought under the workers' compensation system. For example, some courts require state discrimination claims that allege physical injuries to be brought under the workers' compensation system.

117. See Roger Thompson, Fighting the High Cost of Workers' Comp, NATION'S BUS., Mar. 1990, at 20-28.
118. See supra note 21.
Even courts that adopt new ways around the exclusivity rule rarely acknowledge that the balance between employer and employee rights is out of kilter. Two factors that underlie the increased number of challenges to the system, however, suggest that the bargain between employees and employers needs adjustment.\textsuperscript{121}

First, the tension between the tort and workers' compensation systems is becoming increasingly obvious.\textsuperscript{122} When originally enacted, workers' compensation statutes benefitted workers because the tort system, with its inherent difficulty of establishing the employer's fault, had left many workplace injuries uncompensated.\textsuperscript{123} It is now significantly easier for plaintiffs to prevail under the tort system and to receive substantial jury verdicts for pain and suffering, and, sometimes, punitive damages. Plaintiffs are better able to prove their tort claims because of the weakening of some common law defenses,\textsuperscript{124} particularly the increasing acceptance of comparative rather than contributory negligence,\textsuperscript{125} and because of the development of the strict liability concept.\textsuperscript{126}

The tension between the tort and workers' compensation systems has been exacerbated not only because employees would, if given the option, frequently be able to recover under the common law, but also because employees would receive a substantially greater monetary reward under the tort system than under the workers' compensation system. Some states have raised their workers' compensation benefit levels,\textsuperscript{127} but even these increases have failed to keep pace with the rising cost of living,\textsuperscript{128} so that workers are rarely compensated to the full extent of their loss.\textsuperscript{129}

\begin{itemize}
\item exclusive remedy provision of workers' compensation statutes does not ban employment discrimination claims); Reese v. Sears Roebuck & Co., 731 P.2d 497 (Wash. 1987) (determining that the exclusive remedy principle does not preclude handicap discrimination claims).
\item See generally Exceptions, supra note 4, at 1648 (positing that workers compensation system is inadequate both as a means of providing adequate relief to injured workers and as a mechanism for creating proper incentives for reduction of accidents and related costs).
\item See Dittoe, supra note 13, at 1208-10; Page, supra note 50, at 556-57; Exceptions, supra note 4, at 1660-61.
\item See supra notes 22-28 and accompanying text.
\item See Exceptions, supra note 4, at 1645.
\item Maryland is one of the few states that still has contributory rather than comparative negligence as a defense. See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 67, at 471 n.30 (3rd ed. 1984 & Supp. 1988).
\item See Snell, supra note 5, at 455.
\item See Thompson, supra note 117, at 22.
\item id.
\item Exceptions, supra note 4, at 1642.
\end{itemize}
The workers' compensation system is limited to medical and rehabilitation costs, and, usually, two-thirds of the workers' average weekly wage. Furthermore, the prohibition of punitive damages and awards for pain and suffering under the workers' compensation system creates a disparity whereby a worker eligible for only a small recovery under the system could recover substantially more under the common law had the injury not occurred during the course of employment.

When comparing the two alternatives, it is also important to note that those employed in industries that still enjoy the protection of unions, and those who live in states that have adopted exceptions to the employment-at-will doctrine (thereby making it less likely that they could be fired for suing their employer), can be more assertive in pursuing common law remedies. Also, more attorneys are available to help employees assert their rights. Finally, some commentators focus on administrative flaws in the workers' compensation system that prevent the speedy payments that were meant to offset the larger awards possible under the common law.

The second major reason to reconsider the bargain between employer and employee rights is that in some cases employees' safety needs are not satisfied. Workers' compensation statutes were originally designed to promote safety, increasing the level of workplace safety by placing the cost of workplace accidents on employers who pay insurance premiums. Employers desiring to lessen their premiums thus had an incentive to maintain a safe workplace.

Unfortunately, however, the system fails to impose the full cost of work-related accidents on employers. Employees therefore suffer

130. Id.
131. Id. at 1645. For a discussion of the employment-at-will rule and the public policy exception in Maryland, see Gil A. Abramson & Stephen M. Silvestri, Recognition of a Cause of Action for Abusive Discharge in Maryland, 10 U. BALT. L. REV. 257, 259 (1981).
132. Exceptions, supra note 4, at 1645. Some commentators believe the increase in the number of attorneys over the past seventy years hurts the process of compensating employees. See, e.g., King, supra note 16, at 411.
133. Exceptions, supra note 4, at 1644 (citing POLICY GROUP OF THE INTERDEPARTMENTAL WORKERS' COMPENSATION TASK FORCE, WORKERS' COMPENSATION: IS THERE A BETTER WAY? 19 (1977) (positing that problems of workers' compensation are "due as much to the structure and management of the system as they are to the adequacy of benefits").
134. See id. at 1641.
135. See id. at 1646.
136. See generally Thompson, supra note 117.
137. See Exceptions, supra note 4, at 1646. The author explains that "[a]ttaining the socially optimal level of workplace safety requires that the amount of spending on safety measures be set so that it minimizes total accident cost." Furthermore, "[e]mployers are the appropriate party to bear accident costs,
in a two-fold manner that is antithetical to the original bargain: first
they are not compensated fully under the workers’ compensation
system; second they often enjoy a less than safe work environment.
As long as benefit levels remain low and the exclusive remedy rule
remains intact, employers have inadequate incentives to increase the
safety of working conditions. Additionally, recent budget cutbacks138
and policy changes139 at state140 and federal141 regulatory agencies have
increasingly left these agencies unable to effectively ensure a safe
workplace. These two factors have led many courts, and some state
legislatures, to consider renegotiating the bargain between employers
and employees by revising exceptions to the exclusive remedy rule.

B. Recent Judicially Created Exceptions to the Exclusive Remedy
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Courts in several jurisdictions have recently accepted new argu­
ments to avoid the exclusive remedy rule. For instance, new inter­
pretations of Maryland’s exclusivity provision and intentional tort
exception recently emerged in Federated Department Stores v. Le.142
This section first details the court of special appeals opinion in Le,
then examines the new interpretation of the intent exception adopted
by the Court of Appeals of Maryland in the subsequent appeal.
Finally, a judicially created exception to the exclusive remedy pro­
vision that has been adopted by jurisdictions outside of Maryland is
considered.

1. Classifying Torts: Le v. Federated Department Stores

In Le v. Federated Department Stores,143 Thach Le, a department
store salesperson, sued Federated, the corporate parent of his em­
ployer, Bloomingdale’s, for false arrest, defamation, and intentional
infliction of emotional distress.144 Bloomingdale’s regional chief of
security, Suzanne Spahr, had accused him of stealing a calculator.145
Le’s complaint alleged that he was wrongly detained in the security

138. See Metz, supra note 8, at 15.
139. Id. at 14-15.
140. Maryland monitors occupational safety at the state level. See Work Injuries
    in Maryland, supra note 9, at 1.
141. The Occupational Safety and Health Administration (OSHA) administers the
    1990).
144. Id. at 90, 560 A.2d at 42.
145. Id.
office, that he was coerced to sign a statement confessing to the theft, and that he was led through the store crying.\footnote{\textit{Id.} at 92, 560 A.2d at 43.}

Federated filed a motion for summary judgment, arguing that the Maryland Workers' Compensation Act's exclusivity provision precluded Le from suing Bloomingdale's for tortious acts committed by the security officer, a fellow employee.\footnote{\textit{Id.}} Federated asserted that Le could sue at common law only if Spahr was the "alter ego" of Federated.\footnote{\textit{Id.} at 77, 595 A.2d at 1069-70.} Le contended in response that the security officer was Bloomingdale's "alter ego" at the time of the incident, and that the employee's intentional acts could therefore be attributed to the employer, allowing Le the option of a common law suit.\footnote{\textit{Id.} at 77, 595 A.2d at 1069-70.}

The circuit court, relying on the holdings in \textit{Schatz v. York Steak House Systems, Inc.}\footnote{See \textit{supra} notes 84-92 and accompanying text.} and \textit{Continental Casualty Co. v. Mirabile},\footnote{See \textit{supra} notes 93-101 and accompanying text.} ruled against Le on the motion for summary judgment, finding the alter ego theory inapplicable to Le's case.\footnote{\textit{Id.} at 90-91, 560 A.2d at 42.} Le appealed this decision to the court of special appeals, which found that Mr. Le had sustained a nonphysical tortious injury. The court held that such nonphysical, psychological injuries fell outside the scope of the Act's exclusivity provision, thereby permitting a civil tort action.\footnote{\textit{Id.} at 91, 560 A.2d at 43.}

In reversing the circuit court's decision, the court of special appeals distinguished \textit{Schatz} and \textit{Mirabile} by explaining that in those cases the claimants had suffered both psychological and physical injuries.\footnote{\textit{Id.}} The Workers' Compensation Act provides a remedy in such cases for the disability or death of an employee resulting from an accidental personal injury.\footnote{\textit{Id.} at 91, 560 A.2d at 43.} Le, however, had not alleged that he suffered a disability resulting from an accidental personal injury.\footnote{\textit{Id.}} Rather, he sued on the grounds of false arrest, defamation, and intentional infliction of emotional distress.\footnote{\textit{Id.} at 90-91, 560 A.2d at 42.} Thus, the Act did not bar Le's recovery for the intentional torts he alleged.

The court of special appeals relied on Larson's workers' compensation treatise, which asserts that if the "essence of the tort . . . is non-physical . . . with physical injury being at most added to the list of injuries as a makeweight, the suit should not be barred."\footnote{See \textit{2A A. Larson, THE LAW OF WORKMEN'S COMPENSATION, § 68.34(a) (1976).}}
The court of special appeals thus effectively adopted Larson's view that intentional torts that do not entail a physical injury component do not invoke the Workers' Compensation Act. Because the Act thus provides no remedy, an employee would be permitted to bring a civil tort suit to obtain a remedy.\textsuperscript{159}

The rationale adopted by Maryland's intermediate appellate court in \textit{Federated} briefly added Maryland to a list of states adopting schemes whereby courts granted exceptions to the exclusive remedy rule by classifying torts.\textsuperscript{160} This is but one of three means by which courts have avoided the exclusive remedy rule. The two other methods involve redefining the meaning of intent,\textsuperscript{161} and focusing on whether the nature of the employee's injury is of the kind that the workers' compensation system was intended to remedy.\textsuperscript{162}

Two years after the court of special appeals ruling in \textit{Federated}, the decision, although supported by a different rationale, was affirmed by the Court of Appeals of Maryland in \textit{Federated Department Store v. Le}.	extsuperscript{163} The court of appeals rejected a rule that classified torts in favor of a new interpretation of Maryland's intentional tort exception.

2. Modifying the Intent Exception: \textit{Federated Department Stores v. Le}

Rejecting as too narrow the alter ego doctrine developed in \textit{Schatz v. York Steak House Systems, Inc.}\textsuperscript{164} and \textit{Continental Casualty v. Mirabile},\textsuperscript{165} the court of appeals in \textit{Federated Department Stores}
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v. Le\textsuperscript{166} shed new light on the relationship between the Workers' Compensation Act's exclusivity provision\textsuperscript{167} and the intentional tort exception.\textsuperscript{168} Guided by the established principles governing the interpretation of Maryland's Workers' Compensation Act,\textsuperscript{169} the court held that when an employee suffers an injury resulting from a deliberate attempt to injure him, the intentional tort exception authorizes a suit against the employer at common law as though the workers' compensation statute did not exist.\textsuperscript{170} To hold an employer liable for an employee's intentional acts committed within the scope of employment, tort principles would demand neither that the offending employee be the employer's "alter ego," nor that the employee's acts be "expressly authorized."\textsuperscript{171}

In rejecting the alter ego analysis, the court stated that it would not restrict the coverage of the intentional tort exception by inserting limiting conditions not set forth by the legislature.\textsuperscript{172} Furthermore, the court noted that in adopting the alter ego doctrine, the court of special appeals had relied on cases from states whose workers' compensation statutes lacked intentional tort exceptions comparable to Maryland's.\textsuperscript{173} Courts in those states have thus had to adopt limited judicial exceptions to their exclusive remedy provisions to allow employees access to the civil tort system.\textsuperscript{174}

The court found that Maryland need not rely on judicially created exceptions such as the alter ego doctrine because Maryland's statutory exclusive remedy provision can be interpreted as allowing for the very same exception.\textsuperscript{175} Construing the intentional tort excep-

\textsuperscript{166} 324 Md. 71, 595 A.2d 1067 (1991).
\textsuperscript{167} MD. CODE ANN., LAB. & EMP. § 9-509(a) (1991) [formerly MD. ANN. CODE art. 101, § 15 (1985)].
\textsuperscript{168} Id. § 9-509(d) (1991) [formerly MD. ANN. CODE art. 101, § 44 (1985)].
\textsuperscript{169} Federated, 324 Md. at 80-81, 595 A.2d at 1071-72. The principles are set as follows:

*First* the intention of the Legislature as expressed in the words of the Act must be ascertained and given effect; *secondly*, 'the language of a statute is its most natural expositor, and where the language is susceptible of sensible interpretation, it is not to be controlled by any extraneous considerations' (*Alexander v. Worthington*, 5 Md. 471); *thirdly*, the construction must be liberal in favor of a private right, and construction which imputes an intention to deny valuable rights should be avoided; *fourthly*, statutes are presumed to be passed in full recognition of the constitutional rights of the citizen.

*Id.* (citing Frazier v. Leas, 127 Md. 572, 575, 96 A. 764, 765 (1916)).
\textsuperscript{170} Id. at 85-86, 595 A.2d at 1074.
\textsuperscript{171} Id.
\textsuperscript{172} Id. at 85, 595 A.2d at 1074.
\textsuperscript{173} Id. at 82, 595 A.2d at 1072.
\textsuperscript{174} Id. at 82-83, 595 A.2d at 1072-73.
\textsuperscript{175} Id. at 83, 595 A.2d at 1073.
tion as providing nothing more than is already embodied in the exclusive remedy provision would thus render it superfluous. 176

The court also dismissed the notion that Maryland's intentional tort exception might represent a legislative enactment equivalent to other states' judicially created exceptions. 177 The court found that this could not be the case because the judicially created exceptions address injuries deemed to fall outside the scope of an exclusive remedy provision, while Maryland's intentional tort exception "is only applicable to injuries encompassed by [the exclusive remedy provision]." 178 Because Maryland's intentional tort exception grants employees the option of accepting workers' compensation benefits or of pursuing a common law suit, the court concluded that "it makes little sense to equate [the intentional tort exception] with a judicially-created exception to compensation coverage." 179

This new ruling grants plaintiffs such as Le the option to pursue common law tort remedies, which are capable of generating recoveries substantially more lucrative than workers' compensation recovery. Under common law principles, it could be argued that Spahr, the security officer, deliberately intended to injure Le and that Spahr's employer would therefore be liable under vicarious liability standards set forth in Cox v. Prince George's County. 180 Employees in Le's position need no longer engage in an alter ego analysis in order to hold their employers vicariously liable.

3. Modifying the Definition of Intent

Thus, one way to modify the intentional tort exception to the exclusivity provision is to make it less narrow by rejecting the alter ego analyses courts have used in the past. Other states have taken the approach of broadening the definition of "intent." This Article has already reviewed cases in which courts have determined that "intent" includes willful, wanton or grossly reckless employer behavior, in addition to specific intent to cause harm. 181

Some commentators have encouraged a different interpretation of "intent." One line of reasoning urges that the intent concept should mirror the definition set forth in the Restatement (Second) of Torts. 182 The Restatement defines intent as the desire to bring

176. Id.
177. Id. at 83-84, 595 A.2d at 1073.
178. Id. at 83, 595 A.2d at 1073 (emphasis added).
179. Id. at 84, 595 A.2d at 1073.
180. Id. at 81, 595 A.2d at 1072 (citing Cox v. Prince George's County, 296 Md. 162, 170-71, 460 A.2d 1038, 1042-43 (1983)).
181. See supra note 72 and accompanying text.
182. See, e.g., Kawaler, supra note 43, at 204, wherein the author advocates that legislatures adopt a model statute that includes this definition.
about the harm or knowledge to a substantial certainty that the harm would occur.\textsuperscript{183} Most commentators advocating this approach believe that a claimant in this circumstance should be allowed to receive benefits under the workers' compensation statute \textit{and} pursue a common law cause of action,\textsuperscript{184} thus eliminating concerns about inconsistent pleadings.\textsuperscript{185} Additionally, double recovery would not be a problem because an employer could be allowed a set-off should the plaintiff receive a workers' compensation award.\textsuperscript{186}

4. Another Approach: Focusing on the Nature of the Employee's Injury

Some courts focus on the nature of an employee's injury, making exceptions for injuries not contemplated by the workers' compensation statute.\textsuperscript{187} Employees suffering injuries for which the statute fails to provide a remedy may pursue a common law remedy.\textsuperscript{188} This inquiry differs from the rationale presented by the Court of Special Appeals of Maryland in \textit{Le v. Federated Department Stores}.\textsuperscript{189} Under this approach, the tort itself may be physical or nonphysical; it is the result of the injury that may not be compensable. Thus it is not surprising that the two approaches sometimes overlap.

The logic of such overlap is questioned in assertions such as the following:

When one thinks of workmen's compensation, what comes to mind is traumatic injury, occupational disease and similar physical harms associated with the employment. It is difficult to imagine, however, what workmen's compensation

\textsuperscript{183.} \textit{Restatement (Second) of Torts} § 8A (1965).
\textsuperscript{184.} See, e.g., Kawaler, \textit{supra} note 43, at 204, 206.
\textsuperscript{185.} Id. at 207.
\textsuperscript{186.} Professor Larson suggests a "two fund" recovery system when separate and distinct kinds of injury are present. When an employee is injured by a dangerous condition in the workplace and the employee continues to work in the same condition and sustains further injuries, this "two fund" system should apply. The first fund would be governed by workers' compensation and would cover the first injury. Tort law would govern the second fund, covering injuries sustained after the employer gained knowledge of the first injury and its cause. Massey, \textit{supra} note 104, at 358; see also 2A Larson, \textit{supra} note 38, at §§ 59.30 - 59.34; Maryland Handbook, \textit{supra} note 7, at 227-42 (discussing Maryland's subsequent injury fund).
\textsuperscript{188.} See, e.g., Renteria v. County of Orange, 147 Cal. Rptr. 447 (Ct. App. 1978) (holding employee's action for intentional infliction of emotional distress not barred by workers' compensation exclusive remedy provision).
\textsuperscript{189.} \textit{See supra} notes 153-59 and accompanying text.
can have in common with such essentially non-physical torts as deceit, defamation and intentional infliction of emotional distress.\textsuperscript{190}

The overlap occurs because these injuries that stem from nonphysical torts are just \textit{some} of the types of injuries that legislators probably never envisioned when they enacted workers’ compensation statutes. Courts have recognized other injuries that legislators failed to consider when codifying the initial bargain between the employers and employees.

An injury stemming from on-the-job sexual assault is an example of the sort of harm never contemplated by legislators.\textsuperscript{191} Many states cover this injury under their workers’ compensation statutes, barring civil actions for such injuries as intentional infliction of emotional distress by their exclusivity provision.\textsuperscript{192}

Similar results occur with regard to injuries that cause sexual impairment.\textsuperscript{193} Many states do not award permanent disability benefits to employees who receive injuries arising out of and in the course of employment that render employees impotent or sterile.\textsuperscript{194} Workers in this situation cannot pursue common law remedies.\textsuperscript{195} Even an employee incurring a gross facial disfigurement, but whose earning capacity was not affected, would be similarly situated. Surely, when they negotiated their original bargain, employees did not contemplate that these kinds of injuries would remain uncompensated. Some courts are sympathetic to these claims, creating exceptions to the exclusivity rule for them.\textsuperscript{196}

Finally, courts have determined that the physical injury that results from emotional distress due to an employer’s sex discrimination should not be brought under workers’ compensation.\textsuperscript{197} A few courts have classified this injury under workers’ compensation by accepting employer’s arguments that any cause of action in which injuries are compensable through workers’ compensation should be barred from civil litigation due to the exclusivity provision.\textsuperscript{198} Most

\textsuperscript{191.} \textit{See supra} notes 84-92 and accompanying text.
\textsuperscript{193.} \textit{See generally} Dittoe, \textit{supra} note 13.
\textsuperscript{194.} \textit{Id.} at 1207, 1215-16.
\textsuperscript{195.} \textit{Id.}
\textsuperscript{196.} \textit{See}, e.g., Bethlehem-Sparrows Point Shipyard \textit{v. Damasiewicz}, 187 Md. 474, 50 A.2d 799 (1947); \textit{see also} Dittoe, \textit{supra} note 13, at 1223 (citing several California cases).
\textsuperscript{197.} \textit{See supra} note 120.
\textsuperscript{198.} \textit{See supra} notes 119-120 and accompanying text.
courts, however, believe that this interpretation of the exclusivity principle distorts the original purposes of workers' compensation. Employees probably never imagined that they were giving up their right to state discrimination claims when workers' compensation legislation was originally negotiated.

C. Recent Legislative Action Regarding the Workers' Compensation System

Absent a clear manifestation of legislative intent, courts are hesitant to encroach upon the historic expansive reading of the exclusivity provision. In instances when courts have done so, legislators have sometimes stepped in and changed what courts have done to modify the employer-employee bargain. Therefore, it becomes important to look at what legislators can do regarding this issue. Among other actions, the Maryland legislature could consider the following two options that other states have addressed or are currently considering.

1. Increasing Awards to Employees in Specific Cases

Some states require employers to pay additional compensation to employees in certain circumstances, such as when an employer is grossly negligent, or fails to reveal unsafe working circumstances to an employee. California's labor code, for example, provides that an employee injured by the serious and willful misconduct of his employer may have his compensation award increased by fifty percent, up to a maximum of $10,000. Furthermore, employers are not permitted to insure against having to pay this additional compensation. This statutory provision is a compromise between Maryland's current scheme, which allows employers to engage in this behavior with no real consequence, and what some other jurisdic-

200. Dittoe, supra note 13, at 1231. One commentator has indicated that legislatures rather than courts should resolve public policy issues so that public testimony and debate can occur. Ballam, supra note 6, at 120. Legislators, however, are slow to act, and are subject to the pressures of interest groups, especially in states in which there is a fear that changes in the law could drive employers out of the state. See Exceptions, supra note 4, at 1657.
201. See supra note 72; Kawaler, supra note 43, at 182.
202. The legislature could take action on any of the issues presented in the preceding section. For example, the legislature could change the meaning of "intent."
203. See supra note 39.
204. CAL. LAB. CODE § 4553 (West 1989).
205. Id.
206. See supra text accompanying notes 64-75.
tions have done, which is to allow the employee to pursue civil remedies instead of workers' compensation. 207

2. Replacing the Workers' Compensation System with an Integrated System

California recently passed legislation modifying its state's workers' compensation system. 208 This legislation followed an earlier radical proposal that would have provided benefits to employees regardless of whether the condition or injury occurred on the job. 209 That proposal would have eliminated problems with exclusivity because all injuries and illnesses would be handled by the same system.

Although California ultimately abandoned its fundamental compensation reform, making only modest improvements to its system, 210 its ideas on workers' compensation reform merit attention. After California passed its recent legislation, the California Senate Committee on Industrial Relations issued a report titled Healthy Worker — Healthy Workplace, 211 in which it considered issues relevant to future reform legislation.

The primary feature of reform articulated by the Senate Committee on Industrial Relations in Healthy Worker is the merger of California's workers' compensation, state disability, and group health care insurance into one mandatory health care insurance program and one mandatory disability and occupational rehabilitation program. 212 This program would compensate all the disabilities or injuries affecting an employee's ability to work. 213 Thus, it would not matter whether an employee was actually injured at work.

The purpose of this proposed system would be to improve care for sick and injured workers by eliminating overlapping programs and streamlining administration, 214 ending what legislators believe to be an excess of state time and money spent on efforts to tie disability to work and to determine the extent of work-related disabilities. 215

207. See supra note 72.
210. See Bernstein, supra note 208, at D1.
211. SENATE COMM. ON INDUSTRIAL RELATIONS, CALIFORNIA LEGISLATURE, HEALTHY WORKER - HEALTHY WORKPLACE: THE PRODUCTIVITY CONNECTION (1990) [hereafter HEALTHY WORKER].
212. Id. at 40-41.
214. Id.
215. Id. The report states that "[s]ince lifestyles, pre-existing diseases, and related disabilities are burdening the workers' compensation system, the remedy is to create a truly no-fault insurance system for all disabilities which occur in the laborforce and which temporarily or permanently impair the ability to stay on the job." HEALTHY WORKER, supra note 211, at 41; see also California's Radical Proposal, supra note 209, at 22.
The insurance program supporting this system would be funded through progressive taxation based upon income, while the cost of the premium would be divided between the employer and employees at a percentage determined by the state. Recall that under workers’ compensation systems employers are typically fully financially responsible.

The law California actually passed is much less dramatic than those recommendations articulated in Healthy Worker. The law’s most significant change is that it nearly doubled the maximum weekly benefits paid to employees over a two-year time span. The law also increased the maximum vocational rehabilitation benefits, increased counseling services, and included provisions that encourage employers to make speedy payments. The legislation also benefits employers. Insurance companies, for example, have agreed to reduce employer rates. The law also discourages “doctor shopping” by limiting employee options regarding choice of doctors. In sum, although California’s new law eschewed radical change, the ideas
presented in *Healthy Worker* are important for states that are considering effecting more systemic changes in their workers' compensation programs.

IV. RENEGOTIATING THE BARGAIN: AN EVALUATION OF THE ALTERNATIVES

Maryland has several options for revising its present workers' compensation scheme. This section evaluates the judicially created exceptions — classifying torts, modifying the intent exception, and focusing on the nature of the employee's injury — and possible legislative changes — increasing awards to employees in specific cases and replacing the workers' compensation with a brand new system. This section assumes that the bargain between employers and employees must change to promote workplace safety, but also that the renegotiation must not be too drastic in light of the legislature's reluctance to impose additional costs on Maryland businesses.

A. Classifying Torts

Distinguishing between physical and nonphysical injuries would provide employees greater access to the civil court system. Employees who select a civil action and choose unsophisticated attorneys, however, may find themselves victims of improperly drafted pleadings. An attorney whose client had suffered a nonphysical injury might add a physical injury count to bolster the employee's claim and, as a result, unknowingly place the claim squarely within the ambit of the workers' compensation system. Conversely, a claimant might feel compelled to disregard physical injuries and focus instead on more temporary or intangible injuries, such as those resulting from false imprisonment, in order to avoid falling under the workers' compensation system.

A great dilemma arises in the case of an employee who is raped. Such an incident gives rise to claims of false imprisonment and intentional infliction of emotional distress. An employee arguing that the injury is primarily nonphysical is likely to face an employer who will argue that the physical aspect of rape cannot be glossed over in order to engage in a civil action. Additionally, as the workers' compensation system starts to address more fully the issue of com-

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pensating employees for mental or psychological injuries, the rationale behind classifying torts erodes. Maryland's highest court was thus wise to create a different approach to avoid the exclusivity provision in *Federated Department Stores v. Le*.

**B. Modifying the Intentional Tort Exception**

Maryland's decision to broaden an employee's option to choose a common law action by rejecting the alter ego theory will allow plaintiffs a chance to procure a more appropriate remedy through civil actions. The court of appeals decision in *Federated Department Stores v. Le* will provide a more just result for plaintiffs like those in *Federated*, *Schatz*, and *Mirabile*.

In the future, the court should modify the intent exception to refrain from shielding employers who are grossly negligent and who fail to promote safe working conditions. Employers presently have few incentives to promote safety. Regulatory supervision and unionism have declined, leaving fewer workplace watchdogs. The uncaring employer is able to simply write off the increased workers' compensation insurance premiums that result from unsafe working conditions as a cost of doing business.

This alternative for renegotiating the bargain is very promising. Maryland courts have already demonstrated a willingness to pursue this alternative. Courts in the future should enhance the rule-based analysis outlined in *Federated* by adding policy-based arguments that explicitly acknowledge the need to rebalance employer and employee rights.

**C. Focusing on the Nature of the Employee's Injury**

This exception to the exclusive remedy principle makes sense on one level quite simply because it seems inherently unfair for employees to assume the risk of injuries like sexual assault or impotence as part of the quid pro quo with the employer. This exception is problematic, however, because it is difficult to draw the line between what will be considered a "normal" and "abnormal" consequence of working. The courts or the legislature could create more certainty for employers and employees alike, yet still achieve the same result, by keeping what makes sense in the workers' compensation system and by modifying the remaining sections.

**D. Increasing Awards to Employees in Specific Cases**

The alternative of increasing awards to employees in specific kinds of cases holds promise. Its primary strength is that it gives

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221. See *supra* notes 166-180 and accompanying text.
222. *Id.*
223. See *supra* notes 84-92 and accompanying text.
224. See *supra* notes 93-101 and accompanying text.
employees additional compensation in circumstances in which the employer’s behavior was especially reprehensible. Allowing increased awards would provide an incentive to employers to behave in ways that would prevent them from incurring such additional expense. Employers would be more reluctant to engage in intentional or grossly negligent acts, resulting in increased workplace safety.

This alternative benefits employers because it reduces employees’ eagerness to pursue common law remedies. Additionally, employers benefit from the certainty of knowing the economic consequences of certain types of conduct in advance, rather than gambling on jury verdicts in civil cases. This alternative seems more practical than the present scheme in light of the realities of the business world and, as such, deserves serious consideration.

E. Replacing the Workers’ Compensation System with an Integrated System

The ideas presented in Healthy Worker — Healthy Workplace are also worth considering. Despite the unlikelihood that Maryland’s workers’ compensation system will undergo radical reform, California’s ideas are relevant in light of Maryland’s willingness to narrow the exclusivity rule, as evidenced by Federated Department Stores v. Le.

An integrated workers’ compensation system providing benefits to employees regardless of whether they were injured at work would reduce litigation and benefit a greater number of injured citizens. Depending upon the benefit levels in this kind of plan, this alternative could protect employees by providing incentives to promote workplace safety. Under an integrated system, employers could also benefit. As California’s suggestions indicate, employers could benefit by paying reduced insurance premiums and less in attorneys’ fees since employees would no longer need to litigate to avoid a flawed system.

V. CONCLUSION

The exclusivity provision of the Maryland Workers’ Compensation Act has been a blessing to employers by limiting their economic liability. Maryland employees in search of safety in the workplace are, however, understandably discouraged when they see the disincentives the Maryland workers’ compensation law provides to employers. Employers have the luxury of knowing that employees will receive low benefits from workplace injuries, and that only on rare occasions will the employee succeed in a common law tort suit.

The court of appeals implicitly acknowledged the need for a change through their holding in Federated Department Stores v. Le. The bargain upon which workers’ compensation laws are based is out of step with the realities of today’s marketplace. Maryland’s
highest court moved in a positive direction when it questioned past Maryland cases that had unfairly burdened employees. By reinterpreting the intentional tort exception to the exclusivity provision, the court has moved to adjust the balance between employee and employer rights. For plaintiffs like Thach Le, the new ruling enhances the ability to sue under common law principles. For many other employees, the courts or the legislature must go further to adjust the balance. This Article has outlined several alternatives for change. Regardless of which alternative is ultimately selected, debate on the issue promises to be intense.